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Special Issue on Regulatory Governance in a Globalizing World
Guest Editors: Carlos W.H. Lo and Ning Liu

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Preface to the special issue

Public Administration and Policy (PAP) – An Asia-Pacific Journal was first published in 1992 jointly by the Hong Kong Public Administration Association and the City University of Hong Kong. It was suspended in 2005 due to the departure of the Editor-in-Chief. In Spring 2012, it was re-launched with the support of a new co-publisher, the School of Professional Education and Executive Development (SPEED) of The Hong Kong Polytechnic University (PolyU). The e-version of the journal was also introduced in 2013 and has been available for readers through the HKPAA and PolyU SPEED's websites. In 2018, we had a successful collaboration partnership with Emerald Publishing Limited in the UK. Since then, PAP has been published online in open access on the Emerald Insight Platform. In 2021, PAP celebrates its 30th anniversary of its establishment and 10th anniversary of its re-launch.

PAP now publishes three issues and over twenty articles per year and is indexed and abstracted by: CrossRef, EBSCO Discovery Service, Google Scholar, Summons (ProQuest), WorldCat. It has been accepted by Emerging Sources Citation Index (ESCI), and will soon apply for Scopus for impact ranking. Academics and practitioners in public administration, management, public policy, and related fields are welcomed to contribute papers to PAP.

In this special issue on "Regulatory Governance in a Globalizing World", we are grateful to have Professor Carlos W.H. Lo from the Chinese University of Hong Kong and Dr. Ning Liu from the City University of Hong Kong as guest editors. Papers from this special issue consist of seven articles. The first five articles are selected from the presentations during the "Unpacking the Complexity of Regulatory Governance in a Globalizing World: International Conference on Global Regulatory Governance" held on 4-6 July 2019 at the Chinese University of Hong Kong. The last two articles address the government policies and strategies in tackling the coronavirus pandemic in China and Indonesia. We hope these papers will enhance the understanding of the regulatory governance and policies on the COVID-19 in a globalizing world.

Peter K.W. Fong
Editor-in-Chief, PAP Journal
President, Hong Kong Public Administration Association

About the Editor-in-Chief

Professor Peter K.W. Fong, PhD (New York University), is President of Hong Kong Public Administration Association and Editor-in-Chief of PAP Journal. He teaches strategic management and supervises DBA students' dissertations of University of Wales TSD and

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Introduction to the special issue

In the past two decades, there have been growing complexities in regulatory governance, owing much to the rapid difficulty of regulatory regimes from industrialized countries to developing economies and the ever-expanding scope of regulation in different sectors. In this special issue, articles discuss the regulatory approaches, frameworks, and environment under various themes and topics. In term of regulatory approaches, a focus on national styles has gradually shifted to a focus on local levels, all the way down to street-level regulations. Together with the emergence of ideas of value co-creation, more complexities have been added to existing dialogues between the legalistic and co-operative/voluntary paradigms. As for compliance strategies, regulated entities, particularly enterprises, have moved from a preoccupation with the choice between compliance and evasion to considering beyond compliance as part of broader strategies for gaining competitive advantages and business innovation. As more developing and emerging countries have adopted their own regulatory regimes under diverse national circumstances, new theoretical frameworks are needed to account for how cross-national variations affect emerging issues in regulatory governance.

Besides complexities, new sectors (e.g., information technology and the internet) have emerged that call for some forms of government or self-initiated regulation. These newly emergent sectors often involve problems that are distinctly different from those in the traditional sectors (e.g., environmental, education, and financial). Even within the traditional sectors, changes have been emerging given, for example, the rise of new technologies. Adding to these nation-based complexities is the globalization of regulatory governance, as the international community has steadily developed into a single regulatory regime, giving rise to the need to reconcile the regulatory norms in different parts of the world. These developments have generated new excitement and revised agenda to existing regulatory research with greater demand for both theoretical advancement and empirical-based problem-solving.

It was under the above-mentioned background that the Department of Government and Public Administration and the Hong Kong Institute of Asia-Pacific Studies at The Chinese University of Hong Kong jointly organized the "International Conference on Unpacking the Complexity of Regulatory Governance in a Globalizing World" in Hong Kong with support from the Standing Group on regulatory governance of the European Consortium for Political Research (ECPR) between 4-6 July 2019. This conference featured academic debates in key regulation and compliance issues with global significance. In particular, it has inspired

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creative thinking to examine the complexity of regulatory regimes in emerging economies and developed countries from a comparative perspective.

The Hong Kong Public Administration Association took the opportunity of this academic conference to prepare this special issue on Regulatory Governance in a Globalizing World in cooperation with the conference organizers. A total of five articles are included for the anatomy of the complexity of regulatory, which fall into three specific topics of regional regulatory governance, emerging sectors for regulation, and regulatory challenges for the Global South.

Colin Scott, in his article "Managing higher education for a changing regulatory environment", which was based on his illuminating keynote speech to the Conference, addresses the changing regulatory environments of higher education across eight OECD (Organisation for Economic Co-operation and Development) states. The study casts a spotlight on the significant evidence of meta-regulatory approaches to regulating universities, and how universities could use autonomy to manage the changing environment.

Lilach Litor's piece "Regulating corporate social responsibility practices of adopting codes of conduct through criminal law" takes on the emerging topic on the legal regulation CSR to examine the interplay of corporate social responsibility (CSR) and its regulatory approaches regarding the adoption of codes of conduct, using case studies of the jurisprudence of Israel and the United States.

Valter Shuenquener de Araruj in his article "The four pillars for the preservation of the regulatory agencies' technical impartiality in Brazil" investigates how to ensure regulatory agencies' autonomy and technical impartiality in Brazil. Four structural pillars were highlighted, including the legal rule of fixed-term in office, the principle of lesser control intensity of the agency acts, the prohibition of contingency of its budgetary resources, and the prohibition of agency powers suppression.

Michael Freitas Mohallem's article "Electoral corruption unfolded by Operation Car Wash and political rights in Brazil" adopts a legislative perspective to explore the impact of corruption on citizens' political rights to participate in public affairs and to vote in authentic elections. The study analyzes the complex structure of illegal campaign financing in Brazil with the Operation Car Wash case, the most significant corruption in Brazil's history.

Laura Panadès-Estruch in her article "Public-Private Partnerships in transport: a critical assessment of the Caribbean" studies the contextualized Public-Private Partnerships (PPPs) in the Caribbean subregion. The study performed a critical assessment of the selected PPP transportation projects based on five key aspects: the type of arrangement used, the regulatory framework, the financial implications of PPPs, the accountability mechanisms, and miscellaneous data.

Individually these five articles have produced important findings in respective regulatory issues with a distinct theoretical approach and an adequate research method. Altogether, they have provided a glimpse of the growing dynamic of the regulatory world in terms of changing regulatory environments, emerging regulatory areas, and diverse contextual settings. It is our aspiration to make use of this special issue to inspire original ideas and innovative methodologies in the advancement of regulatory governance research in both theoretical and empirical terms.

The last two articles address a timely issue of the coronavirus pandemic in China and Indonesia. Eddie Yu in his article "An analysis of China's strategies in combating the coronavirus pandemic with the 3H framework" attempts to theorize about China's strategy in combating the coronavirus pandemic with the 3H (Heart-Head-Hand) framework. Its findings show that 3H framework distinguishes the effectiveness of a country's public health strategies and practice for combating the pandemic. The framework conceptualized a holistic management approach and its assumptions have been initially tested with this pandemic case.

The last article by Ali Roziqin, Syasya Y.F. Mas'udi and Iradhad T. Sihidi "An analysis of Indonesian government policies against COVID-19" discusses Indonesian government policies in dealing with COVID-19. It found that the Indonesian government responded slowly at the beginning of its spread in March 2020. Moreover, policies such as physical distancing, large-scale social restriction and social safety net will only work if the society follows them. It suggests that the policymakers should pay more attention to the society's characteristics as well as the mitigation system as a preventive measure and risk management to make clear policy in this society.

Carlos W.H. Lo
Ning Liu
Guest Editors

About the Guest Editors

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Managing higher education for a changing regulatory environment

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Abstract

Purpose – This article addresses the relationship of universities to their changing regulatory environments internationally.

Design/methodology/approach – This article updates analysis published in 2004 exploring the contrasting modes of, and key trends in, regulation of higher education across eight OECD (Organisation for Economic Co-operation and Development) states. The article offers a wider analysis of the changing patterns of regulation rooted in mutuality, oversight, competition and design, and the implications for the management of higher education institutions.

Findings – Since 2004, higher education has seen more growth in oversight-based and competition-based regulation, but also some decentralization of regulation as an increasing cast of actors, many international and transnational in character, have asserted themselves in key aspects of the regulatory environment. This article explores the implications of these changes in the regulatory mix over higher education for the ways that universities manage their regulatory environment, arguing first, that there is significant evidence of meta-regulatory approaches to regulating universities, and second, that such a meta-regulatory approach is consistent with an emphasis on university autonomy, raising a challenge for universities in how to use the autonomy (variable by country) they do have to manage their environment.

Originality/value – This article offers an original analysis of how universities might most appropriately respond, deploying their autonomy, however variable, to address their external regulatory environment. The author suggests we might increasingly see the external regulatory environment as meta-regulatory in character and universities making more use of reflexive governance processes.

Keywords Regulation, Higher education, Rankings, OECD

Paper type Research paper

Introduction

Universities originated as, and maintained themselves as, self-governing communities of scholars, engaging in teaching and scholarship, over many centuries. The expansion of higher education in the twentieth century increasingly involved state support for their missions and a broadening range of policy objectives associated with higher education. A 2004 study found that traditions of regulation based in mutuality or community were increasingly giving way to more oversight and more competition in the steering of higher education by governments. Since 2004 higher education has seen more growth in oversight-based and competition-based regulation but also decentralized state regulation as an increasing cast of actors, many international and transnational in character, have asserted

This article originated as the keynote at the International Conference on Global Regulatory Governance hosted by the Chinese University of Hong Kong in July 2019. I thank the organisers and in particular Professor Carlos Lo Wing-Hung for the great honour of being asked to address this conference in my role as Convenor of the ECPR Standing Group on Regulatory Governance. I am grateful also to Slobodan Tomic and participants in a seminar held at Oxford University Centre for Socio-Legal Studies in May 2019 for comments on an earlier draft.

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themselves as key aspects of the regulatory environment. Regulation as a concept is drawn broadly in the regulatory governance scholarship, drawing from a mix of modes of control extending from the traditional hierarchy of rules to bring in competitive processes, community-based controls, and regulation through design.

This article explores the implications of this change in the regulatory mix of higher education and the ways universities manage their regulatory environment. My own work combines the perspective of the regulatory scholar with the experience of a practitioner in university governance. The article is largely conceptual rather than empirical. It links the changing regulatory environment of higher education to the development of governance machinery and the norms within universities in a context where universities increasingly participate in and learn from international networks, both of universities and of regulatory bodies.

Some researchers see risks of hyper-regulation and excessive competition in steering universities, driven by changes in governance associated with New Public Management (NPM) and ideologies of neo-liberalism (Olssen and Peters, 2005). The author argues that such understandings of change, whilst reflecting both reductions in public funding in many countries and increasing market pressures on universities, especially linked to internationalisation, tend to underplay the role of university autonomy. The author strongly suggests thinking of higher education's regulatory environment not as wholly directive, but rather as meta-regulatory in character – acting to steer the self-regulatory capacity and (variable) autonomy of universities. For universities this suggests that they use their autonomy to develop their internal management in a variety of modes to suit their objectives and the modes of control they face, involving more reflexive processes to govern and to animate their purposes and missions. Emphasising the purpose and values of autonomous universities does not deny the need for them to account for their public role and state funding. However it does reassert the role of universities as principals in defining their missions, recasting the army of external regulators as agents in supporting universities to fulfil their roles, as much as they are principals setting public policy agendas independent of higher education institutions.

Transforming and regulating higher education

Universities originated as self-governing communities of scholars and students which can trace their history back to antiquity in Asia, Africa and Europe (Marginson, 2011). The ideals of university autonomy originate from a time when universities were small, elite communities of scholars offering higher education only to a small proportion of national populations and were, accordingly, at the margins of the concerns of emergent state governing apparatus, whilst they nevertheless held some significance for state formation. As state capacity, generally, grew, the changing role and scale of universities in the twentieth century created a challenge both for the institutions and for the governments which, in most countries, took on a significant degree of the funding responsibility for a much expanded and diversified higher education sector with varying degrees of institutional autonomy (Scott, 2011). The transformation of the state's relationship to higher education in the twentieth century focused on the quality of, and accessibility of, higher education and also the importance of knowledge development through research and innovation (OECD, 2009).

Once universities are seen as instruments of public policy, increasingly attracting public funds either directly (through grants) or indirectly (for example through state loans to cover student fees), then it is inevitable that governments will take an interest in understanding their activities and steering their actions and outcomes towards demonstrating value for money in achieving not only institutional but also national goals. As the massification of higher education in many industrialized countries in the post-Second World War period made

higher education institutions increasingly dependent on state funding, so they became intimately linked both to the constraints and ideas of the wider state machinery. Thus when the fiscal crisis of the 1970s brought the expansion of the welfare state to a halt in many European countries, the expanding scope and cost of higher education came into question. Fiscal pressures on states to ensure value for money in higher education have, if anything, increased, not least due to the global financial crisis of 2008 (Hazelkorn, 2011), and the COVID-19 pandemic of 2020 (which has affected, amongst other things, global student mobility, and thus fee income).

Higher education governance has shifted from funding-based instruments to a more identifiably regulatory mode of governance, in terms of government oversight (Black *et al.*, 2015). Notwithstanding this increased state scrutiny, patterns of globalization and increasing competition have generated a more complex regulatory space for higher education in which national governments are less able to fully set agendas. The remarkable growth in international student mobility has been, for some countries, a source of additional income to support growth in higher education. The United States is the largest recipient of overseas students and saw growth of more than 70 percent in international student numbers between 1999 and 2013, from 450,000 to 785,000. UK policies during this period drove British universities to similar growth in international student numbers, 232,000 in 1999 to 416,000. Australia more than doubled its international student numbers, to 250,000 in the same period. While France saw significant growth in international student numbers in the early 2000s, nearly doubling numbers between 1999 and 2006 to nearly 250,000, the growth did not continue and numbers fell somewhat in the period to 2013. Germany has seen only 10 per cent growth in international student numbers between 1999 and 2013, with close to 200,000 international students. Whereas Germany once ranked 3rd in the world for receiving international students, by 2013 it only ranked 5th. By 2013 the other countries ranking in the top ten international student destinations were Canada, Japan, China, Italy and Austria, with the top ten receiving more than 2.4 million international students between them, whereas the top ten receivers took only 1.3 million students in 1999. The largest country of origin for international students by far is China, at over 700,000 students in 2013, more than the next four countries (India, Germany, South Korea, and France) combined (Choudaha, 2017).

Government interest in higher education has sought to diversify the sector so as to provide advanced education both of more applied and more academic varieties across a range of different kinds of higher education institutions (in addition to the self-governing universities), frequently with significant distinctions between the type of providers involved (Shattock, 2008). Governments have also sought to diversify those who benefit from higher education, with emphasis on recruiting larger numbers from historically underrepresented socio-economic categories. With research, governments have increasingly become preoccupied with justifying significant public expenditure through evidence both of competitiveness and impact.

The emergent regulatory landscape of national state regulation was traced in a 2004 comparative study of higher education regulations in eight OECD member states. The study found that traditions of regulation based on principles of mutuality or community-based governance were being supplemented or displaced by a growing emphasis on hierarchy and competition in the oversight of universities (Hood *et al.*, 2004). In the 2004 study we noted that all four basic types of control – as mutuality, contrived randomness, competition and oversight – could be found within the organization and regulation of behaviours in higher education. Mutuality was found in peer-review processes in research and promotions; contrived randomness was found in 'garbage can' committee procedures and unpredictable regulatory decisions; competition was found in the rivalry for prizes, research claims, grant capture, budget share and grant funding; and oversight was found in government reporting

requirements and, for some countries, the approval of curriculum and appointments (Hood *et al.*, 2004, pp. 75-77).

For the contrasting patterns of higher education regulation in 2004 it was significant whether higher education institutions were regarded as part of the central or regional state apparatus (as in Germany and France, for example), as this entailed state oversight over such matters as senior academic appointments and pay, or whether they had emerged as largely autonomous bodies (as with the UK and Australia), albeit with significant state funding. The United States and Japan have placed much larger emphasis on private universities, albeit with significant growth in state universities in the United States. Even where universities are private, as with significant portions of the US, Japanese and to a lesser extent German systems, state funding of educational grants and or loans may give the state a significant interest in educational and research outcomes. We also found considerable evidence of a mixture of the four basic forms of control, with quality assurance increasingly combining the mutuality of peer review with the oversight of more hierarchical reporting requirements (Hood *et al.*, 2004).

The comparative research on higher education regulations found a somewhat different mixture of technique across eight OECD member states (Table 1). Within most systems a focus on mutuality-based governance was identified, reflecting strong traditions of university autonomy (not always extending to other kinds of higher education institutions). The UK shifted from a tradition of mutuality, to a degree, to growing patterns of oversight-based hyper-regulation over universities. The trend towards more oversight-based regulation was widely observed, coupled with a growing trend for more competitive modes, frequently from a low base. At that time only the US was identified as having a low level of oversight-based regulation. But the US system, at that time, saw a much higher dependence on competition for steering, with other countries having low, but in many cases, increasing dependence on competition. Evidence of contrived randomness at play was limited.

We found also that trends in forms of control tend to be related, with the ratcheting of one mode accompanied by the loosening of another, which we referred to as 'the mirror image hypothesis'. For example, in some European systems, an increase in competition saw a reduced emphasis on state controls over appointments and salaries. In Australia, an increased mutuality in quality assurance saw a reduction in the oversight mechanism of mandatory reporting. As in the UK, sometimes modes of control grew together ('the double

Intensity of Governance Governance Mode	Low	Medium	High
Mutuality		US, UK	Australia, France, Germany, Norway, Japan, Netherlands
Oversight	US	Australia, France, Germany, Norway, Japan, Netherlands, UK	
Competition	France, Germany, Norway, Japan, Netherlands	Australia, UK	US
Contrived Randomness	Australia, France, Germany, Norway, Japan, Netherlands, US	UK	

Source: Adapted from Hood *et al.* (2004, p. 82, Table 3.3)

Table 1.
Regulating Higher Education: Eight OECD member states in 2003

whammy'), as with increased competition accompanied by an increase in central oversight (Hood *et al.*, 2004). Writing in 2004 we observed the growing importance of university rankings generated by private organizations, mainly media companies at that time (Hood *et al.*, 2004).

Regulating higher education today

The trends evident in the regulation of higher education in 2004 have continued in the period since. Notably traditions of self-governance and mutuality have come under challenge from greater oversight and greater competition in national, transnational and international governance. Fragmentation in regulation has been accompanied by a shift towards more oversight and more competition steering the higher education sector. Rankings bodies, comprising a mixture of private, sectoral and governmental organizations, implicitly point to norms that higher education institutions need to follow to be highly ranked. This is linked to the commercial motivations of the ranking body and/or their own sense of the priorities for the sector (Hazelkorn, 2011). There has been significant growth in international student mobility, as noted above, creating market pressures to demonstrate reputation and high rankings and with increasing investments in creating internationally competitive higher education institutions, both in European countries such as Germany and France and in Asia, for example in China, Hong Kong and Singapore. Higher education regulation shows a degree of decentering as other nodes and models of regulatory governance have taken on greater significance (Black, 2001) and knowledge, education and research have become ever more globalized. In the next sections the author addresses the fragmentation of higher education regulation in terms of who is engaging in regulation, over what values or objectives is regulation taking place, and what mix of modes or instruments of regulation is being deployed.

Who regulates?

The diversification of higher education institutions beyond the traditional self-regulating community of scholars and the increasing interest of the state, combined with the proliferation of competitive forms of steering, such as rankings, has vastly increased the cast of actors within the higher education regulatory space. Today key actors include:

- government departments and specialised state agencies (including funding bodies and quality overseers)
- national private regulators (including private professional accreditors and self-regulatory university consortia such as the transnational AdvanceHE)
- a range of supranational bodies, especially within the EU, but also including the monitoring functions of the OECD and UNESCO and intergovernmental networks such as the European Association for Quality Assurance in Higher Education (ENQA) and the International Network for Quality Assurance Agencies in Higher Education (INQAAHE) (Dill, 2011)
- a range of transnational private regulators including the media and consultancy organisations who organise some of the university rankings schemes, and the emergent associations of higher education institutions whose research and advocacy activities can increasingly be seen as part of the steering mechanisms over higher education (Dill, 2011). International networks both of regulators and of universities are in part a response to inter-governmental actions to set higher education norms, but they also permit both regulators and universities to detach themselves, to a degree, from the states where they are located.

What values?

Historically the self-regulating community model for universities gave priority to teaching and learning and, subsequently, advancing research. To a varying degree, these were key values around which self-regulation was organised.

We have seen that as mass higher education has developed, for national governments who are providing much of the funding, it is increasingly important for universities to demonstrate their value for money, a key part of the "audit explosion" in the public sector (Shore and Wright, 2000). In public audit doctrine, value for money considers economy, effectiveness and efficiency and goes beyond the more traditional (but still important) audit doctrines of ensuring that the money was spent for the purposes for which it was allocated (Bowerman *et al.*, 2003).

Beyond the value for money, higher education is a major source of social mobility and a key tool for enhancing life opportunities for those from disadvantaged backgrounds. Concerns with increasing and widening participation in higher education are increasingly allied with wider commitments to removing barriers to equality for both students and staff at universities as demonstrated by equality legislation (for example addressing gender, disability, race, sexual orientation), and beyond formal equality, to achieve deeper cultural change. The strong focus on one set of values, such as gender equality, risks ignoring or downplaying other equality objectives, such as seeking to eliminate racism (Bhopal and Henderson, 2019).

How is regulation carried out?

Regulation of higher education in 2020 has a varying mix of mutuality, competition and oversight. In some systems, mutuality is perceived to be under threat with a more limited role for design-based control generally. The role of mutuality today is frequently located within a wider hierarchical structure under which oversight requires processes to be undertaken. For example, peer review constitutes a significant proportion of the activity in the realm of quality. Higher education has always had a transnational or global dimension as mobility of people and ideas has been an essential aspect in both generating and sharing knowledge (Marginson, 2011). Transnational mobility is now accompanied by various forms of transnational oversight and, with that, steering the behaviour of institutions towards some desiderata and away from others, distinct from national government policies and oversight.

Increasing oversight-based mechanisms in higher education involve the setting, monitoring and enforcing of rules. The framework norms for higher education tend to be set through legislation. Such rules are also incorporated into authorisation mechanisms (for example setting down the minimum requirements for recognition as a university in many countries), and within funding mechanisms within which compliance with norms is a condition for grant of funding. Hierarchy is a central aspect of controls which seek to manage the number of students in higher education, which are a core part of some more managed systems (seeking to control public expenditure) but less significant in systems where student fees and loans are more significant. Facing continuing financial pressures in the 2008 global financial crisis and now in the 2020 coronavirus pandemic governments have tended to increase oversight of value for money in higher education. In some cases, such as the UK and Australia, governments engage state agencies directly with assessing the quality of education and the impact of research. Quality has also been central to the growth in supranational oversight of higher education, especially in the EU. The European Network of Quality Assurance in Higher Education (ENQA) (Enders and Westerheijden, 2011) has moved beyond its inter-governmental origins and transformed into an association and *de facto* standard setter for quality assurance processes in Europe, engaging in the review of national quality assurance agencies and with an increasing global reach (Dill, 2011).

Increasing competitive pressures have arisen from national policies in some countries, but there has been even more competition for international students and staff due to the presence and significance of university rankings. The transition towards more data-driven oversight is a core component of the competitive approach to regulation involved with scoreboards and rankings, developed by both public and private organisations. There has been an increasing emphasis on research selectivity, seeking to channel state research block grant funding to higher education institutions (HEIs) best able to demonstrate high quality. There has also been a shift from block grants to competitive grants. Within the EU the latter shift has been amplified by the emergence of substantial EU funding for research projects on a competitive basis.

A core competitive pressure which has intensified over recent years stems from the growth of numerous subject-based and institutional rankings of higher education both nationally and internationally. Whereas the 2004 study noted key business school and national university rankings, 2004 turned out to be an inflection point, with the launch of a number of global institutional rankings, first by Shanghai Jiao Tong University in 2003 (now referred to as the Academic Ranking of World Universities) and then by Times Higher Education in cooperation with Quacquarelli-Symonds (QS) in 2004 (Hazelkorn, 2011). Times Higher and QS subsequently parted company in 2010, leading to competition between the quite similarly framed but distinct rankings of Times Higher and QS. These three influential sets of rankings, ARWU, Times Higher and QS, have generated significant concern both in higher education and with governments because they are partial and oriented to data that is available. First, there is an incomplete picture of quality and second it gives institutions an incentive to change practices in order to enhance their position in the rankings and thus in competitive markets for reputation, students, staff, etc., whether or not this advances or possibly undermines their institutional mission (Hazelkorn, 2011). The European Commission responded to the limitations of extant rankings systems in 2014 with the establishment of U-Multirank, a system to compare universities across core criteria that enables the user to select which criteria to compare and in a way which avoids simple numerical rankings. Recognising the credibility challenges of ranking systems, their originators have established their own meta-regulatory oversight in the form of the IREG Observatory on Academic Ranking and Excellence, an international non-governmental organisation made up of rankings experts which, with the support of UNESCO, has established a set of principles for rankings processes (the Berlin Principles, adopted in 2006) (Dill, 2011).

Whilst mutuality-based collegial governance clearly remains of importance in the regulation of higher education, it is clear that hierarchy and competition have become increasingly significant bases of control. There is not much evidence of the different forms of design-based regulation taking hold in higher education regulation.

University autonomy and meta-regulation of higher education

Regulation of higher education in many countries places considerable emphasis on preserving and even enhancing the organizational autonomy of universities for varied reasons including perceptions that autonomy is a foundation for strong performance. There are also democratic grounds for advancing autonomous universities as important nodes of independent knowledge and learning within democratic states. Even within Western Europe the autonomy of universities is highly varied, with French universities generally having low autonomy when it comes to key organizational decisions, while English universities experiences the greatest autonomy (Boer and Enders, 2017). The rapidly changing external environment of regulation risks compromising university autonomy, however variable that autonomy may be across different countries. Many see significant changes in universities

themselves towards centralization, neo-liberalism and managerialism, as universities have apparently bent to the dictates of new public management (Olssen and Peters, 2005), though this claim can be contested.

The European Universities Association (EUA) has underpinned its efforts to protect university autonomy with the development of a tool for assessing variation in university autonomy in European countries, with reference to organizational, financial, staffing and academic matters. Across these four dimensions there are a total of 38 indicators (Table 2).

The EUA finds a high degree of variation in the degree of university autonomy in Europe. Amongst the group within the 2004 study, higher education institutions in France have traditionally been treated like civil service bodies and, in 2017, were rated as having low academic autonomy (for example admissions and curriculum content), and medium-low autonomy in respect of staffing, finance organization, notwithstanding a strong government commitment to enhancing university autonomy (Lodge, 2018). Intriguingly, whilst the Netherlands rates medium to high on organizational, financial and staffing autonomy, it rates medium-low on academic autonomy, which reflects a higher degree of centralized oversight of programme accreditation. Notwithstanding the trend towards hyper-regulation of higher education, the UK remains an exemplar of university autonomy, according to the EUA, with the sector scoring high for all four sets of autonomy criteria, notwithstanding the growth of centralized government agency oversight (Shattock and Horvath, 2019).

How can the growing intensity of different forms of regulation be reconciled with both the traditional autonomy and the renewed autonomy claims of universities? One possible approach is to recognize evidence that higher education regulation frequently draws on the self-regulating capacity of universities and to suggest that meta-regulation, the steering of self-regulatory capacity (Parker, 2002), may be a positive way to think about the relationship between universities and their regulatory environment. Meta-regulation involves a requirement on the regulatee to do something, but without specifying what they should do, with some form of feedback around what is done in response to the requirement to act (Parker and Braithwaite, 2003). Whilst meta-regulation was conceived to link state hierarchy to self-regulatory capacity, we can see meta-regulatory pressure coming from other sources too, including competition and community activities (Scott, 2008). Notably, the ratcheting of international competition for prestige, students and research funding is mediated in part through the diverse range of rankings. The rankings organisations select their own criteria for evaluation (with considerable variation between them) but do not have authority to direct

Organisational	Financial	Staffing	Academic
Selection Procedure/Criteria for Rector	Length/Type of Public Funding	Staff Recruitment Procedures	Deciding on Overall Student Numbers
Dismissal/Term of Office of Rector	Keeping a Surplus	Staff Salaries	Selecting Students
Inclusion/Selection of External Members in Governing Bodies	Borrowing Money	Staff Dismissals	Introducing/Terminating Programmes
Deciding on Academic Structures	Owning Buildings	Staff Promotions	Choosing Language of Instruction
Creating Legal Entities	Charging Tuition Fees for National/EU Students		Selecting QA Mechanisms/Providers
	Charging Tuition Fees for Non-EU Students		Designing Content of Programmes

Table 2.
Parameters of university autonomy

Source: Adapted from Pruvot and Estermann (2017, p. 14)

institutions what to do. Thus there is no hierarchy in these mechanisms. Rather HEIs must navigate expected costs and benefits of rankings and make decisions as to any response they might make to external stimuli. Universities retain autonomy in their response to rankings, but also take feedback from rankings, thus constituting a form of meta-regulatory steering.

Higher education yields a number of very significant examples of meta-regulation which are underpinned, variously, by hierarchy, competition and community at both national and transnational levels. Because of their claims to autonomy we should not be surprised that meta-regulation has proved to be important in higher education and that it draws on these wider bases of competition and community. Indeed, the operation of important meta-regulatory regimes over higher education in England and Wales tends to challenge claims of a hyper-regulatory environment (Shattock and Horvath, 2019). Or if it is hyper-regulatory it is, to some degree, hyper- and meta-regulatory at the same time.

Table 3 provides examples of meta-regulatory regimes over higher education based on the different modes of control. Hierarchy-based meta-regulation is exemplified by processes of strategic dialogue, seen in Hong Kong and Ireland, which require HEIs to engage in a process of setting down and discussing with regulators their objectives and proposed outcomes in respect of their core missions, which indicates how they contribute to some, but not necessarily all, government-determined sectoral policy objectives. The content of the performance documents is for the HEIs to determine, but with steering from and accountability to the regulator. Through this mechanism formal institutional autonomy is substantially preserved but the funding agency is able to nudge HEIs towards more ambitious targets in respect of national goals. The process in Ireland involves a degree of mutuality since external assessors in the dialogue process are drawn from overseas HEIs.

A community-based approach is exemplified by the Athena Swan Charter programme in the UK, Australia and Ireland under which HEIs volunteer to review both organizational and department level policies/achievement with respect to gender equality and to devise action plans to remove barriers to equality. Appropriate standards accreditation is given where analysis and plans meet (Ovseiko *et al.*, 2017) and accreditation under Athena Swan is a mark of pride and also a source of encouragement within organizations.

Rankings provide a clear example of a competition-based meta-regulatory approach in the sense that rankings bodies have no capacity to require HEI actions. Whether admitted or not, HEIs do engage with rankings in ways that seek to enhance their positions. In the case of the recently introduced Times Higher Social Impact Rankings, the normative content is not simply about the core mission of research and education, but rather about engaging with and advancing the UN Sustainable Development Goals. This includes values extending beyond climate action to combat gender and wider inequality, promote health and well-being, and support sustainable consumption and sustainable cities. No university is required to engage with these Global Goals, but those that do are rewarded in rankings, and the submission process is quite normative in steering universities towards

Control Base	*Examples*	*Jurisdictions*	*Values/Objectives*
Hierarchy	Strategic Dialogue	Ireland, Hong Kong	VFM, Effectiveness
Community	Athena Swan	UK, Australia, Ireland	Equality
Competition	Times Higher Impact Rankings	Transnational	Sustainability
	Student Surveys	Netherlands, UK, Australia, Ireland	Quality
Hybrid	Quality Assurance	Australia, UK,	Quality

Source: Author's own research

Table 3. Examples of meta-regulation in higher education

particular forms of engagement with and governance of the global goals within their organizations.

In respect of quality regimes, and certain other matters in some countries, it is increasingly common to find governments using oversight measures to require certain actions to be taken, but leaving the definition of those actions to the institutions themselves, subject to a degree of scrutiny that often involves peer review. Thus, oversight is combined with the mutuality-based regimes of self-assessment. Traditional mutuality-based quality assurance processes are increasingly supplemented by student surveys, which can be linked both to funding mechanisms and to rankings. This has been the case in the UK, Netherlands, Australia and Ireland, which thus introduced competition-based steering. Within such systems students are increasingly characterised as consumers with collective power to regulate HEIs, thereby linking the market to the student survey outcomes. Such surveys may then constitute part of systems of rankings.

Managing the regulatory environment in universities

The enhanced role of the state in shaping higher education policies has been underpinning a shift towards strategic planning in higher education institutions. This shift, along with the related management structures for implementation, have created the context in which governments have supported the institutional objectives and have also created the posture within higher education institutions with which they wish to respond to external steering stimuli (Shattock, 2010). Higher education regulation is not simply a matter of compliance with externally determined norms. (Braithwaite *et al.*, 2004). To attain autonomy, do universities need to determine for themselves their missions and the norms which will guide their work internally, with academic staff protected by academic freedom to determine their research plans and the content and style of their teaching? If this is correct, then institutions' autonomy and academic freedom cannot be without accountability. But the need for accountability need not imply that universities must manage themselves simply to comply with external reform requirements, nor that a single management mode should be deployed. Indeed, Peter Maasen has set down the university governance paradox "the more university leaders take on and operate in line with the reform agenda's ideologies, the less effective they appear to be in realising some of the reform intentions" (Maassen, 2017, p. 290).

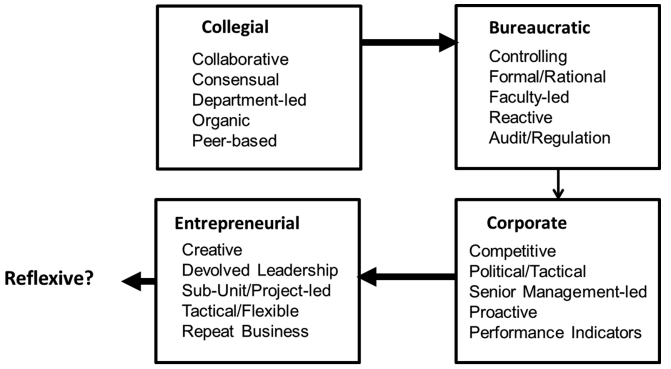
For activities which are substantially governed by relatively stable community or collegial norms, some form of mutuality-based or collegial governance may be most appropriate, as with academic and professional promotions and research and teaching evaluations. The academic department, which has the expertise on disciplinary norms, frequently provides the key focal point for collegial management. For those activities for which relatively stable formal rules dominate, some form of hierarchical governance may be more appropriate. For example, in the classic bureaucratic model, there are financial rules and data privacy rules that govern expenditures and data management. Bureaucratic management in universities tends to shift its focal point from department to faculty, as faculties are simpler to centrally coordinate to promote compliance. Some researchers in higher education management have seen a significant shift from collegial to bureaucratic management as a key response to the development of mass higher education and increasing pressures of external scrutiny and demands (McCaffrey, 2018). Whilst older universities have held on to significant aspects of collegial management, newer institutions may have been established for wider public purposes such as widening access to education, delivery of more applied education and research, and are thus more liable to have started with more bureaucratic governance models from the outset.

The most significant changes to higher education in the 21st century have been the ratcheting of competitive pressures, with competition for students in some systems, and

competition for key employees, especially faculty. There is also increased competition for scarce research funding, and linked, but somewhat distinct, a competition for reputations generated by rankings. University leaders have responded with new forms of management sometimes described as corporate and, somewhat distinctly, entrepreneurial in approach. The corporate mode has tended to centralize power with senior management reducing the powers (and frequently numbers) of faculties. This shift has been accompanied by new technologies of governance, and in particular data and indicators. From an internal perspective data is needed to understand the extent to which strategic objectives are being met and, from an external perspective, indicators provide tools for comparing performance and instilling competition amongst both institutions and national systems. The entrepreneurial mode tries to create leaner and more devolved structures, enabling different parts of the institution to respond more rapidly to opportunities, with a lighter formal governance (and some accompanying risks for regulatory compliance).

Whilst these four modes of managing universities can be presented as a form of progression from one mode to another as institutions seek to better manage the challenges of the external environment (McCaffrey, 2018) , the approach I have laid out suggests that each may simultaneously have a role within a single institution. I further suggest that where norms are not stable and the institution needs to harness its own capacity for better understanding its problems, for securing buy-in for a wide range of actors, and for understanding and testing a range of solutions, a more reflexive mode of governance may be more appropriate. External regulation of higher education which is meta-regulatory in character, seeking to steer the self-regulatory capacity of institutions to shape their norms, practices and achievements, and to report on them, may most appropriately be met with reflexive management modes internally (Figure 1).

If it is correct to value HEI autonomy as delivering better educational and research outcomes then meta-regulatory techniques may be well calibrated to encourage HEIs to act whilst substantially retaining their autonomy, especially over matters where norms and expectations are not fixed, and likely to be substantially within the remit of universities to define as an aspect of their purpose. I hypothesize that more promising approaches to meta-regulatory stimuli will develop robust and reflexive responses to the challenges of the external environment in which the organization's values and objectives can be captured not simply through high level or top down processes, but in a way that creates a living strategy shaped by and supported by the community of the HEI. Such an approach is appropriate for organizations concerned with knowledge and learning. From the perspective of a large



Source: Adapted from McCaffrey (2018, p. 64, Table 2.4)

Figure 1.
HEI management style adapting to changed regulatory environment

organization, such a reflexive approach toward understanding and responding to the environment creates a significant challenge of management and governance. Early research on organizations and institutions took universities as the model. Cohen, March and Olsen, for example, in their study of decision making in HEIs, described universities as 'organized anarchies' in which it's difficult to match problems, solutions, and contested preferences (Cohen *et al.*, 1972). Whilst incompetence is one posture in the face of regulation, other potential responses include compliance-orientation (which may not be wholly appropriate for universities) and amoral calculation (Kagan and Scholz, 1984) or gaming (Bevan and Hood, 2006). Consequently, from the perspective of the regulator, regulatory scholars note that meta-regulation requires strong capacity to review and understand what regulatees are doing (Gilad, 2010). While this observation about capacity is based on understanding the capacity needs of hierarchy-based meta-regulators, it is likely to be equally true for competition-based meta-regulators such as research funding bodies and ranking institutions.

A reflexive approach requires universities to coordinate reflection and learning in such a way that engages internally and externally not only with what the organization does and how it does it but also with why it acts as it does. This chimes with attempts by university leaders to articulate university missions by reference to purpose and values. The reflexive approach is sometimes labelled triple-loop learning in that it encourages reflexive organizations to work back to the problems and challenges which their missions address, rather than to have those problems and challenges defined for them, which would leave them simply to work out what to do and how to do it (Parker, 2002). Such a reflexive approach to the management of the increasingly complex external environment enables universities to clearly articulate their mission and how they deliver, through engagement with their own communities, and in a way that shapes their response to regulatory and meta-regulatory pressures. It offers a counter to fatalism, recasting the university as principal, and the cast of external actors and regulators more as agents to support the delivery of a university's mission.

Conclusion

Universities present a significant puzzle and challenge for regulation, but the regulatory study of this sector also has much to offer regulatory scholarship in general. As organisations which exercise autonomy, to a greater or lesser extent in different countries, universities cannot simply be subject to hierarchical control. Regulatory scholarship and practice are, in any case, increasingly sceptical of hierarchy on its own as the basis for effective control. Within university organisations themselves the exercise of hierarchical line management is equally problematic. And yet, governments and other regulatory bodies need to be able to hold universities accountable and, indeed have a sense of steering the sector, over key aspects of public policy. These public policy aspects include education and the advancement of knowledge and further goals such as widening access to higher education and, critically, stewardship of public finances, in addition to global goals such as creating a sustainable world.

The author argues in this article that numerous examples of meta-regulation in higher education provide a means to reconcile university autonomy with the role of government and other external actors with respect to steering higher education institutions. It provides a means for universities to understand and advance the internal steering of their own purposes, faculty and staff. Meta-regulation not only steers actions, but also learning, and encourages universities and their employees to think beyond what they do and how they do it to wider purpose and values. It also shows why they perform certain actions and how they should best think about their mission and how to achieve it. Such an approach enables universities to cast external regulatory actors as agents in the delivery of university missions to at least as great an extent as universities are agents in the delivery of public policy.

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Regulating corporate social responsibility practices of adopting codes of conduct through criminal law

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Abstract

Purpose – This paper explores different approaches to regulating corporate social responsibility (CSR) patterns of adopting codes of conduct, and discusses the approach that courts should embrace.

Design/methodology/approach – Case studies from various legal systems will be examined. The paper presents new typology relating to different patterns of the Corporate Social Performance (CSP) model, based on aspects of the CSR pyramid, namely, legislative CSR and ethical CSR. Legislative CSR includes adoption of thin codes which reflect compliance within current legal standards of the criminal code, while ethical CSR includes codes reflecting ethical norms and corporate social citizenship beyond mere compliance. The paper also includes the interplay of different patterns of CSR and three approaches to regulation regarding these patterns.

Findings – Both the Israeli negative CSR regulatory approach and the American legislative CSR regulatory approach present difficulties.

Originality/value – The paper introduces a theory for regulating CSR within criminal law, drawing on the pyramid of CSR. It presents an original discussion of distinct approaches to regulation of corporate liability, while further developing the institutional theory of CSR and the interplay of regulation and CSR. The paper suggests a novel solution regarding the regulation and acceptance of CSR: the granting of protection from criminal liability to corporations who adopt CSR.

Keywords Codes of conduct, Corporate social responsibility (CSR), Ethical CSR, Legislative CSR, Regulatory approach, Corporate Social Performance (CSP) model

Paper type Research paper

Introduction

Companies engaging in corporate social responsibility (CSR) have adopted codes of conduct which include internal standards aimed at ensuring ethical conduct of employees and managers. Following the adoption of these codes, one of the issues raised is whether the state should regulate the self -regulation of corporations and consider them within criminal law in an attempt to enhance the adoption of meaningful codes

CSR practices are often analyzed through the Corporate Social Performance (CSP) model (Carroll, 1979), which is composed of a few categories, including institutional, organizational, and individual levels (Wood, 1991). The paper further develops the institutional theory of CSP, which involves the influence of law and rules, societal legitimacy, and stake holder expectations (Wood, 1991; McBarnet, 2007; Marquis *et al.*, 2007). Based on the CSP model, Carroll presented the pyramid of CSR, which includes four dimensions: economic, legal, ethical, and discretionary (Carroll, 1991; Carroll, 2016).

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Drawing on Carroll's pyramid, the paper introduces a typology of CSP practices regarding legislative CSR, as opposed to ethical CSR, thereby further developing aspects of the CSR pyramid. Legislative CSR includes performance aimed at achieving compliance with criminal law standards, whereas ethical CSR reflects the voluntary adoption of ethical norms beyond the standards of the criminal code itself, and an attempt to achieve genuine organizational change.

Scholars have discussed the interplay of regulation and CSR practices (McBarnet, 2007), suggesting that different kinds of regulations may influence the motivation of corporations to adopt CSR practices (Karassin and Bar-Haim, 2015; Karassin and Bar-Haim, 2019). Nevertheless, the current literature does not thoroughly discuss different judicial approaches to regulating CSR within criminal law, nor does it relate to the connection between regulation and different variants of the model of CSP. Moreover, it does not examine how different attitudes towards regulation in criminal law influence the motivation to embrace meaningful patterns of CSR.

The paper aims to bridge that gap by discussing distinct approaches to regulation of corporate liability, based on the different patterns of CSP typology, namely, legislative CSR and ethical CSR. The paper also addresses the gap in how CSR practices are linked to aspects of criminal law by exploring several national approaches, and suggesting a novel solution regarding the regulation of CSR.

The paper looks at the jurisprudence of Israel and the United States as two distinct examples of different approaches to patterns of CSR. Based on analysis of case studies from the two legal systems, the paper points to difficulties arising from the current approaches. It examines the regulation of CSR practices, and discusses whether codes of conduct and compliance programs should be recognized by courts in criminal proceedings. Thus, the research question is: Which judicial approach should be embraced regarding the adoption of codes of conduct?

Several different approaches will be discussed, and a new doctrine will be proposed whereby courts could influence the conduct of corporations by granting protection in exchange for adopting internal mechanisms that enforce fair practices. In order to encourage better ethical environments within corporations, this paper suggests adopting a new approach that would support the regulation of CSR practices within criminal law. Certain codes of conduct and CSR practices could therefore serve as possible protection against criminal liability.

The paper is structured as follows. The first section discusses regulating corporate criminal liability in relation to the different varieties of CSP. It examines traditional state regulation and the development of voluntary practices of CSR. It then presents the typology of CSP practices for codes of conduct, including legislative and ethical CSR, the terms of thick and thin codes, and implications on regulation. The author will discuss the different approaches of regulating CSR regarding codes of conduct, including the negative approach, a legislative CSR regulatory approach, and ethical CSR regulatory approach. The second section presents the American and Israeli systems regarding regulation of CSR practices within criminal law. The third section discusses several approaches and presents justification for the adoption of a new approach towards regulating ethical CSR. The third section also discusses the effect of such regulation on the motivation of corporations to adopt CSR. The fourth section draws on the lines for the suggested approach.

Approaches to regulating corporate criminal liability and types of CSP

CSP patterns: legislative CSR, ethical CSR, and corporate social-citizenship

According to the CSP model, Carroll's pyramid of CSR contains a wide base that represents the economic dimension on which the firm is founded (Carroll, 2016). The legal, ethical, and discretionary aspects are located at the base of the pyramid, which consists of economic and for-profit considerations (Carroll, 2000). The discretionary parameters are reflected in

advancing corporate social citizenship, which entails adopting social responsibility practices towards the community (Carroll, 1999).

The author suggests that different approaches to the regulation of corporations could be connected to different CSP patterns introduced in the paper. I would suggest distinguishing between two different types of a corporation's performance within the CSP model: legislative and ethical CSR. Legislative CSR is a narrow concept, in which the corporation adopts performance standards based on the economic and legislative dimensions of the CSR pyramid. Ethical CSR shares these characteristics, along with ethical and discretionary dimensions as well.

Some corporations adopt basic codes which merely reflect the law, while others adopt meaningful codes which go beyond compliance. Legislative CSR is the adoption of thin codes which aim only at compliance with the demands of the criminal law itself, in addition to fulfilling the economic goals of the firm. Ethical CSR is the embracement of thick codes which adopt ethical norms beyond mere compliance, including the discretionary dimension of corporate social citizenship. Two factors are included: philanthropic activity (Carroll, 1991) and advancing fair behavior to various stakeholders in society, an important factor of CSR according to the stakeholders' theory (Freeman, 1984). The theory of stakeholders posits that firms bear the responsibility to employ fair practices and consider the interests of stakeholders, including customers, suppliers, and the community in general (Karassin and Bar-Haim 2015; 2019). Carroll emphasized that employing meaningful CSR practices requires advancing all of these aspects, including corporate social citizenship (Carroll, 1999).

Different approaches to CSR regulation within criminal law

Regulation of CSR practices can be accomplished through the mechanism of meta-regulation, which controls the internal self-regulation of corporations (Parker, 2007). Meta-regulation advances the adoption of legal practices aimed at encouraging corporations to take responsibility for their conduct (Lobel, 2004; McBarnet, 2007).

Regarding possible regulation of CSR practices, it is useful to distinguish between three different approaches. Table 1 presents the interplay of CSR regulatory practices within criminal law and CSP patterns.

The negative CSR regulatory approach includes either elements A plus 1 of the matrix above or A plus 2. It posits that the state should refrain from regulating CSR and enhance only the traditional state regulations, while rejecting the consideration of adopting codes of conduct in criminal proceedings.

According to approaches embracing meta-regulation, the existence of CSR practices should be considered in criminal proceedings against corporations. In this vein, the different patterns of CSR have implications on the kind of regulation that should be adopted, depending on whether it is a legislative or ethical approach.

The legislative CSR approach includes elements B plus 1 of the matrix above. This approach only requires compliance programs and adoption of thin codes, which merely reflects the demands of criminal law. It advances the possibility of reduced punishment for corporations upon adoption of such codes, and denies the option of granting corporations protection against criminal liability for adopting codes of conduct.

A) Not granting protection against criminal liability	B) Granting protection against criminal liability upon adopting codes
1- Legislative CSR- Compliance with criminal code	*2- Ethical CSR- Ethical norms beyond compliance*

Table 1.
Typology of CSP patterns

Whereas the ethical CSR regulatory approach includes elements B plus 2 of the matrix, it requires the adoption of meaningful codes and social citizenship. The approach posits granting protection against criminal liability to corporations who adopt ethical CSR performance. According to this approach, a code which merely reflects the law itself should not grant protection against criminal liability. The adoption of such a code could not be a basis for a genuine change in the organizational culture. According to this approach, granting protection against liability only on the basis of meaningful codes of conduct will result in avoiding the adoption of codes as a mere attempt to gain legal protection without any real intent to embrace ethical behaviour.

Regulation of CSR practices in the United States and Israel

American jurisprudence: adopting a legislative CSR regulatory approach

American jurisprudence has embraced the legislative CSR regulatory approach. This approach is reflected in the sentencing mitigation doctrine, which considers the adoption of codes and compliance programs in determining sentences (Evans, 2011). According to the sentencing guidelines for organizations (United States Sentencing Commission, 2018), a company with an effective compliance program, including oversight, effective communication to employees with monitoring systems, auditing, reporting and disciplinary mechanisms, may receive a reduction of the basic fine (Haugh, 2017; Wellner, 2005). The sentencing guidelines therefore acknowledge the possibility of granting corporations lighter penalties in exchange for adopting codes of conduct (Bucy, 2009). Yet, corporations have not been granted protection from criminal liability upon adoption of codes of conduct and compliance programs.

In *United States v. Ionia Management S.A.* (United States Court of Appeal Second Circuit, 2009), the corporation was convicted of violating the act of preventing pollution on ships by failing to maintain an oil record book, despite having a compliance program and code of conduct. The corporation's claim that the crew's actions of discharging waste could not be attributed to the corporation, since they were violating the company's environmental policy, was rejected. The court argued that a compliance program, however extensive, could not immunize the corporation from liability when its employees, acting within the scope of their general authority, fail to comply with the law. Therefore, it could only be considered regarding the sentencing.

The American cases also demonstrate that courts have neither examined the content of the codes, nor have they required meaningful codes as a precondition for granting reduced sentences to corporations. The main demands have been procedural and focused on the existence of an efficient compliance program. Corporations have therefore often adopted codes and compliance programs that were only symbolic and mainly intended to cover evidence (Wellner, 2005).

For instance, in *United States v. Caputo* (United States District Court for the Northern District of Ilinois, 2006), although the corporation had a compliance program, it was not effective. The court held that the organization subverted the standard compliance goals of crime prevention into ensuring that the corporation could proceed with its illegal marketing scheme, in direct violation of FDA regulations. By applying standards, actions, and expertise within the compliance program, the organization shielded and covered up their offences and the illegal marketing plans.

Furthermore, sentencing guidelines, in fact, compel organizations to adopt a code of conduct. According to sentencing guidelines, courts take into account the avoidance of compliance programs when determining the severity of the fines. The Sarbanes Oxley Act of 2002 also requires supervision of senior management and adequate financial reporting in publicly owned corporations, and holds senior management liable for false or inadequate

reporting. It includes the requirement that public corporations adopt codes of conduct (Bucy, 2009).

Moreover, corporations have often been required to adopt compliance programs and codes through deferred and non-prosecution agreements (DPA/NPA). In many cases the prosecution has settled a case instead of prosecuting it (Gallo and Greenfield, 2014). Using a special model, companies agree to cooperate with the government and pay heavy fines in exchange for a conditional promise by the American Department of Justice not to prosecute (Haugh, 2017). With a deferred prosecution agreement, corporations are compelled to adopt codes and compliance programs as part of the settlement agreement with the prosecution. This practice turns the adoption of compliance programs and codes into a non-voluntary act.

The adoption of a code and compliance program has often been used as the basis for establishing employee awareness regarding criminal norms, and as a basis for strengthening the possibility of convicting corporations.

For instance, in *United States v. LSB Bank* (United States District Court for the Eastern District of Pennsylvania, 1990), the court emphasized that, having embraced a compliance program and a code of conduct which were published and sent to all employees, they were well aware of their misconduct. Even though the code and compliance program that were distributed provided verifying and recording details of the individuals presenting financial transactions, it was not done in the relevant cases.

Israeli jurisprudence: Adopting a negative approach to regulating CSR

Israeli jurisprudence has adopted a negative approach, which reflects a perception of vast liability of corporations in criminal law, regardless of the adoption of codes of conduct.

In *The State of Israel v. Rosenhoiz* (Israeli Criminal Court of Jerusalem, 2010) which dealt with violations of anti-trust laws related to the Shufersal supermarket chain, the corporation adopted a meaningful code including norms relating to philanthropic contributions, according to which the corporation would contribute to charity and participate in community programs. Despite this meaningful code of conduct, however, the court rejected the claim that the adoption of a code should guaranty defense in criminal proceedings, and ignored the adoption of these codes.

The State of Israel v. Siemens (Israeli Criminal Court of Tel Aviv, 2017) involved a local branch of the international Siemens Corporation, whose managers were involved in bribery. The court emphasized that the adoption of a code of conduct, as well as a vast compliance program, could neither grant protection against criminal liability, nor serve to reduce the sentence.

These rulings raise problems since there is hardly any consideration of the adoption of codes of conduct. Hence, there is no incentive for corporations to adopt such codes.

Regulating CSR: which approach should be applied?

Courts should deny the negative approach and formulate the regulation of CSR within criminal law, while granting corporations protection against criminal liability. There are a few arguments in support of denying the negative approach and embracing the ethical CSR regulatory approach.

First, even-though it could be argued that traditional state-centered regulation is preferable because of the ability to employ criminal sanctions and enforcement, the claim should be rejected. Without recognition of self -regulation within the law, corporate policies will either ignore ethical demands, or adopt basic codes which mainly focus on maximizing profits. Corporate policies which focus largely on meeting deadlines, efficiency, and financial goals might lead to extended wrongful behavior (Walsh and Pyrich, 1994).

As opposed to traditional state law, which is formal, general, and rigid, and uses classical tools of command and control, meta-regulation, employed within the ethical CSR approach, is more flexible and easily adaptable to changes in the external environment and to the specific circumstances of each corporation (Potoski and Prakash, 2005). It takes advantage of the inherent capacity of corporations to manage themselves and control their employees.

It also takes advantage of the knowledge and expertise of individual corporations, which know themselves and their culture best, and which recognize the specific steps needed to prevent potential violations of ethical norms (McBarnet, 2007; Shamir, 2004).

Second, even though it could be argued that the very essence of CSR is its voluntary characteristic, and that mechanisms of self- regulation regulated by the legal system, undermines the original concept of CSR, the claim should be rejected.

We should bear in mind that employing an ethical CSR regulatory approach preserves the voluntary dimension of CSR. According to this approach, organizations are self-determined to adopt a meaningful code. Even so, corporations might decide not to take upon themselves extra obligations and might instead comply only with the criminal code.

Furthermore, the gap between striving to preserve CSR as a voluntary act and regulating CSR, which has enforcement power, only characterizes the legislative CSR. The problem invoked by the legislative CSR regulatory approach has been driven by regulations aimed at gaining compliance with the standards of the criminal code only. Nevertheless, the regulatory approach of ethical CSR is advantageous in its adoption of thick codes, which include voluntary ethical norms beyond compliance. Hence, the approach preserves the very notion of CSR, which was originally supposed to reflect activities beyond compliance. Embracing the ethical CSR regulatory approach maintains the concept of CSR presented as actions by corporations (Parker, 2007). These ethical norms are not codified into the criminal code, but are nevertheless expected to be followed by stakeholders and by society.

The problem presented above is derived from the fact that, in the American system, corporations are compelled to adopt codes of conduct, since non-adoption is a factor in determining sentences, and results in more severe penalties. It is also used to force organizations to adopt compliance programs through plea-bargaining intended to avoid trial. Nevertheless, embracing a new approach, according to which non-adoption of codes would not be considered in the sentencing stage, would preserve the voluntary characteristics of the CSR.

The new ethical CSR approach should therefore be adopted, since it presents a solution to the problems of both the Israeli and American CSR systems. Under the Israeli system, denying the negative approach will create an incentive for corporations to adopt codes of conduct.

Under the American system, the adopted codes of conduct often lack true legitimacy, mainly because they are only criminal law-driven compliance programs concerned with avoiding law enforcement, rather than building a substantive ethical organizational culture (Haugh, 2017). Applying the ethical CSR approach will result in adopting efficient codes of conduct.

Third, even though it could also be argued that organizations that employ any CSR regulation necessarily establish the motivation for adopting CSR practices, that claim should be rejected.

Indeed, if CSR remains purely voluntary, it could lead to a symbolic adoption that is unaccompanied by genuine organizational change. For instance, a bus transport corporation could adopt voluntary codes and paint its buses green, while still causing pollution. The very possibility that the self-regulation practice could be tested in courts one day may lead to a fundamental organizational change when voluntary practices are applied.

One of the motivations for adopting codes, beyond the direct legal benefits, is societal response and stakeholder expectations. As scholars have noted, many consumers over the

last decade have been switching to more socially responsible products, reflecting a shift towards higher levels of ethical concern in consumer purchasing decisions (Freestone and McGoldrick, 2008).

Regarding the motivation for corporations to adopt CSR, we should bear in mind that CSR was developed partly in an attempt to advance financial performance by attracting consumers, and partly for institutional reasons (Marquis *et al.*, 2007), such as legalities and regulations (Karassin and Bar-Haim, 2019). Yet, beyond the motivation of avoiding direct legal consequences, CSR literature presents societal pressure as a motivation for corporations to adopt it. Placing liability on corporations affects their image and reputation. Corporations will try to avoid criminal liability as they take into account societal influence as a dominant motivator for adopting CSR.

In this vein, granting liability protection only to corporations that develop thick codes would then be an incentive for adopting meaningful codes of conduct. Companies wishing to preserve a good image would be motivated to do so. The idea of granting protections only to corporations adopting a thick code is based on the view of CSR as deriving from societal expectations, and not as a practice aimed at granting mere legal protections.

The motivation of managers and employees to act and enforce ethical norms is an important element that is at the foundation of the rationale of applying meta-regulation of CSR. Managers and employees will enforce and comply with norms due to both intrinsic and extrinsic motivations (Feldman and Perez, 2009). The intrinsic motivation relates to self-interests and beliefs, whereas the extrinsic motivation refers to external institutions and rules. In this respect, the ethical CSR regulatory approach combines the two motivations, as it emphasizes the role of voluntary acts based on organizational goals and aspirations, as well as the importance of legal procedures.

Furthermore, scholars have emphasized the influence of participation and trust in motivating the enforcement of norms within mechanisms of self- regulation (Feldman and Perez, 2009). In this respect, the managers and organizations will find incentives for complying if they participate in designing the ethical norms they will adopt. This trust-based approach means that if a genuine thick code is adopted, a criminal law conviction would be no longer necessary. In this vein, it has been claimed that the managers' willingness to both comply with ethical norms and expect ethical behavior is derived from an ethical concern and a belief in the legitimacy of the norm (Gunningham *et al.*, 2005; Feldman and Perez, 2009). The ethical CSR regulatory approach that the framework of meta regulation enables, includes self-regulation and is derived from the motivational belief in the legitimacy of the norms within the code designed and enacted by the firm itself.

Fourth, although it could be claimed that the current regulations of CSR are not efficient, taking into consideration that compliance programs in the United States have actually not reduced corporate crime levels (Wellner, 2005), the ethical CSR regulatory approach should still be embraced.

Indeed, compliance programs in the United States are often aimed at pushing employees into hiding and covering evidence of wrongful behavior. This could lead to compliance training being used, not as a means of generating lasting norms of ethical behavior, but as a tool applied only to shield the corporation from liability. Companies might direct employees to limit the mention and tracing of wrongful behavior, rather than eliminating the behavior itself.

Indeed, the adoption of thin codes within the legislative CSR of the American system is problematic, since it does not include added value beyond the existing law. Nevertheless, adopting an ethical CSR regulatory approach could be a solution.

Promoting legislative CSR and the adoption of codes which reflect the law will not result in preventing unethical behavior, but will result in lowering the level of ethics within the corporation, since employees will consider any voluntary ethical norms beyond the code as

unnecessary. Employees will treat unethical behavior which is not covered by the code as legitimate and hence, will conduct various unethical activities.

Both the Israeli and American jurisprudence have evolved in such a way that adopting meaningful codes of conduct may worsen corporations' legal situation. Once a corporation adopts ethical norms beyond the law, it is bound to comply with its own policy statement. A corporation adopting a policy statement that it does not properly implement may expose itself to greater liability than it would have had it adopted no code at all. Hence, any implementation of code which includes ethical norms beyond the demands of the law itself exposes corporations to greater liability. Under these circumstances, corporations are driven to avoid adopting a code of conduct, or may only adopt a thin code reflecting the demands of the existing law that the corporation is bound to comply with anyway.

Indeed, many codes of conduct in the American system are not efficient, and focus only on prohibiting behavior against the firm itself by its employees, including behavior which impacts profits, such as, theft from employers and misusing corporation assets. Nevertheless, an ethical CSR regulatory approach would require corporations to implement norms with a genuine added value of ethics preventing criminal behavior regarding stakeholders and the public in general.

Furthermore, corporations are mainly motivated by societal pressure, and the very act of holding a corporation liable affects their reputation. Social norms play an important role as incentives for the enforcement of ethical conduct (Feldman and Lobel, 2010). The adoption of CSR practices is mostly driven by the desire to meet stakeholder expectations, including the ethical expectations of customers and the public. The possibility of a reduced fine is not a solid enough motivation for corporations to change their unethical behaviors and adopt thick codes accompanied by ethical behavior, since corporations will still be held liable. As long as corporations are still held criminally liable in a way that damages their reputations, the motivation for adopting meaningful code will be weak. Convicting corporations in criminal law has implications on the perception of the corporation among stakeholders. Receiving exemption from criminal liability by adopting thick codes is a much stronger motivation for corporations to reform their ways and meet social expectations. The possibility, therefore, of gaining protection from criminal liability has advantages for corporations beyond saving extra payment on fines and the legal consequences of conviction.

The American case shows that courts do not examine the content of the codes, but only examine the measures taken regarding compliance programs when sentencing. Hence, American courts do not require thick codes as a precondition for granting reduced sentences. The legislative CSR regulatory approach focuses on the inner mechanism for compliance with the requirements of the law itself.

As long as CSR regulation only demands compliance with the law, it will not motivate corporations to adopt meaningful codes. This is contrary to the basic goals of CSR which aims at advancing ethics and social citizenship of corporations. Such regulation, which advances legislative CSR, could even result in downgrading the level of ethics within corporations.

Fifth, the argument could be made that assigning extra duties results in extra costs, thereby affecting the efficiency and financial goals of corporation. Yet this claim should be rejected, because extensive demands regarding ethics do not necessarily raise costs, but only require ethical standards and decency. Furthermore, corporations are not required to take upon themselves these demands, but instead are granted protection when they voluntary adopt them. The exemption granted to corporations eventually saves money and the payment of costs and criminal fines. Preserving a good reputation by avoiding conviction in criminal law also saves money.

Finally, although it could be argued that it is problematic to raise demands which go beyond those required by the criminal code. Despite the legislature's sovereignty in

determining the policy regarding criminal offences and the requirement of extra involvement of the courts themselves, the claim should be rejected.

As professional bodies detached from political agendas and pressures, the courts are advantageous in dealing with ethical issues, unlike elite groups and corporations, which often have close connections to the political arena (Litor, 2019a; Litor, 2019b; Litor *et al.*, 2020).

Adopting a new approach for regulation of CSR: presenting ethical CSR regulatory approach

A few guidelines will facilitate implementation of the suggested ethical CSR regulatory approach. Contrary to the situation in the United States, where non-adoption of a code is considered when determining sentences, the adoption of ethical codes should remain voluntary. The adoption of such codes should only benefit corporations. In addition, managers should not be liable for choosing not to adopt codes.

Protection from criminal liability should be granted only to those corporations who embrace a thick code of conduct reflecting corporate social responsibility and hence the content of the code and the specific norms adopted should be examined.

There are a few parameters for thick codes.

(1) The code should include ethical norms beyond the requirements of the criminal code itself.

(2) A code aimed only at avoiding risks to the corporation and maximizing profit would not suffice. Hence, the enforcement of offences and norms regarding the employer, such as conflict of interests would also not be adequate. The code of conduct must be focused at preventing unethical behavior.

(3) In accordance with the stakeholder theory we should evaluate whether the code includes norms which go beyond the relationship of employees and the corporation, to address issues related to various stakeholders. Thick codes should also advance dissenting behavior to different stakeholders. Thick codes would include offences aimed at the public interest and society in general, such as antitrust laws or bribery and fraud.

(4) Codes of conduct may range from general ethical guidelines to very specific policies intended to prevent employees from committing particular types of crimes. In Israel, codes of conduct tend to be very general. It is therefore essential for corporations to adopt concrete guidelines. Regulation CSR must be aimed at ensuring that the norms of the ethical code are in accordance with the practice and structure of the specific corporation, and avoiding the specific risks that revolve the activities of the corporation. It is of special importance when a risky field is involved that is more prone to problems.

(5) In cases involving a history of repeated violations by a corporation, the code should be aimed at preventing these specific violations.

(6) Meaningful codes should include philanthropic contributions and activities for the benefit of the community.

(7) A code of conduct needs to have been enacted before a specific violation of law occurs.

(8) Codes should be aimed at preventing severe offences with large ramifications for the public, such as violations regarding work safety, and infractions that can potentially endanger the life or body.

(9) If a corporation supplies essential services, it is particularly important to grant it protection against criminal liability.

(10) The various actors associated with corporations, such as contractors, subcontractors, and agents, should be required to comply with the code of conduct. Corporations should be liable for violations of either its employees or contracted bodies. The test should be the control the corporation has on the acts of its associated organizations.

(11) Instead of using deferred prosecution and non-prosecution agreements such as plea bargains, as is the custom in American law, liability and sanctions should be determined only by the courts themselves.

(12) The compliance program itself should include several principles which create proportionality and transparency and communication to all employees. In some cases, a corporation would be expected to adopt special measures within a compliance program including internal discipline tribunals with the authority to place sanctions on employees who do not comply with the ethical code. For instance, large corporations with many employees, international corporations, and public corporations owned by the state or a local municipality would be expected to adopt more meaningful norms and compliance programs

Table 2 presents the difference between the suggested approach – ethical CSR regulatory approach and legislative CSR regulatory approach.

	LEGISLATIVE CSR REGULATORY APPROACH	**ETHICAL CSR** REGULATORY APPROACH
Whether corporations are granted protection in criminal procedure upon adopting codes?	Reduction of sentences	Granting protection against criminal liability
What is required for granting benefits within criminal proceedings?	Procedural demands – adopting adequate compliance program	Demands regarding content and norms beyond procedure
Whether focused on compliance with the law?	Demands thin codes: Demands compliance only with the criminal code	Demands thick codes- reflecting voluntary ethical norms beyond - compliance
Which kind of norms are included?	Focuses on norms regarding the employer- risks to the corporation and profit	Focuses on additional norms, regarding various stake holders beyond the employer and concerning the public - interest and social expectations
Is a philanthropic contribution needed?	Not needed	needed
Does a general code suffice?	General principles	Addressing specific risks of the cooperation and repeated violations, and severe offences
Who the code relates to?	Covers actions of employees	Covers actions of all contractors and sub- contractors
Cases of non -adoption of codes	Non adoption is considered in sentencing and corporations are compelled to adopt code of conduct	Non adoption of codes is not considered

Table 2.
Typology of CSR regulatory approaches

Conclusion

Criminal law in many countries has recognized the possibility of holding corporations liable for criminal acts. The development of CSR practices in the last few decades has raised the issue of whether and how CSR practices should be regulated within criminal law. Should the adoption of codes of conduct grant protection to corporations against criminal proceedings?

Drawing on the Corporate Social Performance model (CSP) and the institutional dimension of the pyramid of CSR (Carroll, 1991), the paper discusses distinct approaches to the regulation of corporate liability: a negative approach which denies the regulation of codes; a legislative CSR regulatory approach; and an ethical CSR regulatory approach.

These distinct approaches relate to the different patterns of CSP typology presented: the adoption of thin codes within legislative CSR, and the adoption of thick codes within ethical CSR. Legislative CSR requires merely the adoption of thin codes reflecting compliance with the current legal standards of the criminal code, while ethical CSR requires thick codes that reflect the adoption of ethical norms beyond compliance and social citizenship. As a possible motivation for adopting CSR, the paper suggests a novel solution regarding the regulation of CSR that grants protection to corporations from criminal liability.

American law has embraced a legislative CSR regulatory approach that is reflected in the sentencing moderation doctrine, which takes into consideration the adoption of codes of conduct and compliance programs in determining sentences in criminal law. Establishing inner compliance programs leads to lighter sentences in criminal proceedings, while neglecting to adopt such codes leads to more severe penalties. Nevertheless, the sentencing mediation doctrine has, for the most part, not led to the prevention of criminal acts by employees. This also raises a concern, since corporations that conduct themselves ethically are held responsible for the acts of individual employees which may be contrary to the expressed instructions of management. As opposed to American law, Israeli law has adopted a negative approach which ignores the development of CSR practices.

Both the American and Israeli approaches should be rejected in favor of a new approach. The new approach, ethical CSR regulatory approach supports granting corporations protection against criminal liability if they develop thick codes. This could be a novel solution for self-regulation practices within criminal law, as it advances the adoption of genuine meaningful codes of conduct and changes organizational culture.

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Appendix

Table A1.
American system versus Israeli system

	IS THERE NECESSARILY A REDUCED SENTENCE UPON ADOPTING CODES AND COMPLIANCE PROGRAMS	IS THERE CONSIDERATION OF THE CONTENT OF CODES - DOES THE COURT DEMENT THICK CODES?	IS THERE A MORE SEVERE SENTENCE UPON NOT ADOPTING COMPLIANCE PROGRAM	DOES THE CODE BASE LIABILITY	WHETHER THE CODE GRANTS PROTECTION AGAINST CRIMINAL LIABILITY	WHETHER COMPLIANCE PROGRAMS AND CODES ARE COMPELLED
American system	**Yes** There is a reduced sentence upon adopting compliance programs -according to sentencing guidelines	**No** consideration of content of code /Demanding only compliance programs -Demanding thin code	**Yes** There is a more severe sentence upon not adopting Compliance Program and code	**Yes** Code of conduct could base liability for commitments breached	**No** Not granting protection from liability	**Yes** Corporations are compelled to adopt compliance programs and codes in the framework of agreements with the prosecution
Israeli system	**No** Acknowledgment of necessarily reduced sentence	**No** consideration of content of code	**No** There is not a severe sentence upon not adopting code	**Yes** Code of conduct could base liability for commitments breached	**No-** Not granting protection from liability	**No** There is no possibility of agreements with the prosecution in order to avoid trial

About the author
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The four pillars for the preservation of the regulatory agencies' technical impartiality in Brazil

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Abstract

Purpose – The purpose of this paper is to debate on how to achieve, in countries that have invested in the North American model of the regulatory state, the greatest efficiency in creating norms for the organization of public and private activities in order to guarantee the autonomy and technical impartiality required for the proper functioning of regulatory agencies.

Design/methodology/approach – This paper describes the development of the legal framework regarding regulatory agencies in Brazil. The research was based on bibliographical data, media reports, and the Brazilian Supreme Court decisions.

Findings – The regulation dissemination through regulatory agencies in Brazil has given rise to a series of controversies concerning the limits of their performance and the extent of their technical discretion. According to the findings, it is concluded that these independent agencies should be guided by the following four pillars: (1) the legal rule of fixed-term in office; (2) the principle of lesser control intensity (deference) of the agency acts; (3) the prohibition of contingency of agencies' budgetary resources; and (4) the prohibition of agency powers suppression. Otherwise, the institutional capacity of agencies will be diminished and their neutral action in technical matters will be compromised.

Originality/value – This paper shows how enhanced autonomy and technical impartiality can be useful for better regulatory governance in other countries, preventing them from suffering from the same problems that have occurred in Brazil.

Keywords Regulatory agencies, Fixed-term, Judicial review, Contingency, Technical autonomy

Paper type Research paper

Introduction

The emergence and diffusion of regulatory agencies in Brazil essentially relates to the federal government's concern in the mid-1990s with the State's transformation into a new public management model. The project aimed to stay apart from patrimonialism and bureaucracy, leading to profound reforms in the Brazilian legal system, e.g., the Constitutional Amendment 19/1998, the legislation related to the expansion of the Third Sector (Statutes 9,637/98, 9,790/99 and 13,019/14), the National Privatization Program (Statute 9,491/97), and the creation of regulatory agencies.

These reforms have following points in common: the efforts towards de-bureaucratization, the increase of the State's efficiency, and the focus on the quality of public services (even those not directly rendered by the State). In addition, privatization has led to private parties showing greater participation in the economy, as well as greater provisions of public services.

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That resulted in a higher demand for investments by the private sector, which also needed a stable and predictable regulatory environment (Mendes, 2000, pp. 108-109). During that time, Brazil started a beneficial process – apparently irreversible – of distancing itself from the direct execution of various economic activities and public services, which imposed a broader and more efficient regulatory action. It is noteworthy that, in the telecommunications sector, the creation of a regulatory agency occurred even before the State turned over the activity. Indeed, ANATEL (The National Telecommunications Agency) was created in July 1997, while EMBRATEL's (Brazilian Telecommunications Company) control was sold to the private sector one year later. This episode represents a policy with strong legal repercussions executed in a carefully planned manner.

Inspired by the US regulatory model, which relies on independent agencies, the Brazilian Federal Government created the most diverse regulatory agencies. In some states and municipalities, the focus was on multisectoral regulation. For instance, the State of Rio de Janeiro has two regulatory agencies, AGETRANSP (Transport Regulatory Agency) and AGENERSA (Energy Regulatory Agency), and some municipalities have also created their own agencies, such as AGERSA (Municipal Agency for Regulation of Public Services of Cachoeiro de Itapemirim), and AGEREG (Regulatory Agency of the Delegated Public Services of Campo Grande).

These agencies include features that allow regulations to be more neutral and efficient, which are crucial for a more rational decision-making process (West, 1983). Their legal framework strengthens their autonomy and protects them against harmful political influences in the decision-making process. Moreover, the reliance on technical regulation through special agencies was influenced by a historical context in which, according to Guerra (2008, p. 75), "the abstract formulas of law and judicial discretion no longer bring all the answers".

A patrimonial and bureaucratic state reveals itself as one in which there is a confusion between the State's and sovereign patrimony (Adams, 2005; Rodriguez, 2008). Furthermore, power is exercised with traditional domination based on bureaucracy and, according to Max Weber (1999, p. 248), there is a focus on "liturgical satisfaction of the political and economic policies of the Lord". Because the bureaucratic state does not aim for results, it must be abandoned and replaced by a management state. In the words of Lane (2003, p. 4), "a theory of governance in the public sector must be concerned with how things are done and the results". In Brazil, the management state was profoundly inspired in the English model of new public management and, therefore, the hierarchy was replaced by a consensus-oriented environment (management by hierarchy to management by contract) (Ferlie *et al.*, 1996, p. 13).

The ideas presented in this article can inspire other countries that seek an improvement in their regulatory state model. The state's option for organizing economic activities using regulatory agencies requires a theoretical analysis that honors the presence of minimum characteristics so that they can act with reinforced autonomy. Without a minimum legal framework, regulatory agencies are not able to develop a public policy.

This paper considered previous research on failures in regulatory agencies, especially Black (1987), Sunstein (1990), Moran (2002), and Baldwin *et al.* (2012).

The main purpose of this article is, therefore, to present a perspective on how to achieve – in countries that have invested in the North American model of the regulatory state – the greatest efficiency in creating norms for the organization of public and private activities. Even though the regulatory state exists based on a national model (Moran, 2002), it is possible to think of some universal regulatory standards for state regulatory agencies, so they can have their technical decisions preserved in the greatest social benefit.

The main advantage of regulatory agencies comes from their independence and greater technical impartiality. The attributes of these autarchies allow their decisions to become, in theory, immune to political influences. This lack of excessive political influence is able to

strengthen the state capacity to take good and efficient decisions and avoid corruption (Bersch *et al.*, 2017). According to Paulo César Melo da Cunha (2003, p. 57), regulation through regulatory agencies "involves the creation of technical norms, depoliticized, that apply to certain market segments to guarantee the free choice among suppliers in a competitive regime and with affordable prices".

Most legal scholars believe that regulation is better performed by agencies as they have the autonomy to develop impartial technical norms. They can also issue regulations capable of settling a variety of interests through politically neutral technical discretion, i.e., the authority given to the administrator to decide technical issues in an attempt to limit judicial control and prevent judicial ruling as a replacement for the administrator's choices (Guerra, 2008). Thus, in times of better regulation, polycentric regulation, smart regulation, nudging, expropriating regulation, and sustainable administrative regulation, one shall recommend that regulatory agencies with a truly enhanced autonomy organize economic activities and public services.

It is quite right that it is not easy to separate technical matters from political choices. In some cases, that is even impossible because the adoption of a given technical criterion may depend on a political evaluation. There are various examples, such as the purchase of fighter aircrafts by the Brazilian State and the decision concerning the digital television system to be adopted in the country.

So, it is hard to define technical impartiality in practice. Theoretically, impartiality exists whenever the regulatory agency makes decisions about the arguments presented by the involved parties and the available scientific evidence. Technical impartiality is crucial for regulatory success and occurs whenever the agency's decisions consider the best answer that science can offer to satisfy the public interest. This technical neutrality can encourage state policy to adopt consistency and continuity, combining, as Majone (1999, p. 9) reminds us, "expertise with a rule-making or adjudicative function".

One of the factors that, for example, can impair the technical impartiality of the agencies is the unwanted capture of their agents by a specific segment (Boehm, 2005; Engstrom, 2013). Thus, a state's normative framework must create and reinforce rules so the agency's technical decisions are not overinfluenced by external political factors that can compromise the achievements of the best regulatory solutions. Nevertheless, this understanding of technical impartiality does not dispel the criticisms about the meaning of the words impartiality and technical neutrality. With this concern in mind, we identified four pillars for sustaining the technical autonomy and the impartiality of Brazilian regulatory agencies. They include the legal rule of fixed-term in office; the principle of lesser control intensity (deference) of agency's acts; the prohibition of the contingency of agencies' budgetary resources; and the prohibition of agency powers harmful suppression. However, it must be acknowledged that this list is not exhaustive and that other rules applicable to agencies are also important. By way of illustration, one can mention the mandatory quarantine of leaders who move away from the office.

Besides, other countries' regulatory legal framework may consider the pillars described in this article, thereby allowing them to avoid the same problems that occurred in Brazil. Regulatory governance should aim to improve the performance of public administration, and this highlights concern with the effective functioning of the regulatory agencies. The pillars must coexist and thus create a kind of protective shield in favor of a fair, exempt and proportional regulation. Those aspects contribute to a more efficient public policy in the contemporary world where good and smart regulation is crucial for state decisions that demand stability and continuity. Therefore, every regulatory state should at least respect all four guidelines above mentioned.

The identification of minimum features in a regulatory agency model is essential to ensure its autonomy. And the need to implement public policies in a more rational and technical way

demands that any country in the world provide its agencies with some fundamental prerogatives as the ones we will point out in this paper.

The fixed-term in office and the Brazilian Supreme Court's view

In Brazil, the independent agencies' statutes usually require the Senate approval of the appointed board of directors and to establish a fixed-term for such administrators. Article 6 of Statute 9,986/00 (Federal Regulatory Agencies Act) provides that "the term of office of Commissioners and Directors shall be determined by the law of each Agency". In general terms, agency directors will only lose their position if they resign or are dismissed due to a lawsuit with *res judicata* or an administrative disciplinary proceeding (article 9 of Statute 9,986/00). Brazilian statutes – such as 9,986/00, 9,427/96 and 9,478/97 – are also concerned with intentional phenomenon that directors' terms will never expire at the same time, which allow for the regular continuity of services.

There is a belief that with fixed-terms, the agency may be able to make decisions devoid of political influence. The one who performs the regulatory function at a high level would, in the theory, be completely comfortable in making decisions contrary to the Government authorities' interests. Even though regulatory agencies may not create and define public policies, since they are deprived of democratic legitimacy, one cannot deny that some of their technical decisions can have disastrous effects on governing authorities.

Experience has shown, however, which legal provisions that prevent directors to be discharged *ad nutum* during their terms in office have not preserved the expectations of technical and impartial regulations. When a political authority still in office appoints a member of the agency board, there is a tendency for an alignment that may compromise the essence of the agency's impartiality. Hardly an agent will displease the one that has appointed him for a relevant public position, even if he may not be easily dismissed. In other circumstances, where the appointing authority is no longer in office, there is a high risk that the agency director will act contrary to the governmental interests. In one case, there was excessive compliance and in the other there was exacerbated intolerance. Thus, technical neutrality is not an easily achievable target. Nevertheless, we must state it is easier to obtain technical neutrality with the fixed-term rule than without it.

After the emergence of Brazilian regulatory agencies in the second half of the 1990s, the Supreme Court has already had the opportunity to judge the constitutionality of the fixed mandate. In ADI (Direct Action of Unconstitutionality) 1,949/RS (Brazilian Supreme Court, 2014), filed by the Governor of the State of Rio Grande do Sul, there was a controversy concerning the State's Statute 10,931/97. The plea was directed against a legal rule that required a previous approval of the state Legislative Assembly for the nomination of AGERGS' (State Agency for Regulation of Delegated Public Services in *Rio Grande do Sul*) counselors, as well as against a legal rule that established the need of the Assembly to agree with the *ad nutum* dismissal of those counselors.

Without any further controversy, the statutory provisions concerning the Legislative Assembly's approval were considered constitutional by the Brazilian Supreme Court, based on article 52, item III, letter "f" of the Constitution. That provision is subject to the principle of symmetry, so that State members may also submit the nomination for an effective position within a public entity to the Legislative Assembly's approval.

As to the counselor of AGERGS' dismissal, the law of the State of *Rio Grande do Sul* established that it could only occur with the Legislative Assembly's consent. This kind of rule, which extends the powers of the state legislature to the detriment of the executive branch, without a similar provision in the Federal Constitution, is unequivocally unconstitutional. Nor is there any complexity to reach this conclusion. The checks and balances system among state powers is dictated by the Brazilian Constitution and the ordinary legislator cannot interfere in

this dimension without violating the separation of powers principle. Moreover, this was what the Brazilian Supreme Court (2014) decided, according to the excerpt from the judgment:

> although the participation of the head of the Executive is necessary, the exoneration of the regulatory agencies counselors cannot be left to the discretion of this Branch. This could undermine the nature of that special regulatory agency, which is intended for the regulation and supervision of public services provided within the framework of the political body, the reason why the law has given it a certain degree of autonomy.

The constitutionality of the fixed-term in regulatory agencies was thus recognized. But how can we reconcile what was decided in ADI 1,949 (Brazilian Supreme Court, 2014) with the Brazilian Supreme Court's Precedents number 8 (which do not preserve the fixed-term), 25 (which do not preserve the fixed-term), and 47 (which guarantees it in the scope of public universities)? This conciliation is not an impossible task. An alternative is to consider that, in the Supreme Court perspective, the fixed-term must be preserved in indirect public administration entities with enhanced autonomy, like public universities and regulatory agencies. In the case of a simple autarchy, the head of the Executive Branch may dismiss its directors at any time, even during their term in office.

Deferent and non-deferential control of the regulatory agencies acts

A judge who controls a specific regulatory agency act may not have full knowledge of the reasons behind that technical norm. For that reason, sometimes a judge that only considers the aspects and arguments presented in a unique suit may evaluate an agency rule as unconstitutional. However, once the technical details that justified its publication become known, one can conclude to the contrary that there was nothing wrong with the norm. This finding reinforces the inadequacy of trivializing the use of principles in the jurisdictional control of regulatory agencies' acts. Principles such as the dignity of the human person, free initiative, proportionality, reasonableness, and free will are fundamental in a State based on the rule of law, but their application in a generic manner, dissociated from the specific reality that permeates regulatory agencies, can lead to disastrous results.

It is common sense in the doctrine that the control of regulatory agencies' acts should be exercised with less intensity than the one carried out within other entities of the public administration. The judge must respect the agency's act and he should not replace the merits of the agency's technical decision by his own understanding, which is often exclusively supported by the evaluation of judicial experts. This kind of control is less intense when it comes to what is decided by the regulatory agency, but in contrast it requires a more rigorous observance of the procedural rules necessary for its acts enactment. Therefore, there must be an appreciation of motivation and social participation in the decision-making process.

Deferred control must be favored in technically-complex matters, which is not recommended when faced with sensitive legal cases. In this sense, Jordão (2016, p. 57) states: "on legally sensitive issues, there is a tendency to apply non-deferential judicial control; on technically complex or political issues, there is a tendency to apply deferential judicial control". The principle of deference is now accepted by most administrative scholars, as acknowledged by Moreira (2016), as it has also been invoked, albeit timidly, in REsp (Special Appeal) 1,171,688/DF (Brazilian Superior Court of Justice, 2010) MCM. Moreover, in REsp 806,304/RS (Brazilian Superior Court of Justice, 2008), Judge-Rapporteur Min. Luiz Fux defended the following thesis:

> (Item) 5. Regulatory agencies have exclusive competence to establish tariff structures that are most suitable to the telephone services offered by the concessionaires.
>
> (Item) 6. The Judiciary must not intervene in the rules established by competent authorities, except in the cases of constitutional control, in order to prevent embarrassments that may compromise the quality of services and even render it unfeasible.

The Supreme Court has already had the opportunity to favor a regulatory agency's decision to the detriment of a law that regulated technical matters. In ADI 5,501 (Brazilian Supreme Court, 2015a), the Supreme Court ruled, in a preliminary decision, that ANVISA's (Brazilian Health Regulatory Agency) ban of synthetic phosphoethanolamine (unproven cancer drug) should prevail over the law that allowed its usage (Statute 13.269/16), under the main reason that drug licensing is more directly related to a regulatory agency competence for scientific regulation than to the National Congress.

One of the reasons for less intense control of agency acts is that these institutions issue more complex technical decisions based on framework laws that promote de-legalization. In Brazil, the admissibility of de-legalization is the result of deep doctrinal controversy; yet, it has already been accepted by the Supreme Court in at least two cases [RE 140,669/PE (Brazilian Supreme Court, 1998); ADI 4,568/DF (Brazilian Supreme Court, 2011)]. According to García de Enterría (2006, p. 186), de-legalization means:

> an operation carried out by a law that, without entering the material regulation of a matter, until then regulated by a previous law, opens this subject to the availability of the Administration's regulatory power.

To Souto (2002, p. 47), de-legalization implies:

> Withdrawal, by the legislator, of certain matters, from the domain of the law (*domaine de la loi*), passing them to the domain of non-statutory norms (*domaine de l'ordonnance*). The law of de-legalization would not provide details about the matter in question, but would only open the possibility for other regulatory sources, state origin or not, to regulate it by its own acts.

Regulatory agencies have thus been deciding issues of a predominantly technical nature with a broad normative openness. Also, the specificity of their acts demands a higher argumentative burden from the control authorities and deference to the agency's decision.

In the United States, the predominance of a deferential jurisdictional control in respect to the decisions of regulatory agencies dates to the 1984's precedent of the US Supreme Court Chevron USA Inc. *vs.* NRDC (National Resources Defense Council), 467 U.S. 837 (US Supreme Court, 1984) JPS. In this case, it was settled that the Judiciary should accept the unambiguous choice made by the regulatory agency. Besides, if there is any ambiguity within the agency's decision, the agency interpretation should be preferred to the one of the Judiciary, as long it is reasonable.

Non-deferential control of an agency's acts produces clear deleterious effects since the judicial authority does not have full technical expertise on the matter submitted to its judgment, which then may lead to the adoption of a solution that is not suitable for proper regulation. Moreover, the expansion of judicial control may compromise the coherence and uniformity of regulatory practices, hindering the adoption of an efficient regulation model (*better regulation*). Furthermore, the prospective nature of systemic technical regulation is not found in judicial decisions, which are limited and aimed at settling the conflict presented in court. In regulation, there is also a conciliation of multiple interests involved, while the judges, in general, only appreciate the interests of the parties.

Although the application of the deferential principle is commendable, it has also disadvantages that cannot be overlooked. The regulatory agencies' deficit of democratic legitimacy may justify a more intense (not deferential) judicial action, especially when they are faced with legally sensitive issues. Indeed, regulation can drastically affect values of the greatest constitutional scope, and the technical solution is only one among many possibilities. For that reason, control institutions should not be invariably subject to the agency's technical parameters, what is good and necessary, especially because a supposedly scientific criterion used by an agency can result from a previous political evaluation – and it is not always possible to completely separate what is strictly technical from what is political. Therefore, it is

necessary to remember the example of Brazil's digital television system. At the end of a dispute among various systems in the world, the option for the Japanese digital TV system was certainly supported by technical criteria. But the recognition of the predominant role of a certain technical parameter may result from a veiled political assessment since hardly one equipment or system is better than all the others in every technical parameter. Considering the example given, it is possible that one adopted a decision that favors, for example, the political convenience of strategic proximity between Brazil and Japan.

In addition, social control over regulatory agencies acts may influence politically their decision-making process. Regarding the controversial issue of limiting the usage of fixed broadband internet, the apparently exclusively technical ANATEL's (Brazilian Regulatory Agency on Telecommunications) view suffered deep oscillations, due to the unpopularity of the restrictions to the users' rights. In April 2016, ANATEL decided to prohibit the limitation of broadband connection to users that reached the amount of internet hired (franchise). Two months later, in an interview with the Brazilian newspaper *Valor Econômico* (Bortolozi, 2016), ANATEL's president stated that the agency would not intervene or regulate the private sector business model, leaving the companies to decide on the adoption, or not, of a limited amount of internet (franchises) for customers in fixed broadband contracts. In June 2016, the high controversy surrounding the subject inspired ANATEL to poll the public on this issue.

Given that social control may interfere with the regulatory agency's technical decisions, it may also justify the exceptional adoption of non-deferential judicial control. In synthesis, although the deferential control of agencies acts can encourage a more technically efficient public administration model, the non-deferential one also has its place, especially when there is a need for the effective protection of expressive rights, such as fundamental rights. The initial prestige of the first intensity of control (deferential) cannot annihilate that of the second (non-deferential).

Contingency of the regulatory agencies budget resources and its suffocating effect

On 5 June 2012, TCU's (Brazilian Federal Court of Accounts) Minister Jose Jorge went to the Senate Economic Affairs Committee and highlighted the problem the federal regulatory agencies' high constraint of resources. He also argued that regulatory agencies should have their own budgets, apart from the general budget of the Federal Government. On this subject, one must emphasize that TCU recommended to the Civil House the creation of formal mechanisms/instruments to provide greater stability and greater predictability in the decentralization of resources for agencies and to unbundle their budgets from their respective supervising ministries (Judgment 2,261) (Brazilian Federal Court of Accounts, 2011). However, the same Court also has a decision validating ANEEL's budget constraint (Judgment 2,271) (Brazilian Federal Court of Accounts, 2006).

The constraint of funds allocated to regulatory agencies ends up derailing the adequate performances of special regime agencies and completely undermines their capacity to carry out efficient and independent regulation. The regulatory agency's full institutional capacity can only be exercised if ordinarily earmarked revenues reach their pockets.

Indeed, the proper functioning of a regulatory agency is not exclusively related to the budget constraint. The management quality, too, depends on efficiently-structured measures and processes. It is possible that the resources arrive and that, even so, the agency does not perform as expected. This occurs, for example, when there is a low budget execution, in which the resources received are not spent. But in any case, the constraint makes it much more difficult to adopt regular planning and may significantly jeopardize the agencies' operations. In practice, the constraint effect undermines the autonomy of the regulatory agencies, rendering them deeply ineffective. On the other hand, when a regulatory agency negotiates with the Government to obtain sufficient resources for its operation one may say that it leads

to the harmful effect of transferring technical discretion to those who can decide on the release of budgetary resources.

There is also another problem. Much of the budgetary resources allocated to regulatory agencies come from inspection fees paid by those directly affected by regulations. And everything that is collected under this rubric should be returned to the agency. If everything is not coming back to the agencies' pockets, and yet the agency is working, there are two possibilities: what is collected is excessive and should be reduced, or what is charged as inspection fee is the ideal amount, but the functioning of the agency is substantially impaired. That is why any tolerance of the budget constraints within regulatory agencies ends up unduly pressing the increase of the inspection fees, as verified by Lucas Rocha Furtado in TCU's Judgment 2,271 (Brazilian Federal Court of Accounts, 2006).

The statute project PL 3,337/04 (Brazilian Chamber of Deputies, 2004), authored by the Chief of the Federal Executive Branch and which was filed in July 2013, provided for the management, organization, and social control of regulatory agencies. In general terms, the project encouraged public participation in the regulatory agencies decision-making process by the means of public consultations. It also stimulated their deliberation in a collegial manner, increased accountability to the Executive and Legislative Branches, provided for the obligation to sign a management contract with the Ministry to which it belonged, and regulated the agencies' interactions with the competition regulators. However, there were no specific provisions for budget constraints within the regulatory agencies. The Statute 9,986/00, which provides for the management of human resources in federal regulatory agencies, also does not address any prohibition of budget constraints. The absence of legal provisions, in the sense of prohibiting constraints in the regulatory agencies' financial resources, does not, however, deprive the Judiciary of taking the necessary measures to allow these special regime entities to function properly.

The Brazilian Supreme Court has already recognized the need to prevent the constraints of Brazilian National Penitentiary Fund's resources. That fund was created by the Complementary Statute 79/94 and aims to support the modernization and improvement of the Brazilian Penitentiary System. In September 2015, the Supreme Court judged the case ADPF (Claim of non-compliance with a fundamental precept) 347 MC/DF (Brazilian Supreme Court, 2015b) and acknowledged that the constraint could corroborate the existence of an unconstitutional state of things, which is why it adopted the prohibition of the constraint of the Fund's resources as a structuring measure. In the aforementioned judgment, the Court determined that the federal government should "release the accumulated balance of the National Penitentiary Fund for usage according to the purpose for which it was created, refraining from carrying out new constraints". The realities of Brazilian penitentiaries and regulatory agencies are completely different, but it's important to highlight that the Supreme Court already accepted the possibility of the Judiciary's constraints prohibition. For sure, the ideal solution for the problem would be the existence of a legal provision prohibiting budget constraints meant for the functioning of regulatory agencies, but this type of *inertia* has already been reasonably remedied by the Judiciary.

The reinforced economic-financial autonomy of the regulatory agencies should become a reality through the prohibition of budgetary constraints; otherwise, there is no reason for these special regime entities to exist. Furthermore, in the absence of a legal prohibition regarding the constraint, the forbiddance may be guaranteed by the Judiciary, which is responsible for assuring the technical impartiality of the state regulation, a goal sought by article 174 of the Brazilian Constitution:

> As a normative agent and regulator of economic activity, the State shall exercise, in the form of the law, the functions of supervision, incentive, and planning, being this determinant for the public sector and indicative for the private sector.

Harmful suppression of regulatory agencies powers

The enhanced autonomy of regulatory agencies also depends on the preservation of their legally stipulated competencies. The statutes that create regulatory agencies set their tasks very broadly. Statute 9,478/1997, for example, stipulates that ANP (Brazilian National Agency of Petroleum, Natural Gas, and Biofuels) has the ability to prepare bidding documents and to promote bids for oil exploration concessions, including contract conclusion and its supervision. If ANP's president disagrees with the content of bidding documents drafts informally proposed by the head of the Executive Branch, the agency could see its jurisdiction suppressed overnight, through an executive order that would transfer it to the Ministry of Mines and Energy, a body occupied by someone, necessarily, politically aligned with the President of the Republic.

It is unthinkable to consider the enhanced autonomy of a regulatory agency, if their powers may be withdrawn by the Executive power provisional measures. We do not propose a state ossification, in a way that inhibits any kind of changes in competencies between the direct public administration and those special regime agencies. However, the political option for regulation through agencies justifies measures to make it more difficult to weaken their jurisdiction. The fixed-term rule would not reach its goal, if the head of the Executive Branch could, for example, avoid an undesirable regulatory agency technical decision with a new law that removes the agency's powers.

The current wording of article 62, paragraph 1 of the Brazilian Constitution already provides for material restrictions on the issuance of provisional measures. They all have the clear and salutary purpose of avoiding that the Chief of the Executive Power, on the pretext of disciplining urgent and relevant matters, violates the separation of powers, impairs fundamental rights, and weakens the regular functioning of the rule of law. Ideally, that same constitutional provision would also expressly prohibit the issuance of a provisional measure intended to eliminate or reduce the powers of regulatory agencies. As long as this prohibition does not exist, we will have severe weaknesses in the Brazilian regulatory model.

The analysis of the four pillars previously mentioned allows us to identify that they are closely related to each other and that they have a common goal: the objective of enabling a regulatory environment capable of ensuring stable and technically fair responses. The four aspects strengthen the model of a regulatory state that best serves the interests of society, avoiding the excessive political contamination of the regulatory agency's decisions.

Conclusion

We present below the main ideas defended in this paper, which are essentially concerned with preserving the technical impartiality of regulatory agencies considering four structural pillars.

1. In times of better regulation, polycentric regulation, smart regulation, nudging, expropriating regulation, and sustainable administrative regulation, it is recommended that the organization of economic activities and public services be carried out by a self-governing entity with real enhanced autonomy. In addition, this attribute must be secured not only by the means of legal formalities but also with simplistic discourses that disregard the underlying economic interests of those who are affected by regulation.

2. We identified four minimum pillars to support the technical autonomy of Brazilian regulatory agencies, without which their impartiality is compromised. They are: (1) the legal rule of fixed-term in office; (2) the principle of lesser control intensity (deference) of the agency acts; (3) the prohibition of contingency of agencies' budgetary resources; and (4) the prohibition of agency powers suppression.

3. The board members' fixed-terms should be preserved in those entities of the indirect public administration with enhanced autonomy, such as public universities and, more recently, regulatory agencies. During the mandate period in a regulatory agency, it is inadmissible to withdraw it by means of a new legal provision, as well as the *ad nutum* dismissal of any director, since the right to remain in that post is already incorporated into the patrimony of its beneficiary. In the case of a simple entity or an institution governed predominantly by private law (a mixed-capital company or a public company), the Chief of the Executive branch may, on the other hand, exonerate his or her directors at any time, even during the term of office, either because of the Brazilian Supreme Court precedents number 8 and 25 or because of the reasons set forth in ADI 2,225, which recognized the unconstitutionality of Legislative Branch approval as a requirement for position nominations in private law entities of the indirect public administration. The legal regime of the latter authorizes the Chief of the Executive Branch to carry out the dismissal *ad nutum* of its directors at any time.

4. The trivialization use of principles in the jurisdictional control of regulatory agency acts can lead to disastrous results. Principles such as the dignity of the human person, free initiative, proportionality, reasonableness, and free will are fundamental in a State governed by the rule of law, but their use in a generic way and separated from the specific regulated subject matter can unduly undermine the regulation created by an agency.

5. The control of regulatory agencies' acts, whether exercised by the direct public administration, the Court of Accounts, or by the Judiciary, must be guided by the principle of deference, which recommends the controller to avoid the use of vague principles when interpreting the validity of technical rules. One cannot take principles so seriously. Regulatory agencies have thus decided issues of a predominantly technical nature with very wide normative openness. The specificity of their acts requires of the controlling authorities a higher argumentative burden and an initial deferent behavior to the agency's choice.

6. The principle of deference imposes a less forceful control over the content of what is decided by the agency, but, on the other hand, it requires a more rigorous observance of the procedural norms for its acts enactment. Therefore, there must be an appreciation of motivation and society's participation in decisions.

7. Although the observance of the deference principle in the control of regulatory agency acts is commendable, it has some disadvantages that cannot be overlooked. And in this context, its deficit of democratic legitimacy may justify a more intense (not deferential) judicial action, especially when faced with legally sensitive issues. In such cases, the institutions that control regulatory agencies cannot be naive and invariably subject to the technical parameters built by the agency, especially because the choice of a predominant technical criterion can result from a previous political evaluation, and it is not always possible to separate completely the technical and the political. To summarize, although the deferential control of agencies acts can encourage the public administration to become more technically efficient, non-deference also has its place, especially when there is a need for effective protection of relevant rights, such as the fundamental ones. The prestige of the first intensity of control cannot annihilate that of the second.

8. The constraint of allocated funds to regulatory agencies ends up derailing the adequate performance of these special regime entities and completely undermines

their capacity to carry out efficient and independent regulation. The absence of a legal prohibition on the constraint on the budget of regulatory agencies does not deprive the judiciary from taking the necessary measures to allow these special regime entities to function properly.

9. The strengthened autonomy of regulatory agencies is also guaranteed by their legally stipulated competences. Thus, it is unthinkable to ensure its autonomy if it is possible to remove its powers, for example, by employing a provisional measure. Therefore, the state's political and legal options for regulation through regulatory agencies justifies the increased difficulty in reducing its competences. That is why article 62, paragraph 1, of the Brazilian Constitution, expressly prohibited issuing a provisional measure to eliminate or reduce the powers of regulatory agencies.

10. The country that adopts, in its regulatory public policy, a normative parameter that guarantees the observance of the four pillars will be more able to guarantee greater effectiveness in the regulation of technical matters. Furthermore, this will imply a significant reduction of the political influence in the decision-making process of regulatory agencies.

11. The difficulties in the experience of Brazilian regulation as a state policy raised the concern of the four pillars presented in this article. The dissemination of those ideas to other countries may help create a protective shield in regulatory governance that brings, as a practical implication, an improvement in regulation, so that the interests of all parties involved in the regulation are better considered and harmonized.

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Electoral corruption unfolded by Operation Car Wash and political rights in Brazil

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Abstract

Purpose – This article aims to advance the literature on the effects of corruption and its relationship to human rights violations. The article also presents an overview of existing legislative measures as well as those expected to be implemented at the national level to tackle corruption and its impacts on fundamental rights.
Design/methodology/ approach – The study draws on the literature that addresses the relation between corruption and human rights, and analyses a single well-known case in Brazil (Operation Car Wash) in order to discuss both the violation of citizens' political rights and of those being investigated.
Findings – The article suggests that the Brazilian State has failed to guarantee fundamental rights as well as to effectively control electoral corruption. By exploring the complex structure of illegal campaign financing in Brazil, the article exposes how Operation Car Wash evidenced the violation of both of the right to participate public affairs and to vote in authentic elections in Brazil.
Originality/value – Considering that the literature shows it is difficult to link the breaches of human rights with incidences of corruption, this article debates the macro context in which the Car Wash case is inserted and demonstrates the evidence that link the corrupt acts involved in this operation to the violation of specific fundamental human rights: the political rights.

Keywords Corruption, Brazil, Elections, Human rights, Political rights, Operation Car Wash
Paper type Research paper

Introduction

This paper argues that Brazil has failed to guarantee civil and political rights enshrined by the country's human rights treaties due to its inability to prevent large scale electoral corruption. It focuses on Operation Car Wash, the largest corruption case in Brazil's history, and its unprecedent impact on national and international politics.

In 2014, Brazil witnessed the beginning of an investigation reaching all main political parties, the largest companies in the construction industry as well as Petrobras, Brazil's giant state-owned oil enterprise. The scheme maintained a broad agreement among the political parties that supported the governments during that period. It is estimated that the scheme began around 2004 and public agents who were in decision-making positions in Petrobras maintained sham competition among the large construction companies, which actually formed a cartel. On the other hand, private companies systematically offered generous donations to almost all parties – ruling and opposing parties – in electoral periods, both via official donations and slush funds.

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The effects of corruption are perceived in different ways in contemporary societies: in economic activity, in access to social rights and in democratic processes. Different examples of corruption illustrate the ways private companies feel convinced that their competitors are corrupt. These examples also explain how public services can suffer due to lack of public resources lost to corruption. The impact on democracy, though, is not easily measured in local corruption cases. They may affect specific political forces or temporarily frustrate parts of the electorate, but most electoral corruption cases do not sufficiently affect the political rights of an entire nation.

Brazil's Car Wash corruption scandal, however, is a rare case that changed the paradigm of electoral corruption by affecting the people's political rights in national elections. The scale and plurality of political actors impacted Brazilian democracy to an extent that the political rights of its citizens were violated. This case carries all the necessary legal elements to be brought before a human rights tribunal.

In Brazil, despite the perception of extensive political corruption, the attention lies on the causes, not the effects of bribery. The central focus in the public debate is the inefficiency of the justice system. Impunity – which includes the low rate of criminal convictions in general and of corruption specifically – is viewed by many as the cause for the failure in the fight against corruption. According to Avritzer and Filgueiras (2011, pp. 26-27), "the judiciary has proved to be inefficient towards corruption, particularly concerning crimes involving privileged jurisdiction. Despite the succession of cases of corruption in Brazilian public life, the rate of criminal convictions is low, which creates a sense of impunity that hangs over Brazilian politics."

According to this view, recent legislative reforms have offered new and more effective investigative tools to the police and prosecutors, but have failed to alter the Brazilian Judiciary's slowness and inability to punish. According to Lorente (2016, pp. 245-246), "the greater transparency of the Brazilian government has made it easier to uncover corruption in the public sphere, but it did not make up for the deficiencies of the judiciary, which remains slow in the trial process."

The perception that seems to prevail – which was clearly shown during the electoral process in 2018 – is that the practice of corruption is an element of political immobility, of stagnation and of restraining access of new political agents supposedly capable of acting with integrity. When political agents who acquire competitive advantage in the electoral process using illegal resources are not punished, this leads to long career as elected politicians, or at least to greater chances of success.

The literature on corruption indicates, therefore, impunity as one of the main elements for the perpetuation of corrupt practices. This article intends to advance this discussion in order to approach corruption from two new perspectives: (a) the analysis of the effects of corruption and its relationship with the violation of human rights, especially political rights of Brazilian citizens; and (b) an overview of the legislative measures already adopted as well as those expected at the national level to tackle corruption and its impacts on fundamental rights. To do so, the article mobilizes the literature that addresses the relation between corruption and human rights, and analyses a single well-known case (Operation Car Wash) in order to approach both the discussion of citizens' political rights violations and of those being investigated.

Although the emphasis on the judiciary as protector of political integrity shows how institutions in the fight against corruption are given excessive expectations and, in turn, downplays the responsibilities of individuals and their political choices, it also recognizes the impact of corruption on political rights. To be discussed below, in identifying structural obstacles in the competition between political parties, which are largely fuelled by corruption, the problem is transferred from the sphere of mere political choice to the field of political

rights, in which the Judiciary is naturally expected to act. That is precisely why it is so important to analyse the legislative and judiciary measures adopted.

Operation Car Wash will be explored in order to approach the relationship between a subset of human rights and the corruption perpetrated by public agents in recent times, political parties and large companies in the Brazilian civil construction market. According to the Federal Prosecutor's Office (n.d.), "Operation Car Wash is the largest investigation of corruption and money laundering Brazil has ever had. It is estimated that the volume of resources diverted from Petrobras, the biggest state-owned company in the country, is around billions of reais (Brazilian currency). Besides, there is the economic and political expression of those suspected of participating in the corruption scheme that involves the company. In this scheme, which lasted for at least ten years, large contractors organized in a cartel and paid bribes to bureaucratic executives and other public officials. The amount of the bribe varied from 1% to 5% of the total amount of overpriced billion-dollar contracts, which was distributed through financial operators, including dollar dealers investigated in the first stage."

The article first presents Brazil's legislative framework on corruption and human rights, focusing on the international law adopted by Brazilian system. This section details corruption and human rights from a legislative perspective and briefly discuss how the literature explores the causes of corruption in Brazil.

The second section will discuss the relation between corruption and human rights, and the impact on political participation, using mainly the Car Wash case as a reference. It then focuses on civil and political rights, more specifically the rights: (a) to participate in public affairs; and (b) to vote in authentic elections. Thus, it is argued that the Brazilian State has failed to guarantee such rights by not preventing the dissemination of illegal financial resources in national and local elections over the last decades. Finally, this section makes a brief allusion to the possibility of investigating the violation of citizens' political rights.

Finally, the consequences of Operation Car Wash will be evaluated, and some recommendations will be proposed.

The anti-corruption and human rights developments in Brazil

In recent years, Brazil went through intense transformations in terms of dealing with corruption. One decade of significant legislative reforms resulted, among other statutes, in the Clean Slate Act (Law No. 135/2010), which rendered candidates ineligible for eight years if they renounced their mandates to avoid being removed from office, who were removed or who have been convicted by a collegiate decision of a court of law, even if it can still be reversed through appeals; the Organized Crime Act (Law No. 12,850/2013), which details the rewarded denunciation procedure: "the expansion of the use of rewarded denunciation can be attributed both to the greater precision of the applicable rules and to a cultural change that public authorities involved in the investigation underwent" (Mohallem and Ragazzo, 2017, p. 58); the Anti-Corruption Act (Law No. 12.846/2013), which establishes the possibility of legal and civil liability of legal entities; and the Freedom of Information Act (Law No. 12,527/2011). This new legal framework became the basis for investigations that exposed one of the largest corruption schemes ever unveiled, Operation Car Wash (Watts, 2017).

The Prosecutor's Office, the bodies of internal and external control of the public administration and the Judiciary itself each underwent evolution that also contributed to these investigation efforts, which were made notorious with Operation Car Wash (2014 – 2021). The Supreme Court's decision to bar companies from making financial donations to political campaigns perhaps had the greatest impact in advancing financial equality between candidates. The judges sought to "correct the pathologies that distort the representative system" and to clear the "channels of expression and political participation" (Supreme Court of Brazil, 2015). To the Court, it was clear their responsibility was to bring back the

importance of the voters to the elections system, at a time that was overshadowed by corporate donations. The decision should be capable of mitigating the "capture of politicians by the economic power, which created an unwanted 'plutocratization' of the political process" (Supreme Court of Brazil, 2015). The judicial review suit was initiated by the Brazilian Bar Association and received support from many social groups.

The progress in the fight against corruption in Brazil is far from consistent and the success of reforms over the last decades remains uncertain. In recent years, Brazil has fallen in the Transparency International corruption perceptions index and, today, it occupies the 105th place among 180 countries. Brazilians' trust in political institutions has reached an all-time low (Brazilian Institute of Public Opinion and Statistics, 2017), which puts the democratic stability at risk.

According to Carvalho (2008), Brazil has been dealing corruption since colonial times, but the concept of corruption has changed. The author argues that besides its moralistic conception, corruption is also political and systemic – it is embedded in the political system, in its functioning and in its logic. Thus, a vast range of literature will defend that Brazil's corruption is not explained by the absence of a control system – mainly after the return of democracy and the 1988 Constitution – but arises from various structural causes.

There are many theoretical perspectives that explain the origins of corruption and why it continues even after institutional remedies are implemented. Some of them relate to Brazilians' tolerance or cynical ignorance towards corruption (Silva, 1999). Other elements frequently linked to corruption are the technical advances and "professionalization" of corrupt activities, the impunity as the rule and the development of a clientelist Congress, among others.

Some recent literature argues that the moralist view – which accepts corruption as a cultural feature of Brazilian citizenship – is intangible and hard to be measured. So, two theoretical perspectives are presented to address the problem: one centred on patrimonialism and another on the rent-seeking perspective (Pinho and Sacramento, 2018). The first understands that corruption in Brazil can be explained by patrimonialism, which was not eradicated by industrialization in the country. According to this perspective, Brazil's political structures are too conservative to succumb to industrialization. So, it seems possible that the modernizing forces in the economic sphere are always trying to mould the conservative political forces, but in fact conservative politics resist the modernizing economy. This approach subsists with the rent-seeking theories, which became hegemonic after the implementation of "economic neo-constitutionalism" in Brazil during the 1990s.

In short, Pinho and Sacramento (2018) aim to attest that in the patrimonial system, as seen in Brazil, agents' actions are permeated by a confusion between the public and the private, which facilitates the plunder of the public by the actors – based on a fragile civil society. Besides that, they assert that the Brazilian limited and non-institutionalized democracy gives space to develop more active institutions, such as clientelism, patrimonialism and corruption.

Brazil has developed important domestic legislative instruments and adopted many international legal instruments to tackle corruption, but this apparatus has failed, so far, to effectively curb corruption. It is not easy to respond to the causes of this failure, but the socio-political literature, as we briefly exposed, has presented some interesting perspectives to better comprehend the problem and its origins in Brazil, as well as the difficulties in overcoming the current situation.

International law in the Brazilian legal system: the links between corruption and human rights

Brazil has adopted international legal instruments aimed at fighting corruption, such as: (a) the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; (b) the

Organization of American States (OAS) Inter-American Convention against Corruption; and (c) the United Nations Convention against Corruption. Therefore, at least formally, Brazil takes part in the most relevant international legal systems available for states in the Americas aimed at fighting corruption, although their effective domestic implementation still faces significant challenges (Meyer-Pflug and Oliveira, 2009).

Similarly, Brazil is considered a country with a high commitment to international human rights. It has ratified 16 of the 18 main international treaties and protocols. Regarding the Organization of American States (OAS) treaties, Brazil is part of the main human rights treaties. For the purpose of this article, two international human rights treaties will be relevant: The International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR), both recognized as important international references in the protection of political participation and democratic rights.

Although there are solid legal instruments in the Brazilian legal system aimed at fighting corruption and there is significant adherence to international human rights law, few formal connect between these two sets of norms. Much of the literature that examines corruption, its causes and effects from a political or economic viewpoint, looks at its consequences on a country's political or economic wellbeing. Therefore, the human rights perspective has been left out of discussion, although as remarked by Pearson (2001, p. 30), "essentially, the fight against corruption and the fight for protection of human rights both rest on the need for accountable, representative government committed to equality and transparency".

While human rights standards have been recognized as a legitimate international concern (as a result of the notion of universalism in Human Rights theory), the corruption issue is largely viewed as a domestic political issue which is the responsibility of individual states to address. This may be a possible explanation for the lack of dialogue between the issue of corruption and its effects on fundamental human rights, a problem that can only be overcome by the guarantee of international human rights instruments allied to the enforcement of domestic anti-corruption law, along with the recognition of the intrinsic relation between them.

Corruption manifests itself in different ways and under different circumstances, but it can always be seen as a contributing factor to ongoing inequalities, by undermining social welfare, aggravating poverty and affecting the integrity of the political system. That is, corruption implies disrespect for human rights and prevents the development of democracy, whether it is a direct, indirect or remote cause for the violations. Gebeye (2012) affirms that corruption may be directly related to a human rights violation when the act is deliberately focused on violating a right; it can be an indirect cause when the corrupt act is an essential factor contributing to a chain of events that leads to a violation, and it can be a remote cause when it is one factor among others that contribute to human rights violations. As argued by Gebeye (2012, p. 26), "conversely, wherever human rights are not protected, corruption is likely to flourish".

In the last decades, there have been several developments among organizations that brought the issue of corruption onto the international agenda. As we can see, Brazil has been following this path by adopting the main international legal instruments aimed at fighting the problem. At the same time, Brazil has also ratified the main treaties on human rights and has even made an important step forward in its domestic legal system by addressing the issue of corporate corruption and its relation with human rights. In the next section we will explore specifically the political rights aspects of corruption, using mainly the Car Wash case as a reference.

Corruption and political rights: the Operation Car Wash case

Corruption and human rights connect on many levels. Corruption obstructs – locally and globally – the promotion of human rights and may be linked to the misappropriation of

resources originally allocated for funding public policies, the weakening of laws and institutions' credibility, the distortion of the justice systems, the interference in the political process and the capacity of public services.

As for Brazil, it would also be possible to argue for the existence of multiple state actions or omissions that would invariably breach commitments taken on by the state with regards to guaranteeing human rights. Corruption is directly linked to poverty, because it feeds the cycle of unequal distribution of power and wealth. This is, among other factors, due to the misappropriation or concentration of financial resources that should be used to promote public policies and to guarantee the fundamental social rights established in the Constitution (Leal and Ritt, 2017, p. 155).

Systemic corruption in Brazil might be emblematic regarding its impact on social rights. According to the 2008 São Paulo State Federation of Industries Corruption Report (FIESP, 2012), 27% of the resources spent by the state on education was lost due to corruption. Regarding the volume of resources spent on health, it is estimated that corruption amounts to 40% of all public investments in this area. However, though the analysis of the ties between social human rights and corruption is very important, this particular work focuses on evaluating the context of the violations of rights of political participation.

The literature indicates the difficulty that lies in linking breaches of human rights with incidences of corruption. According to Pearson (2001, p. 51), "the difficulties encountered in answering the question as to whether corruption can lead to human rights violations may well be one of the reasons why it has not been adequately addressed in the past". Thus, this article aims to contribute and present by means of a case assessment, Operation Car Wash, in order to debate the macro context in which this case is inserted – the illegal campaign financing – and demonstrate the evidences that link this operation to the violation of specific fundamental human rights: the political rights.

Operation Car Wash

Throughout 57 operations (until December 2018 – the operation continued beyond this date), Operation Car Wash became "the largest investigation of corruption and money laundering that Brazil ever had". Considering the operation on the trial court level, only in its state of origin, Paraná (currently it actively operates in several states of the country), there were refund requests of US$10 billion, 1,072 arrest warrants have been issued and 11 leniency agreements have been signed. In the Supreme Court (STF), which has original jurisdiction only regarding the authorities that benefit from special jurisdiction, 193 inquiries were opened, and 100 members of parliament, senators and ministers were charged.

The operation received significant popular support precisely because the judiciary – or most of the judges with jurisdiction over the cases – played a role that was generally expected from them. By punishing political agents that occupied important public offices, it signalled that the judiciary could effectively hold them accountable for corruption. Prosecuting hundreds of politicians and businessmen sent a message that the judiciary could after all end the impunity for corruption crimes.

Illegal campaign financing and its interference in Brazilian democracy

The complex structure set up for diverting resources from Petrobras to electoral campaigns made these campaigns highly competitive. One of the construction companies involved, Odebrecht, made at least 645 illegal contributions to politicians, totalling US$64 million, between 2008 and 2014 (Taiar, 2017). In turn, the meat company JBS, which held the record for campaign donations in 2014, flooded the electoral process with approximately US$156 million, of which US$113 million were in official donations and US$37 million were in cash payments or directed to companies appointed by politicians (Escosteguy, 2017).

Statistically, one of the determinant factors of success in election campaigns is the volume of resources spent by candidates and their parties. Usually, the more expensive the campaign, the greater the chances of success in the election. When analysing the result of the elections in light of the funding received, the winning candidates invariably receive several times the average amount of other competitors. Illegal resources were donated and officially declared – in a kind of money laundering via electoral campaign – as well as lawful money distributed to the campaigns via slush fund. Civil society organisations and the Electoral Justice are usually unable to monitor the abuse of economic power on the electoral dispute.

Even in contexts such as the one that existed in Brazil, the relationship between financing and election success is not of absolute causality. A greater volume of resources allows for a campaign to have more reach and more sophistication, possibly resulting in a broader influence on voters. However, one must consider the possibility that "candidates with more chances to be elected attract more resources. In this case, we would have a kind of reverse effect, in which the expected success in elections generates more funding" (Speck, 2012, p. 77).

Therefore, the Brazilian elections in the two decades before the Supreme Court ruling that blocked companies' electoral donations in 2015 were characterised by a strong imbalance of financial contribution by the companies that were later investigated. In this context, it is reasonable to say that some degree of distortion of the election results should have occurred, which allows us to establish a direct link between the distribution of the resources obtained through corruption and the violation of the political rights of Brazilian citizens.

Human rights and the right to political participation

Political rights are often seen by their best known and most evident aspect: the right to vote and to be elected. But the two main human rights treaties that bind Brazil on the matter of political rights – the ICCPR and the ACHR – bring to the discussion other comprehensive rules with an equally important effect on democracies. Article 25 of the ICCPR divides the right of political participation into three rules: (i) to take part in the *conduct* of public affairs, directly or through freely chosen representatives; (ii) to vote and to be elected at *genuine* periodic elections by universal and equal suffrage and held by secret ballot, guaranteeing the free expression of the will of the electors; and (iii) to have access, on general terms of *equality*, to public service in the country.

Article 23 of the ACHR has very similar wording, and also establishes rules of: (i) taking part in the *conduct* of public affairs, directly or through freely chosen representatives; (ii) voting and being elected in *genuine* periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (iii) access, under general conditions of *equality*, to the public service of the country.

The *conduct* of public affairs is "a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels", according to the Covenant's Human Rights Committee (1996), a quasi-judicial body which is in charge of conducting cases that arise from individual complaints and of interpreting the Covenant.

The presence of large amounts of illegal resources in the Brazilian elections and politics in recent years has weakened the way in which public affairs are directed or conducted. This is because a few companies and individuals exert influence on State affairs in an unequal proportion compared to the vast majority of individuals who simply have a single vote. In this sense, "trading in influence in an election process infringes upon the free expression of the will of the electorate, and as such, violate the rights of all citizens, be they voters or candidates" (Terracino, 2007).

Thus, abusing the right to conduct or direct public affairs can be characterized in at least two ways: first, the concentration of most of the private funding of elections in a few donors – which origin is most often illegal – results in the establishment of privileged *bridges*

of trust and access to elected representatives. Politicians become accountable to those who vastly increase their chances of electoral success and not to a diffuse electorate.

The second form of violating right to conduct public affairs occurs in the transformation of political priorities. On the one hand, bridges of special access are established from the moment the financial contribution is made (which could be legal or illegal, as long as they are bulky). On the other, there will be enormous pressure for the political agenda and government projects to coincide, at least in part, with the projects of the donors. Even if there is no specific request, agreement or any explicit illegality, the mere fact that a particular political agent will need financial support in the next electoral cycle is sufficient to transform their agenda to include actions leading to new donations in future elections.

Take the two mega-events promoted by Brazil, the FIFA World Cup in 2014 and the Rio de Janeiro Olympics in 2016 as examples. In both cases, there was a critical debate in Brazil as to what would be the best use of public resources, whether for building sports arenas or for basic public services. Coherent and defensible arguments exist on both sides of this difficult policy question. But the path adopted by the State, to pay for part of the mega-events infrastructure, has resulted from the potential future impact of such an investment, or it may have been a merely pragmatic calculation that choosing to have large construction works would mean favouring the financiers who, in turn, will have more resources available for future donations. Substituting voters' political priorities with donors' priorities is perverse and once again removes from the population the right provided for in articles 23 and 25 of the ACHPR and ICCPR, respectively, to conduct or to direct public affairs.

Another aspect included in the protection of political participation is the exercise of voting in authentic elections. To define authentic elections is not a simple and objective exercise. After all, how does one measure the authenticity of an election? Would only obvious fraud disfigure legitimate political participation? Or could one consider that elections which include excessive illegal financial resources also compromise authentic popular will for the reasons discussed above?

According to the Human Rights Committee (1996), Article 25 of the ICCPR "lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant" and must be interpreted in its broadest and most protective sense of the democratic process. The Committee also issued its opinion on the destructive potential of excessive resources (or illegal resources) in elections:

> Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. **Reasonable limitations on campaign expenditure may be justified** where this is necessary to ensure the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party (Human Rights Committee, 1996).

Although this excerpt recommends an interpretation favourable to the possibility of imposing restrictions on legal election funding, its logic applies to cases with illegal resources. The aim of item "b" of Article 25 of the ICCPR is to ensure that the "free choice of voters is not undermined, or the democratic process distorted by disproportionate expenditure on behalf of any candidate or party", whether legal or illegal. The protection is aimed against the excessive resource, without specifying its origin (Human Rights Committee, 1996).

Does the fight against corruption violate the political rights of the citizens being investigated?

The beginning of this article explored the predominant perception of Brazilians about the impunity associated with corruption as the main challenge in the anti-corruption agenda. Regardless of the importance of preventive measures, which could block future cases of corruption, in recent years a certain civic impatience directed towards the judiciary –

especially the collegiate courts – has become more perceptible as have the difficulties in holding politicians accountable for crimes against the public administration.

In this context of public frustration, the performance of the then federal judge of the 13th Federal Criminal Court of Curitiba, Sergio Moro, stood out quickly. Acting as head of a court specialized in financial crimes and money laundering, he became nationally known for rigorously conducting the trials brought to him by an equally prominent task force of federal prosecutors and the federal police. The most prominent case was undoubtedly the judgment of the former President, Luiz Inácio Lula da Silva.

Lula's trial sparked a major debate in the country over whether the national expectation of fighting impunity and the proximity of the elections was the actual reason why his trial reached a second degree conviction faster than the average time for similar cases. And, according to his attorneys and to his supporters, led to his unjust criminal conviction. The arrest of former President Lula was surrounded by controversy. A Supreme Court justice, speaking to the press after the arrest and before the case reached the Court, said the prison "violates the Constitution" (Mello, 2018). There were also expressions of international solidarity to the former president, such as referring to the prison as "unjust and bias" (*El País*, 2018). The lawsuits against Lula thus became the official point on the debate around human rights and corruption, but from the procedural fairness standpoint of the defendant instead of the society.

In response to the arguments of Lula's lawyers, the country debated whether the STF's understanding should be upheld, allowing for the execution of the prison sentence after conviction in the appeals court, even if the prosecution has not yet come to an end. It was also debated whether Lula could run for president after being convicted in the appeals court and therefore being a case of impediment according to the Clean Slate Act (Complementary Law 135 of 2010), which allowed the electoral court to prevent registration when the candidate had been convicted by a collegiate court of a specific set of crimes indicated in 21 subsections (Whitaker, 2016). The Lula case also led to a complaint before the Human Rights Committee (2017), based on the allegation that Sergio Moro was not an impartial judge, that his arrest was arbitrary and that his rights to be presumed innocent and to have his privacy preserved had been violated (Communication No. 2841/2016, submitted to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, in favor of Mr. Luiz Inácio Lula da Silva).

Lula's claim has not yet been analysed on its merits, but the Committee (2018) issued, in August 2018, an interim measure concluding that he should be able to exercises all his political rights while in prison and allowed to compete in the 2018 presidential elections until the judgment becomes final.

In response to the Committee's measure, the Superior Electoral Court dismissed the Committee's interpretation and voted for Lula's ineligibility. The ruling vote was that of judge Luís Roberto Barroso, which carried the understanding that the ineligibility of Lula was derived from the Clean Slate Act in the face of his criminal conviction. The great surprise of the trial was judge Edson Fachin's dissenting vote, in favour of authorizing the candidacy of Lula. The vote acknowledged both the effectiveness of Committee's interim measure and Lula's right to political participation as noted in Article 25 of the ICCPR (Human Rights Committee, 1996).

The trial of former President Lula is now part of the debate that deals with the relationship between corruption and human rights. Davis (2019), for example, affirms that the connections between corruption and human rights violations are contingent, and must be analysed case by case. The author highlights that "implementation of anti-corruption policies can cause, rather than prevent, human rights violations. It is not uncommon for anti-corruption law to be used to violate due process rights or to persecute champions of human rights" (Davis, 2019, p. 3). In other words, the author asserts that human rights violations can be directed towards citizens that, somehow, stand against systemic privileges or seek to combat social inequalities. That is precisely what former President Lula's supporters argued.

The outcome of this case is far from obvious and has mobilized various political forces in Brazil over the past years. The implication was that Operation Car Wash has awakened and united the political left sector against the judicial protagonists that prevented Lula from running in the 2018 presidential elections. The episode in which the Lula family's private conversations were illegally revealed by the case's judge is a common point for criticism and a source of legal vulnerability of the entire operation. The discussion has gained more nuances after Operation Car Wash's leading judge Sergio Moro joined the new president elect and Lula's rival, Jair Bolsonaro, as his Minister of Justice. Furthermore, the recent disclosure of dialogues between the chief prosecutor of Operation Lava Jato in Curitiba and judge Sérgio Moro, obtained illegally through the hacking of the prosecutor's phone, brought new elements that indicate the partiality of the judge in relation to defendant Lula.

Conclusion: the legacy of Operation Car Wash and the right to political participation

Operation Car Wash has ended and there is little doubt about the impact it produced and the perspective it created for a new standard of investigating and punishing. It will also be remembered by illegalities, biased investigations and decisions in some of its cases. However, it remains unclear whether it will leave behind a legacy of lasting legislative reforms and innovative practices in investigation.

The Brazilian citizens were victims of corruption. The Brazilian State did not comply with several commitments made in international human rights treaties because it was not able to keep corruption at a minimum level. Brazil gained an international reputation for its cases of corruption, just as it once did because of football. In Brazil, corruption does not occur sporadically, but develops as a systemic, organized web, as was discovered with Operation Car Wash.

The lack of effectiveness of the anti-corruption measures taken so far can be explained by the socio-institutional limits that, for centuries, have been drawing the dynamics of national politics. The institutional constraints of Brazil's political system require politicians to adapt themselves to the rules of the game. It was expected that Operation Car Wash would open a new chapter in national politics, since it has been uncovering the corruption networks that have dictated the Brazilian politics for years.

Just as the causes of corruption are complex and varied, so too are the effects. The central argument of this text is that political rights have been deeply affected in recent years by the lack of effective control over the inflow of excessive financial resources into the electoral process. As a result, elections were potentially biased in favour of candidates that received illegal financial resources and, consequently, it was impossible for citizens to fairly participate in public affairs.

To reach this conclusion, it has been demonstrated that Brazilian anti-corruption legislation has advanced in recent years, without being able to face the serious impunity that protects those involved in corruption. Car Wash represented a break from this perception and paved the way for confronting the systemic corruption that permeates the entire Brazilian political system. Political rights lie amid a conflict of narratives: society expects elections without the bias caused by illegal resources, but the defendants in these same corruption prosecutions also expect to see their political rights protected against strong punishing expectations.

The paper has argued that corruption in Brazil is a systemic problem, thus overcoming it requires not only political change, but also legislative and judicial reforms. The paper also described some of the recent multi-institutional efforts implemented in recent years. Therefore, this article intended to show that besides Operation Car Wash, some important legislative measures – such as the Clean Slate Act – and crucial judicial decisions such as the Supreme Court ban on corporate election funding – are part of the same complex moment in which anti-corruption efforts have been developing. Despite the legal developments that permitted Operation Car Wash to advance, a window of opportunity remains open, waiting for a new

generation of legislative reforms that can consolidate successful practices in investigating corruption, as well as strengthening peoples political rights against electoral corruption.

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Public-Private Partnerships in transport: a critical assessment of the Caribbean

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Abstract

Purpose – This article critically analyses the extent to which selected Public-Private Partnerships (PPPs) transportation projects in the Caribbean subregion embrace good practices and how they benefit the public sector.

Design/methodology/approach – The article begins with the general rationale of PPPs, leading to a discussion on the specific challenges of the Caribbean subregion and an assessment of certain critical projects. The sample cases include the L F Wade International Airport in Bermuda, the cruise berthing and cargo port redevelopment project in the Cayman Islands, and the Sanger International Airport in Jamaica. There are five aspects to the critical assessment: (a) an evaluation of the type of PPP arrangement used; (b) the legal/policy framework; (c) financial implications; (d) accountability; and (e) miscellaneous data. Desk-based research is conducted as supported by both international and local sources to convey a uniquely local perspective in this under-researched area of scholarship.

Findings – PPP frameworks in the Caribbean are improving quickly but remain a work in progress. Jamaica leads the region. Bermuda trails behind. Problems of legal compliance with frameworks and limited market engagement persist, leading to risk management problems.

Originality/value – This article fills a literature gap on critical analysis of individual Caribbean PPP transportation projects. Previous reports, mostly by international organisations, cover regional or sectorial trends. Other sources take a descriptive but not critical approach.

Keywords Public-Private Partnerships (PPPs), Public procurement, Best practice, Offshore, Small states, Caribbean

Paper type Research paper

Introduction

Public-Private Partnerships (PPPs) are methods to provide public goods, works and services. They frequently entail long-term collaboration (e.g. 15 to 50 years), constant involvement of private partners throughout project development, complex underlying financing arrangements, payments over the life of the built assets to the private sector partners, optimal risk management involving effective risk transfer from the public to the private sector and public ownership of the infrastructure after the agreed contract tenure (European Commission, 2004; Yescombe and Farquharson, 2018). Definitions are varied within this framework. Digings and Bennett (2021) define them as "forms of cooperation between public

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authorities and the private sector that have been used to modernise the delivery of public sector infrastructure and to deliver strategic public services across Europe". A widely accepted US definition of PPPs is the "procurement of a long-term contract for multiple elements that may include development (design and construction), operation and/or maintenance of a facility that involves a component of private financing" (US Department of Transportation – Federal Highway Administration, 2019, p. 2). Ultimately, whether a specific deal qualifies as a PPP requires a case-by-case analysis.

There are five main aspects to PPP evaluation: (a) the type of arrangement used; (b) the regulatory framework; (c) the financial implications of PPPs; (d) the accountability mechanisms; and (e) miscellaneous data. The first section of this article justifies the selection of variables.

To address the research question of whether the Caribbean jurisdictions are ready to welcome PPPs projects, this article critically evaluates selected PPP transport projects in the Caribbean which fills the literature gap on comparative PPP studies in this region. Caribbean-specific features including limited fiscal space, tight constraints on financing, small size preventing economies of scale, vulnerability to natural disasters and climate change (Queyranne *et al.*, 2019) justify a study of its own. Scholarly literature has assessed PPPs thoroughly in developed, mostly Western, jurisdictions. In contrast, the Caribbean subregion is under-researched. International organisation reports have focused on regional trends (Queyranne *et al.*, 2019) and avoided criticising individual projects openly. This second section discusses the need for a Caribbean-centric study.

The third section justifies the choice of specific examples in Bermuda, the Cayman Islands and Jamaica. PPP arrangements are commonly used to procure hard infrastructure, frequently water and wastewater projects, roads, public transport and waste management (Akintoye *et al.*, 2016) or social infrastructure projects such as schools, hospitals or prisons (Bergère, 2016). There are many challenges in the transportation sector because it is "an extremely inflexible investment" which cannot be easily traded or adjusted quickly to changing demand or transferred elsewhere, and one where the positive externalities of non-users are extremely difficult to turn into project profit (Turró, 1999, pp. 233-234). The fourth section of this article applies the key variables for PPP studies to the selected sample.

This article is structured in four main sections, covering a literature review of public-private partnerships globally, the Caribbean context applied to PPPs, sample justification, and critical assessment of the PPP models in the selected sample. The methodology used is desk-based research based on legal and policy sources. Legislation and policy documents have been obtained from official, publicly managed online portals to guarantee reliability. Media sources have been used for support and further context. Notably, only top publications with a proven track record of quality have been used including the Jamaica Gleaner, the Royal Gazette in Bermuda and the Cayman Compass. A blend of international and local scholarship is used, including sources from vetted international organisations and top academics. The author, based locally in the Cayman Islands, has spared no effort to include relevant local sources.

Mapping the trade-offs of Public-Private Partnerships

This section explains what aspects of PPPs are important when critically assessing case studies. Relevant concepts of PPPs include the type of arrangement used, the regulatory framework, the financial implications of PPPs and the accountability mechanisms.

PPPs are common because it is an umbrella term rather than a fixed arrangement. PPPs are typically described with the range of tasks that have been allocated to the private sector. These commonly include a combination of design, build, finance, operation and management. PPPs frequently include a "DBFOM" PPP, where all five tasks have been allocated to the private sector; with variations including BOO for "build, own, operate", BOT meaning "build, operate, transfer", BTO standing for "build, transfer, operate", or BOOT as "build, own, operate, transfer" and, finally, DBFO entailing "design, build, finance, operate" (Yescombe, 2014; Yescombe and

Farquharson, 2018, p. 13). Underpinning legal structures can also help define PPPs: common types comprise contractual and institutional PPPs. Contractual PPPs are those where a contract governs the relationship between the parties; institutional PPPs represent those cases where both the public and the private sector partners become shareholders in a third company (Yescombe, 2014). Concessions are sometimes classified as PPPs because they represent the "transfer of public rights to a promoter, private or otherwise" (Turró, 1999). This plurality of arrangements, rather than a fixed legal construct, is responsible for the worldwide spread of PPPs.

A second feature of successful PPPs is an ample regulatory margin. There are four key elements in creating a PPP framework: a clear policy orientation to deliver a long-term vision; a supportive institutional arrangement to build internal capacity in PPP procurement; a body of financial support measures that will attract private interest; and a legal and regulatory framework providing clarity in the parties' obligations as well as defining their rights (Verougstraete and Sekiguchi, 2017). Countries can choose whether to regulate PPPs either using law, policy or a combination of both (Delmon, 2015). For instance, the UK's PFI and PF2 were regulated mostly in policy and administrative documents; Spain's *colaboración público-privada*, now repealed, was mostly regulated in law. Others have combined law and policy. The Cayman Islands Public Management and Finance Act (2017 Revision) and the Financial Regulations (2013 Revision) define eligibility and financial constraints, and Government Ministries, Statutory Authorities and Government Companies define their own policies within the limits of the legislation.

The third factor is financial implications of PPPs. When well-managed, PPPs combine the public and private sector's strengths whilst delivering value for money. To achieve this, PPPs need early and accurate financial assessments. The PPP option should only be selected when it maximises value for money against all other forms of procurement. Structured finance determines which financial arrangement is to be applied to each specific PPP project, whereby "financing is based on a well-defined object, separated from the parties involved in the deal itself" (Gatti *et al.*, 2012, p. 578). A popular stream of structured finance for PPPs is project finance, understood as a "lending technique that involves lending against the cash flow of particular projects" (Yescombe, 2013). Additionally, procurement managers should pursue value for money. Traditional public procurement criteria focused on selecting the lowest priced bid. This approach would put significant pressure on PPPs to deliver public projects at a profit for the private sector but at a low price for the public sector. Contractors would aim to push prices down when public procurement criteria were based solely on price. Välilä has described this trade-off as cost-savings of contract bundling versus 'the ability of the government to ensure that the private partner's zeal for cost-savings does not lead to an undue reduction in the quality of service' (Välilä, 2020). A new focus on value for money or the "most economically advantageous tender" has brought more suitable selection criteria.

The fourth factor is accountability. Potential PPP disadvantages may include the privatisation of public revenue, computing the whole-life costing of a PPP; whether the transfer of risk from the public to the private sector is effective and, ultimately, who can be held responsible for the financial failure and rescuing of a PPP; and their financing cost and potential for politicisation in the use of PPPs (Delmon, 2015). Institutions are often put in place to manage those risks. However, they are not one-size-fits-all and should be designed considering the needs and requirements of a specific jurisdiction.

The fifth factor is a miscellaneous section, including other information of interest. This item includes data that does not strictly fall under any of the other four categories but assists in assessing the PPP projects. This improves the quality of the results by focusing on context and practical aspects.

Contextualising PPPs in the Caribbean

The Caribbean hosts 31 mostly small, island countries, of heterogeneous economic performance, relying on commodity exports or tourism and subjected to extreme

environmental risks (The World Bank, 2020). It combines sovereign states and former colonies from the United Kingdom, the Netherlands and France that became independent, though not sovereign, overseas territories. The specific challenges that PPPs face in the Caribbean, coupled with overarching literature gaps, justifies this study.

First, the Caribbean brings development challenges to PPPs. Most jurisdictions have small, remote and uncompetitive internal markets, overgrown public sectors and skint social security networks. Public revenue in most Caribbean countries is consumption-focused, relying among others, on high tariffs and administrative fees. Most rely on external trade and apply a comprehensive system of tariffs, such as Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Montserrat and Turks and Caicos Islands. These dynamics make Caribbean countries highly vulnerable to risks in other countries.

Second, PPPs have a strategic role to play in the Caribbean. The combination of tax neutrality with fiscal restraint in most Caribbean countries forces them to seek innovative ways to afford projects with a high initial investment. Several Caribbean countries do not levy personal income tax or corporation tax. The Caribbean also hosts the highest regional concentration of offshore banking and finance centres worldwide, including 10 out of the 26 worldwide (International Monetary Fund, 2019). In addition, fiscal restraint has become a trend in the past decade, especially after the Global Financial Crisis of 2007-09 (Alleyne *et al.*, 2011). Consequently, Caribbean infrastructure funding lags behind that of developed nations. Public sector investment decelerated in 2005-2015 from 10% to 6.5% of GDP (Queyranne *et al.*, 2019) and a financing gap of USD 10.6bn is estimated for the 2014–2024 period (Caribbean Development Bank, 2014, p. viii).

The third reason is that infrastructures in the Caribbean lag behind international standards. A study commissioned by the International Monetary Fund argued on the importance of a legal framework for private participation to reduce risks but "most Caribbean countries do not have such legal provisions" (Queyranne *et al.*, 2019, p. xii). In particular, a regional legal study found that competition is closer to a black letter law principle rather than a practice (Panadès-Estruch, 2020a). Additional challenges that the Caribbean brings to PPPs are lack of or limited technical expertise, risk assessment flaws and ineffective or limited risk transfer to the private sector, need of legal reform to attract private (foreign) investment and lack of funding for project advisors, conducive to unbearable fiscal risks to local governments (Queyranne *et al.*, 2019).

This section has argued that challenges to local economies, a diminishing ability to raise public revenue and limited infrastructure endowments justify the interest on covering Caribbean PPPs. The next section focuses on sample selection.

Selected sample

PPPs are slowly making their way to Caribbean shores. In 2017, there were 48 ongoing PPP projects in Caribbean countries in different stages of development. Of those, 62.5% were in the concept stage, compared to only 16.7% under implementation (The World Bank *et al.*, 2017). Caribbean PPP trends show that a majority of PPP models are based on private finance and user-paid fees and used mostly for transport infrastructure upgrading projects (Panadès-Estruch, 2019): transportation is the leading sector, comprising 37% of the projects and 45.91% of the capital expenditures (The World Bank *et al.*, 2017).

This article's sample is diverse, and representative of key infrastructures and geographical, demographic and economic diversity. The sample has been designed to accommodate both ports and airports, the two key transportation infrastructures for island countries. Second, geographical spread within the Caribbean subregion has informed the sample. Jamaica and the Cayman Islands are located in the Caribbean sea. Bermuda is not strictly there, but it is often studied as part of the Caribbean subregion due to its common

geography, weather, economics, leading productive sectors, legal development and local market characteristics. Third, these selected case studies represent diverse demographics: Bermuda and the Cayman Islands are small, with population not exceeding 65,000; whereas Jamaica's population exceeds 2.725 million in 2018 (Statistical Institute of Jamaica, 2020). Finally, the sample also considers economic diversity. Jamaica has the lowest GDP per capita, with USD 5,582; Bermuda and the Cayman Islands show figures well beyond that, with USD 117,089 and USD 85,975 in 2019 (The World Bank, 2021). This leads to a more representative and well-balanced sample.

PPPs are used across the Caribbean beyond the article's sample. The Bahamas has implemented government policy on PPP to "mobilise additional funding and financing sources" (Government of Bahamas, 2018). No PPP projects have started yet. The British Virgin Islands' procurement policy has enabled the use of PPPs and it is expected that the Terrance B. Lettsome International Airport expansion and redevelopment will be executed with a Design-Build-Finance PPP (Hearnden, 2015; Government of British Virgin Islands, 2016). The Turks and Caicos' Procurement Ordinance generally defines PPPs as based on any combination of public and private finance, with two PPP hospital locations and a new PPP-based CCTV system currently under way (Invest Turks and Caicos, 2020).

The first case study is Bermuda's L F Wade International Airport redevelopment project. Bermuda spans 150 islands and islets across 53.33 square kilometres with 64,000 inhabitants (Hendry and Dickson, 2018). It is also one of the British Overseas Territories, with a UK-appointed Governor as the supreme authority and with wide local self-governance powers (Hendry and Dickson, 2018). The first feature that makes Bermuda a relevant case study is that it is the latest territory among the sample in regulating PPPs: its framework entered into force on 2 July 2018. Bermuda's geography is the second relevant item of this case study: a high number of widely spread-out islets lead to complex transportation needs provided its small landmass. Its many islands and islets are connected with a system including ferries, public buses, minibuses, taxis, rental cars, scooters and horse carriages (Bermuda Tourism Authority, 2020).

Bermuda's L F Wade international airport redevelopment is a 30-year concession to manage the airport's operations, maintenance and commercial functions (Bermuda Airport Authority, 2017). The intended result is to enhance the passenger experience, improve retail and dining options, make spaces more accessible and expand flight routes (Bermuda Airport Authority, 2017). Facilities will revert to public ownership in 2047, upon contract tenure completion.

The Cayman Islands' cruise berthing facilities is the second selected case study. Cayman is one of the largest banking centres worldwide in terms of assets (Fichtner, 2016). It is a three-island Caribbean country located to the south of Cuba, with numerous links to North, Central and South America, including the United States, Cuba and Panama. Like Bermuda, it is also a British Overseas Territory (Hendry and Dickson, 2018). Financial services and tourism drive the local economy (Cayman Islands Economics and Statistics Office, 2020). Cayman's interest is justified on having in place the most comprehensive framework yet to be put into practice. The Cayman Islands passed its Procurement Act in 2016, which did not enter into force until secondary legislation was passed in May 2018 (Cayman Islands Government, 2016; Cayman Islands Government, 2018a; Cayman Islands Government, 2018b). Cayman is planning to go ahead with another PPP outside of the transportation sector: the Integrated Solid Waste Management System (Cayman Islands Government, 2017).

Cayman's PPP case study is the cruise berthing and cargo port redevelopment facilities. It started in the early 2000s to replace current passenger tendering with direct boarding access from the cruise ship to the port terminal. The cruise berthing and cargo port redevelopment involves "two cruise piers or four berths; land reclamation adjoining the existing cruise and cargo area; the expansion of existing cargo facilities inclusive of quay walls, a RoRo jetty and

dolphins; a cruise terminal and commercial buildings; and pavement for cargo quay, cruise terminal quay and the parking lot" (Cayman Islands Ministry of District Administration, Tourism and Transport, 2017). This project is currently suspended pending the outcome of a referendum on the project itself, as well as an ongoing constitutional review on its enabling law (Matrix Law Chambers, 2020). The future of the facilities is uncertain due to those ongoing constraints and COVID-19's impact on the cruise tourism sector.

The third case study is Jamaica's Sangster International Airport. Jamaica is an island country located in the Caribbean sea, to the south of Cuba. The first interesting factor about this country is that geographically, it is the largest among the sample, at a land mass of 11,424 square kilometres and with a population close to three million (Bank of Jamaica, 2017; Statistical Institute of Jamaica, 2020). The second factor is that it is the only country among the sample that is not a British Overseas Territory, though it was in the past. Jamaica was colonized by the British in 1655 and it gained independence in 1962. Thirdly, Jamaica has the oldest colonized public procurement framework, with laws going back to the mid-1980s. Lastly, the local economy is based on services, accounting for more than 70% of GDP, and with a balance of payments reliant on tourism (Statistical Institute of Jamaica, 2021). The chosen case study is relevant as the country's "largest airport and gateway to the island's tourist industry" (Simon, 2015, p. 39), providing access to its tourism resorts on the north coast (Caribbean Development Bank, 2014, p. 26).

Many regard the Sangster International Airport as a complete success. No strong criticism is found in the literature, as institutions such as the World Bank and the Caribbean Investment Bank support it without reservation. Under the previous public ownership and management, the airport was ageing and crowded, with the airport's operations becoming "a significant drain" in the public budget at a time when debt was "high and rising" (Caribbean Development Bank, 2014). Sangster is a Jamaican transportation PPP involving the Government of Jamaica and the Vancouver Airport Services Consortium to deliver management, operations, financing and capital improvements of the airport, with assets reverting back to public ownership after 30 years (The World Bank *et al.*, 2017). The project has reached its first half of the contract tenure, delivering significant private investment, doubling airport capacity to seven million passengers yearly and providing 43 new retail spaces (The World Bank *et al.*, 2017).

Critical assessment of the selected projects

This section critically evaluates the sample according to five variables: the type of arrangement used, the regulatory framework, the financial implications of PPPs, the accountability mechanisms and miscellaneous data.

PPP types

The Caribbean is moving towards pure PPPs and beyond concessions, showing a more innovative, hands-on approach. The sample includes two pure PPPs out of the three cases. Pure PPPs, including contractual and institutional, are based on a continuous partnership that keeps the public and the private sector partners cooperating through the project tenure. Bermuda and Cayman, with their airport and port respectively, starting after 2015, are pure PPPs. Concessions are arrangements where the private partner leads the project and takes key decisions, with the public sector excising oversight only. All deals show lengthy contract tenures, of either 25 or 30 years, as expected. Jamaica's Sangster Airport, starting in 2003, played it safe by using a concession.

The L F Wade International Airport redevelopment is a 30-year Design-Build-Finance-Operate-Maintain PPP which started in 2017 (Bermuda Airport Authority, 2020). This model represents one of the most complete PPP arrangements, the DBFO, with its initials

representing the four functions grouped under contract (Yescombe, 2014; Yescombe and Farquharson, 2018: 13). With it, the Bermudian Government is using one of the most comprehensive PPP arrangements available. Project delivery is managed via a partnership between a public sector entity, the Bermuda Airport Authority; and Bermuda Skyport Corporation Limited (Skyport), a special purpose Bermudian company owned by the Canadian company Aecon Concessions (Bermuda Airport Authority, 2020).

The cruise berthing facilities and cargo port redevelopment PPP contract is a Design-Build-Finance-Operation contract for 25 years starting from asset construction (Cayman Islands Ministry of District Administration, Tourism and Transport, 2017). Verdant Isle Port Partners won the project award in 2019. This is a consortium of four companies led by Carnival and Royal Caribbean, among the largest cruise ship companies worldwide and the top companies for cruise calls in Cayman (Panadès-Estruch, 2020b). The project is currently suspended due to legal and political challenges and a final decision will be taken only after the May 2021 general elections (Panadès-Estruch, 2020b). Given the information publicly available, the project is likely to go ahead as a contractual PPP, with a contract detailing the regime of rights and obligations to apply to the parties.

Jamaica's Sangster Airport is a 30-year concession contract which started in 2003 (Caribbean Development Bank, 2014), where a limited liability company operates the airport (Simon, 2015), users pay the airport's fees (Queyranne *et al.*, 2019) and the public sector retains ownership (Airports Authority of Jamaica, 2020). This deal came after a failed attempt at privatisation under the Cabinet's approval and direction of the National Investment Bank of Jamaica (Caribbean Development Bank, 2014). Concessions representing the outsourcing of soft infrastructure (i.e. services) are not PPPs. The concessionaire, MBJ Airports Limited, is a private company whose equity was originally controlled by Abertis Infraestructuras SA in 2014, a globally leading Spanish infrastructure provider, with 74.5% of equity, and Vantage Airport Group, with 25.5% of equity (MBJ Airport, 2020). In 2014, Abertis divested from the airport sector and sold its stake to Grupo Aeroportuario del Pacifico (Browne, 2014; Grupo Aeroportuario del Pacifico, 2020), a Mexican company and also concessionaire of Norman Manley International Airport. The Airports Authority of Jamaica retains ownership and is responsible for regular performance reviews and contract administration oversight (Airports Authority of Jamaica, 2020).

Regulatory framework

Regulatory frameworks should aim to be comprehensive and enforceable, rather than striking a prescribed balance between law and policy. Jamaica, with the longest PPP experience, shows the most comprehensive framework. Bermuda and Cayman have succinct PPP regulation and rely heavily on their general procurement frameworks, still under construction.

Bermuda's regulatory framework is based on the Code of Practice for Project Management and Procurement (Government of Bermuda Office of Project Management and Procurement, 2018). The Code entered into force in July 2018. There is no specific PPP regulation but, as "high value procurement", they require competitive procurement procedures. The competitive procurement requirement can be waived, but only upon written request of the Authorised Officer (i.e. the project owner) and with the written approval of the Director of Procurement, who retains the option of consulting the Accountant General or the Financial Secretary. In addition, PPP procurement shall be reported to the designated procurement office prior to any advertisement, presumably for compliance reasons. Specific PPP regulations shall be included in the future, developing further the eligibility of projects for PPP procurement, or introducing enhanced safeguards in managing finance and risks of PPP projects. The framework needs development.

The Cayman Government has largely complied with what is expected of procurement in the current legislative framework but out of goodwill, rather than enforceability. PPP regulation in Cayman is succinct, mostly enshrined in Law and not applicable to its cruise berthing facilities. PPPs were foreseen for the first time in 2013, when the Public Management and Finance Act (2013 Revision) (Cayman Islands Government, 2013) determined four conditions for PPP eligibility, which function as financial safeguards and will be reviewed in the next subsection. In turn, PPPs are excluded for projects with "a lifetime value of less than CI$15 million" (EUR 15.05 million, USD 18 million) and for "projects where the fast pace of change in the sector makes it difficult to effectively define the outputs it requires in a long-term contract" (Cayman Islands Government, 2013). The cruise berthing's procurement started in 2015. The legal framework for procurement, the Procurement Act and its Regulations, entered into force three years after that, in May 2018 (Cayman Islands Government, 2016; Cayman Islands Government, 2018a; Cayman Islands Government, 2018b).

Jamaica is the sampled country with the most comprehensive public procurement system. A combination of legal and policy framework, Jamaica has the Public Procurement Act 2015 and its 2018 Revision (Government of Jamaica – Houses of Parliament, 2015; Government of Jamaica – Houses of Parliament, 2018a), its 2018 Regulations (Government of Jamaica – Houses of Parliament, 2018b) and a suite of supporting policies. The only specific reference to PPPs within the legal and policy framework is entitling the minister in charge, subject to the Cabinet's approval, to exclude PPPs from complying with the procurement's legal framework (Government of Jamaica – Houses of Parliament, 2015, s.3.3.a). On the one hand, this is reassuring, as having no specific provisions for PPP makes them fall under the full remit of procurement procedures and their safeguards. On the other hand, providing the option of excluding PPPs from compliance with the legal framework is problematic, despite requiring the Cabinet's support. This lack of specific legal and policy regimes for PPPs has been compensated with oversight institutions, which will be covered under "accountability".

Financial safeguards

This aspect considers whether the sample has mechanisms to manage the financial implications of PPP. PPPs are long-term agreements with underlying complex financial arrangements. All jurisdictions should aim to have financial rules that help to assess whether the PPP debt is to be considered on or off-balance sheet and, especially when on balance sheet, to make sure that PPP-related long-term financial commitments are adequately foreseen and managed. IMF-commissioned research concluded that most Caribbean countries have frameworks which do not assess fiscal risks at key project stages (Queyranne *et al.*, 2019), with Jamaica being the only exception among the sample. However, minimum safeguards for long-term sustainability of public finances have been set in all the sampled countries.

Bermuda's L F Wade International Airport represented a fair fiscal commitment, but with warnings. The Fiscal Responsibility Panel, a panel of three independent evaluators, issued a report in 2015 stating that the L F Wade PPP would not require public spending. However, it would involve "the loss of airport revenues net of operating costs over the medium and longer term" and shall be offset by fiscal measures which increase revenue (Peretz *et al.*, 2015). By 2019, PPPs were still on the docket for Bermuda: the same Fiscal Responsibility Panel pointed out the low share of domestic investment and the need to "become more innovative in sourcing financing for future projects" including, among others, PPPs (Portes *et al.*, 2019, p. 26). The same 2019 report highlighted the need for the government to set "clearly and transparently" its fiscal strategy and targets (Portes *et al.*, 2019, p. 29).

The Cayman Islands has been an advocate for good fiscal management since 2013 when the Framework for Fiscal Responsibility was made binding. All PPP costs must comply with the general financial rules, so net debt (i.e. the total outstanding value of public borrowing minus liquid assets) does not exceed 80% of operating revenue and ability to borrow to fund

capital expenditure restricted to projects with sufficient expected revenues or when sufficient surplus can be demonstrated (Cayman Islands Government, 2012). The Law also determines four PPP-specific financial safeguards (Cayman Islands Government, 2013). First, "a sound appraisal underpinning the proposed project before the financing means has been determined" shall justify the need for the project. Second, it is also necessary for PPPs to deliver "improved value for money against a conventionally financed alternative". This is equivalent to the public sector comparator considered previously in this article, whereby PPP financing must project better results than public financing — that is, if the government could afford the project from public budget allocations or could obtain better financing conditions without involving private partners. Third, a "long-term affordability case [which] has been assessed and agreed by the appropriate technical experts retained by the Cayman Islands Government" shall demonstrate the financial viability of the project. Fourthly and finally, "an independent opinion [...] from a qualified accountant of good standing on the correct accounting treatment in the Cayman Islands Government's accounts" is required to make sure PPPs are correctly accounted for. Additionally, "the Cayman Islands Government will retain independent accounting, legal, financial, economic, environmental and other technical advice as appropriate to ensure value for money" in all PPP projects.

Jamaica has been praised as one of the five countries in the Caribbean which "assess[es] fiscal risks in key project stages [including] at project selection, tender preparation, contract negotiation and renegotiations, and contract extension" (Queyranne, *et al.*, 2019, p. 51). For PPPs, the Public Bodies Management and Accountability Act (2014 Revision) sets specific accounting rules and requires the approval of the Cabinet on recommendation of the Public Investment Management Committee (Government of Jamaica – Ministry of Finance and the Public Service, n.d.). Applicable laws also require contingencies for PPPs, up to 8% of GDP after April 2017. Financially, by 2017, the Sangster concession had brought over USD 200 million in facilities' improvement and expansion, including 43 new commercial retail spaces, leading to doubling the airport's capacity to 7 million passengers annually (The World Bank *et al.*, 2017).

Accountability

The three jurisdictions rely on oversight bodies to make sure that PPPs are kept accountable. It is impossible to assess a project wholly until its end and all these examples are still underway. In 2020, they have all implemented similar central procurement bodies, namely a designated procurement office within their respective governments. Jamaica offers the strongest accountability network, with two PPP-specific bodies designed to overcome conflicts of interest between PPP promotion and accountability. Cayman and Jamaica have also implemented civil society panels to review high-value projects. Though Bermuda is lagging, cross-fertilisation is high across the sample and leads to opportunities to learn from each other.

Bermuda has no dedicated PPP unit, but has a designated public procurement body: the Office of Project Management and Procurement (OPMP). The Office centralises public procurement oversight, guidance and support across the Government (Government of Bermuda Office of Project Management and Procurement, 2018). There are no records of other general procurement or specific PPP units other than the OPMP.

Cayman's Procurement Act 2016 has established additional administrative structures to improve public procurement. Two new administrative bodies have been created. The Central Procurement Office is tasked with "providing training, advice and guidance to all entities and persons involved in public procurement" (Cayman Islands Government, 2016). The Public Procurement Committee (PPC) is a group of eight members entrusted to review public procurement documentation for contracts exceeding a value of CI$250,000 and direct awards with values exceeding CI$100,000 (Cayman Islands Government, 2016). The Committee is

also responsible for assessing recommended awards over these thresholds: if approved, the project can go ahead; otherwise, the project owner can either accept the PPC's refusal or proceed with its own recommendation so long as it is accompanied by a written notification stating the reasons why. These two entities promote public oversight and assist in engaging the general public into procurement matters. PPPs are excluded for projects under CI$15 million; consequently, they fall under the PPC's oversight.

Jamaica has two PPP-specific units within the Government, which separate PPP promotion and oversight, leading to improvements in managing institutional conflicts of interest: one within the Development Bank of Jamaica, charged with business case development, the PPP's transaction phase and the day-to-day administration, including advisory, financial and managerial support; the second PPP-specific unit is responsible for assessing value for money and fiscal impact within the Ministry of Finance and the Public Service (Government of Jamaica – Ministry of Finance and the Public Service, n.d.; Queyranne *et al.*, 2019). General bodies, such as the Office of Public Procurement and the Public Procurement Commission complete the system and are equivalent to the Central Procurement Office and the Public Procurement Committee of the Cayman Islands.

Miscellaneous data

This section covers data concerning the performance of the projects that does not fall strictly in any of the categories considered previously, intending to reflect on the challenges that PPPs face in the Caribbean. The sample shows remaining concerns regarding the robustness of procurement compliance, mostly affecting relationship management between the Government and the selected private partners or concessionaires.

Concerns with the L F Wade International Airport have been raised regarding the lack of competitive bidding, a process which was based on an unsolicited proposal and is deeply concerning (Fisher, 2018). Richards, the then Minister of Finance, defended the decision based on the inability of the Bermudian Government to compensate unsuccessful bidders for the expenses incurred (Johnston, 2018). The Bermuda Public Services Union (2015) highlighted additional problems regarding poor value for money compared to other forms of procurement, cost underestimation in affordability analyses and limited private sector appetite and bankability, which Richards also dismissed due to necessary constraints from the low figures of passengers, in comparison to those shown in more experienced PPP markets (Johnston, 2018).

The main concern regarding the cruise berthing facilities in Cayman is the voluntary compliance of the project with the legal framework. As explained above, the project started before the legal framework became enforceable. Thus, compliance relies on the Government's goodwill, rather than the law. A remaining concern is that, in 2020, Cayman has no PPP experience. However, the Government expects to be ready when the time comes. The local Government has training programmes for civil servants through the Civil Service College, provides access to the online training platform of the United Kingdom's civil service and plans to collaborate with the University College of the Cayman Islands to provide island-wide training opportunities (Panadès-Estruch, 2020a).

Jamaica's airport privatisation has been driven by a concessionaire. Its two largest airports, Norman Manley and Sangster International Airports, are operated under 30-year concessions. The Sangster concession agreement was signed in April 2003. Six months later, in October 2003, Norman Manley International Airport's concession agreement followed, with concessionaire Grupo Aeroportuario del Pacifico (Airports Authority of Jamaica, 2020). The Jamaican government justifies the concessions as "in keeping with international trends and the need to attract private capital to finance the required levels of expansion and development [...] to cope with the projected growth in aircraft and passenger traffic" (Airports Authority of Jamaica, 2020). However, this is a risky strategy: entrusting the two

international airports of the country and, since 2014, to the same concessionaire is, at least risky and at most imprudent.

Conclusion

Caribbean PPPs are rapidly improving, but legal and policy frameworks need further work. This article sets out to find out whether the Caribbean is ready to welcome PPP projects. The Caribbean area is relying more on PPPs to deliver projects that would otherwise be unaffordable, but it needs to develop ways to achieve accountability and maximising value for money. Based on five variables: (a) the type of PPP; (b) regulatory framework; (c) financial safeguards; (d) accountability; and (e) miscellaneous data, this article has three key findings. First, accountability and publicity need to be enhanced. Second, market engagement needs to be improved. Third, implementation of legal and institutional frameworks has unearthed issues that need to be corrected. Figure 1 summarises the findings as discussed and highlights the areas with shortcomings. Whereas this is normal, local law-makers have to introduce the necessary adjustments as early as possible.

Jamaica's record is good, but not perfect. Jamaica has shown the most consistent, comprehensive framework. Its record track of PPPs is praised by many (ICAO, 2015; Samuel, 2019; David-Barrett, 2020), its regulatory framework largely places PPPs within the public procurement framework with no special treatment, and the possibility of excluding PPPs from legal compliance is largely compensated with financial contingencies and PPP-specific institutions. However, time will tell whether using the same concessionaire for both international airports will pay off. The concessionaire's market capture might lead to issues in one airport also affecting the other. Should this happen, the Jamaican Government's position would have little room for negotiation. The Cayman Islands ranks better in preparedness than action. Their procurement framework, largely reliant on legislation, is up to the task, and its civil servants are training on procurement. Nevertheless, PPPs are seen more as a last resort rather than a default option and, consequently, none has moved beyond partner selection in 2020. The system looks good, but remains untested. Bermuda is unconvinced on whether PPPs can truly take off due to systemic restrictions, either of geographical nature or due to lack of administrative capacity. However, the Bermudian Government should stop using this as an excuse to move ahead in implementing a

Variables	*PPP type*	*Regulatory framework*	*Financial safeguards*	*Accountability*	*Project concerns*
Bermuda's L F Wade International Airport	contractual DBFO PPP, 30 years	**policy, needs development**	**concerns about value for money and fiscal sustainability**	central designated procurement office	**compliance with procedures**
Cayman's Cruise berthing and cargo port redevelopment project	contractual DBFO PPP, 25 years	law and policy	debt capped & conditioned; PPP-specific safeguards	government and civil service oversight institutions	**framework not binding to the project, remains untested**
Jamaica's Sangster International Airport	concession, 30 years	law and policy	specific accounting treatment; PPP-specific contingencies	institutional separation between PPP promotion and assessment	**risk management: same concessionaire for both international airports**

Figure 1.
Summary of findings

comprehensive accountability framework and start setting fiscal targets to move ahead with PPPs. Their frameworks show flaws in policy, ensuring value for money and fiscal sustainability. In addition, compliance mechanisms need reinforcing. Among the countries in sample, they are the one that needs to work harder to solve the issues identified in this article.

This study faced usual limitations regarding the sample selection, the access to data and the different stages of project completion. The sample is fair, comprising a diverse, representative pool of projects. International organisation reports already cover regional general trends and it is precisely from narrowing it down to the detailed study of a sample where the article adds value. Regarding access to data, this has to do with the article finding that publicity and reporting need to improve in the Caribbean. The article engaged with all main sources, especially local ones. On the different stages of each project, researchers will be able to evaluate the projects with certainty only after project completion.

PPPs in the Caribbean are not exempted when it comes to squaring the circle between increasing budgetary demands and raising investment in public goods, works and services. Caribbean countries are taking great strides provided their limitations. The question is whether they are working on safe havens or sinking ships. For the moment, they are working on the latter.

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An analysis of China's strategy in combating the coronavirus pandemic with the 3H framework

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Abstract

Purpose – This paper attempts to theorise about China's strategy in combating the coronavirus pandemic with an embryonic framework - 3H (Heart-Head-Hand) framework. By adopting a descriptive approach, the paper introduces the case of coronavirus outbreak in China and how the public health administration coped with it. The 3H framework has been applied to analyse China's strategy, and the framework's assumptions are initially tested.

Design/methodology/approach – The pandemic case is created based on credible reports, press releases from different respected sources, World Health Organization (WHO) statistics, interview transcripts and broadcasting stations' video clippings. Interpretive analysis with pragmatism approach has been conducted in analysing the data and information collected. Triangulation, wherever possible, has been done to validate the data and information.

Findings – As an exploratory study, its findings show that 3H framework distinguishes the effectiveness of a country's strategy and practice for combating the pandemic. Countries, which failed to observe the assumed principles of 3H domains tend to have much more infected cases and deaths.

Originality/value – The 3H framework conceptualised a holistic management approach and its assumptions have been initially tested with this pandemic case. The framework shows its predictability value for a country's pandemic management effectiveness.

Keywords 3H framework, Holistic management, Chinese public health administration, Pandemic, Novel coronavirus, COVID-19, China

Paper type Research paper

Introduction

The coronavirus pandemic has undoubtedly been one of the most terrifying and devastating diseases in modern history. Every country needs to be vigilant against its attack – the process is like a comprehensive examination of a country's leadership and competence in public health administration or as what Fukuyama (2020) described – a brutal political stress test. Arguably, it may not be a fair examination setting for all countries because while some were assaulted by surprise with little knowledge about the virus, other countries were alerted months earlier about the virus alarming threats to human life thus ought to have better prepared for the attack. Surprisingly, those sat the examination earlier, such as China, Taiwan and New Zealand, performed far better than those sat the examination months later, such as the US and the UK. This paper attempts to identify key success and failure factors of countries in combating COVID-19 using a novel 3H framework (Yu, 2020). With this background, the paper begins with China's response to the mysterious virus attack.

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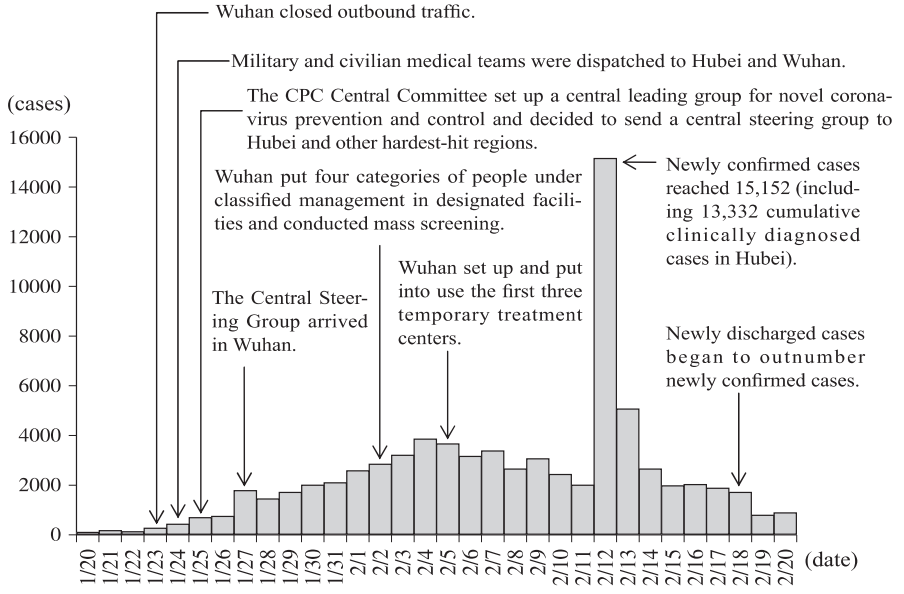
The early outbreak

In late December 2019, several patients with mysterious respiratory disease were treated at Jinyintan Hospital in Wuhan. Rumours circulated in the city that people have caught a highly infectious disease at the Huanan Seafood Market (Market), which is a live animal and seafood market in Jianghan District, Wuhan. Little information about the disease was officially announced despite a burgeoning number of patients with SARS-like symptoms flocked into hospitals for consultations and treatments. The Market was closed on 1 January 2020 when the city government of Wuhan admitted that there was a new coronavirus from animal transmitted to human cases found in the Market.

On 9 January 2020, the National Health Commission (NHC) team released information on the pathogen of the viral pneumonia of unknown cause and made a preliminary judgement that a novel coronavirus was the cause. The NHC informed the World Health Organization (WHO) accordingly and WHO officially announced to its members and to the world that a cluster of pneumonia cases was identified in Wuhan. On 19 January, NHC diagnosed that the coronavirus was spreading among humans.

The lockdown

In mid-January 2020, Wuhan reported daily infected cases between 2000 and 3000 (Figure 1). The infected cases were mostly occurring in families. As Wuhan was recognised as the epicentre, NHC and Chinese Center for Disease Control and Prevention (CDC) immediately alerted the Party leaders. President Xi Jinping promptly spearheaded the Central Leadership Group for Epidemic Response to develop a comprehensive strategy and execution plan against the coronavirus epidemic on all fronts. Premier Li Keqiang flew to Wuhan to inspect and coordinate draconian prevention and control measures. On 23 January 2020, a day before the Chinese New Year Eve, municipal authority announced the complete lockdown of Wuhan to curb the spread of the virus out of the city. Figure 1 depicts the infected cases hiking between 20 January and 20 February 2020.



Source: The State Council Information Office of the People's Republic of China (2020)

Figure 1.
Daily Figure for Newly Confirmed Cases in China (20 January – 20 February 2020)

Figure 2 shows the corresponding adjustment was made on 13 February 2020, as 242 deaths are the accrued number, which were reclassified as COVID-19 patients. That means the outbreak in China, mainly in Wuhan, could have caused severe casualties in early January and only subsided in late February.

The recovery

According to the WHO (2020b) report, China controlled the epidemic in three stages. In the first stage (mid-January), China aimed to prevent the exportation of cases from Wuhan and also to prevent the importation of cases to block transmission and control the sources of infection. On 10 January 2020, CDC informed WHO the whole genome sequences of the COVID-19 virus.

In the second stage (late January to mid-February), the national key strategy was to contain the spreading of the coronavirus and to categorise and treat the infection cases.

In the third stage (late February to mid-March), national strategy was mainly focused on reducing clusters of infected cases, continued the stringent containment and social distancing practices.

Figure 3 shows that China was on a steady recovery road and most noticeable after 1 March.

Effective containment

The following statistics compiled by The Centre of Health Protection of Hong Kong (CHP HK, 2020) show that China had well contained the coronavirus within the epicentre province, Hubei. Understandably, Hubei was badly hit – 68,149 infected cases or 85% of the China's total, and 4,512 deaths or 97% of the China's total. The province's sacrifice had effectively saved substantial casualties of nearby provinces such as Hunan, Zhejiang, Henan, Guangdong, indeed, the rest of China. Consequently, other provinces had only 1 or 2% of the country's infected cases and with only single or low double-digit number of deaths. This study thus focused on Hubei, especially on Wuhan – the war zone.

The scorecard

Despite hiccups at the beginning, China swiftly pulled together to combat the pandemic with effective strategies and execution. Table 1 shows its achievements as compared with the world and the US statistics:

Figure 4 shows the efficacy of treatment. The number of cured cases was substantial despite that the healthcare systems were overwhelmed at the peak of the pandemic at the epicentre.

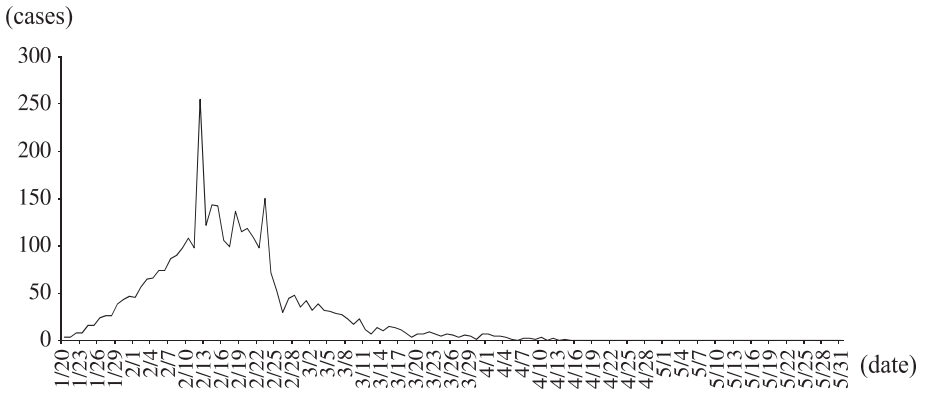
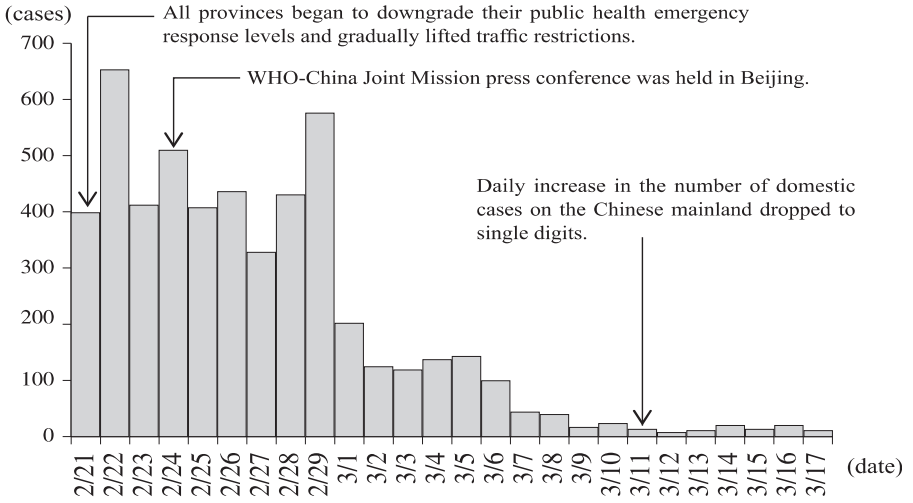


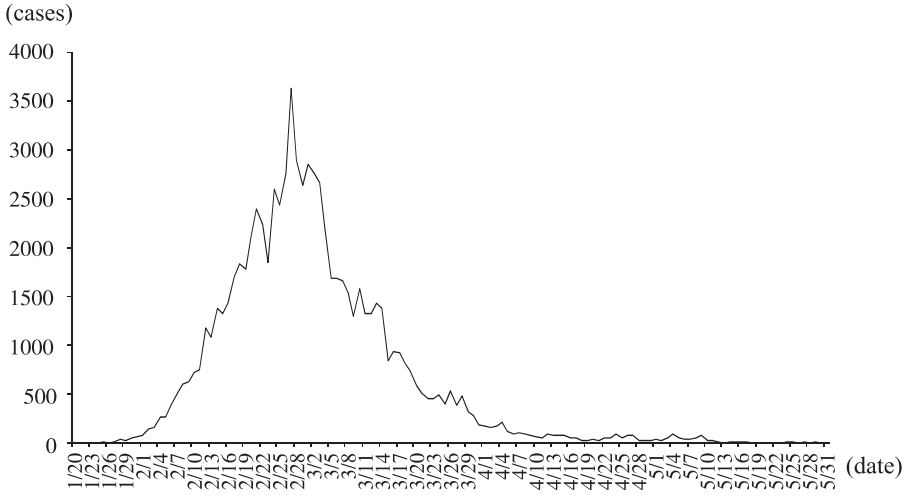
Figure 2.
Daily Fatality Figures for China (20 January – 31 May 2020)

Source: The State Council Information Office of the People's Republic of China (2020)



Source: The State Council Information Office of the People's Republic of China (2020)

Figure 3.
Daily Figure for Newly Confirmed Cases in China (21 February-17 March 2020)



Source: The State Council Information Office of the People's Republic of China (2020)

Figure 4.
Daily Figure for Cured Cases in China (20 January – 31 May 2020)

Country	Total cases	Total deaths	Total Case per million population	Deaths per million population
World	61,301,380	1,437,629	7,864	184
The USA	13,248,676	269,555	39,931	812
China (Mainland)	**86,495**	**4,634**	**60**	**3**

Source: Worldometer (2020)

Table 1.
Reported COVID-19 Cases and Deaths as of 27 November 2020

The editors of the *New England Journal of Medicine* (2020, p. 1479) commended China that "[F]aced with the first outbreak, chose strict quarantine and isolation after an initial delay. These measures were severe but effective, essentially eliminating transmission at the point where the outbreak began." The following analysis shall unveil the nation's overall pandemic strategy.

Chinese public health administration in crisis management mode

Lai (2011, p. 95) alludes that Chinese epidemic management institutions have been effectively overhauled by Wu-Wen leadership right after SARS in late 2003 onward. Such measures laid down a solid groundwork for the defence against this coronavirus attack. Zhou (2020) highlights two key characteristics of the current Chinese public health administration. First, charismatic leadership based influence – President Xi shall set the directives and tone for the pandemic strategy and the entire Chinese Communist Party's propaganda machinery shall promote Xi's mission statements for the campaign. Second, "recentralisation" of the authority and power from local back to central government – regional, provincial, city, town and village governments shall strictly follow the commands, guidelines and protocols in detecting, chasing, containing and treating coronavirus cases. Healthcare and medical workforce, equipment and Personal Protective Equipment (PPE) are centralised and allocated mainly to Wuhan and nearby cities in Hubei.

More specific public health crisis management initiatives directed by President Xi and the central authority are as follows (based on NHC, CDC and WHO reports or otherwise stated):

(1) Key mission statement: for the people and of the people – putting people's lives and health first

The purposeful mission promoted national solidarity and boosted the spirits of voluntary healthcare and support workers (*The Lancet*, 2020). Upon Wuhan's epidemic was confirmed, the state government decisively imposed the unprecedented lockdowns of Wuhan and eventually Hubei for 76 days. Consequently, the epidemic was largely contained within Wuhan so that the nation's resources could pull together and focus on rescuing the coronavirus victims in the city. The rest of the mainland and neighbouring cities such as Hong Kong and Macau of China could gain time to tighten their preventive and control measures against the virus invasion.

(2) Law-based and science-driven strategies

While imposing abrupt and dragooning measures and at huge economic and social costs, scientific evidence supported the actions and they were legally executed.

(3) Unified and seamlessly connected administration system

President Xi at State Council level meeting set the missionary goal and strategic directives. Between January and May of 2020, Xi chaired 18 meetings to hear from heads of healthcare administration departments' briefings and he instructed measures in response to epidemic dynamic situations. Premier Li Keqiang translated the state goals and directives into programmes and plans and aligned all levels of government departments and agencies to seamlessly implement them accordingly. State leaders have travelled frequently in person to cities severely affected by the coronavirus to build the trust and spirit of healthcare workers and people.

(4) Four ways of early responses – early detection, reporting, isolation and treatment

Strict performance commitments and protocol versions have been imposed on the parties involved so that they act accordingly. On detection, nucleic acid testing capacity has been

expanded to an average of 3.78 million tests per day in June. On reporting, hospitals report infected, discharged and death cases online within 2 hours; laboratories report the results within 12 hours; CDCs complete epidemiological investigations and follow up close contacts within 24 hours. On case reporting, suspected cases, confirmed cases, or asymptomatic infected individuals were required to report. Web-based reporting system has to be within 2 hours after diagnosis; information checking by CDCs within 2 hours after receiving the report. To improve quality of treatment, patients are categorised into severe, critical, mild symptoms and light symptom or asymptomatic patients, whom are being treated in different locations with different medical care facilities. Moreover, patients are treated with personalised treatment plans, typically mixed with western and traditional Chinese medicines though the effectiveness of the later on infected cases was only supported by anecdotal evidence (Cyranroski, 2020).

(5) Coordinated supply and distribution of resources

Medical, healthcare and support workers flocked in coupled with thousands tons of medical supplies and PPE flooded into Wuhan from different parts of China in January. It required superior logistics and operation plans to deploy these resources to hospitals, building sites, temporary treatment centres. Based on the rapid expansion of hospital capacity and sharp declined of infected cases and deaths in Wuhan starting from mid-February, the provincial and municipal's resources coordination and deployment plans have been effectively executed. Manufacturers have also been responding to the government's call to face masks and other PPE materials. Food suppliers have ensured an abundant supply to supermarkets and online orders to maintain the people's daily needs.

(6) Rapid and flexible improvement in treatment capacity

Over 42,000 medical professionals, including 19,000 respiratory and intensive care unit doctors from at least 19 provinces responded to the state government's call flew in Wuhan in late January. Hospitals and treatment centres were built in lightning speed from having 5,000 to 23,000 beds, including three makeshift hospitals with 4,000 beds completed in days. Such expansion in healthcare capacity had timely accommodated hiking number of infected patients and enabled an orderly triage, isolation of severe or high contagious cases from mild cases. Most of the Fangcang shelter hospitals and temporary treatment centres have been closed in April as the daily infected cases in Wuhan and nearby cities reduced to zero or single digit (Chen *et al.*, 2020).

(7) Application of high-tech measures

Telecommunication technologies supported by 5G network enabled Wi-Fi and internet coverage across the country to support big data analysis for speedy infected case chasing and reporting, remote clinical consultations and other epidemic prevention and control measures. The government joined hands with tech giants such as Alibaba and Tencent to develop a colour-coded health rating system for tracking millions of people daily. AI and GPS technologies supported lockdown surveillance, such as facial recognition, case chasing and containment measures were effective (Chaturvedi, 2020).

(8) International exchange and cooperation

The state's directive is to share China's coronavirus knowledge and scientific discoveries with the world, such as providing a full genetic sequence of the coronavirus strain to WHO in January (Lu *et al.*, 2020). It has also shared the best practices with other countries by publishing *Multilingual epidemic control manuals for COVID-19, Protocol for Prevention and Control of COVID-19 Cases* and other coronavirus related healthcare resources via China

NHC and China CDC official channels and websites and regularly exchanged of COVID-19 statistics with WHO and other countries. China in March and April 2020 donated an amount of US$50 million to WHO to support its global coronavirus pandemic response (*The Straits Times*, 2020).

The public health governance structure in times of crisis

China established the Joint Prevention and Control Mechanism of the State Council to coordinate epidemic control initiatives across government sectors at provincial to municipal levels. The NHC led the Joint Prevention and Control Mechanism and convened multiple working groups for the national COVID-19 response, including scientific research, clinical treatment, and medical supplies (Chen *et al.*, 2020). Other key supporting organisations and units, including: NHC's the New Coronavirus Pneumonia Expert Group on Medical Treatment Centre, Disease Prevention and Control Bureau; China CDC's National Institute for Viral Disease Control and Prevention, Public Health Emergency Centre, Wuhan City Novel Coronavirus Prevention and Control Command Centre; Chinese Academy of Medical Sciences and National Immunization Program Expert Advisory Committee.

This crisis management case echoes Christensen and Ma's (2018) assertions that coordination between the vertical (state-provincial-municipal) levels and horizontal (various experts and planning support units) mechanism is of great importance to its effectiveness of management. Owing to its hiccups at the beginning at Wuhan, there were trust issues between the people and local government and also between the central and local authorities, which was also what Christensen and Ma (2018) and Shangguan *et al.* (2020) argued as inherent political realities in China. Hence Zhou (2020) advocates that the central government has capitalised on the crisis to recentralise the power and authority back to the state government. The above state-leading measures against the COVID-19 with active support from all fronts were forcefully and stringently implemented across all levels of government down to individual healthcare units and inhibited local discretions. Municipal mayors and other government officials who failed to act in compliance with published protocols and policies had been removed from their offices. Consequently, when comparing with several key provincial and municipal practices, they were quite consistently implemented. Apparently, the epicentre of Wuhan had a larger scale and scope of operations as reported above.

Given the unprecedented nature of the outbreak, the scale and scope of the pandemic project that China has launched, it is inevitably an important case for public administration study. This paper attempts to theorise about China's strategy and execution in combating the pandemic with the 3H framework on an exploratory basis.

Introducing the 3H framework

What is the 3H framework?

The 3H framework is newly developed for managing imperative people and organisational/ national issues holistically. The framework's key domains are represented by the metaphorical expressions of Heart, Head and Hand. It aims to develop a holistic solution to manage people and the national/ organisational issues. Each H domain of the 3H framework has an array of theoretical groundworks rooted from well-established literature in the respective fields illustrated below.

What is the 3H framework for?

The 3H framework postulates that the most effective way to manage people's and organisational issues is a holistic approach. There are necessary and sufficient conditions to

fulfil in order to satisfy the holistic management approach. Few organisations or countries can sustain long-term competitiveness if they can only fulfil partial 3H framework conditions. By referring to the 3H framework, it can systematically guide us in holistically developing and executing a strategic plan. It should not be considered as a cookbook recipe or even treated as an ISO operation template. Rather, it should be regarded as a paradigm of thought or a mental schema. If it is successfully embedded in the minds of leaders, they should be able to intuitively plan and execute their strategies effectively and efficiently with the 3H approach. The importance of addressing all 3H domains in strategic planning and execution appears to be obvious to people, yet sadly, we witnessed some country leaders failed to holistically manage the COVID-19 outbreak in their countries and that oversight was very costly in terms of human and economic losses.

The conceptual framework

As a new framework, the following algebraic expression helps conceptualise the functional relationship of the H domains.

National COVID-19 performance (NP), the dependent variable, is a function of the complements among Heart (H1), Head (H2) and Hand (H3) independent variables of that country.

$NP = f(H1cH2cH3)$

NP = National COVID-19 Performance

c = Complement to integrate and connect

H1 = Heart domain (emotional appeal, leading, motivating and engaging people's abilities)

H2 = Head domain (logical and strategic appeal, planning, organisational, cognitive abilities)

H3 = Hand domain (competence appeal, operational/ functional abilities)

Each H's domain carries different weights. In this study, H1 carries much heavier weight than H2 and H3, whereas H2 carries a relatively heavier weight than H3. Reasons being, even though a country's healthcare strategy, system and competence are more advanced, if the leader fails to unify and motivate people to fight the coronavirus war, the country would fall apart and may even turn into an internal-fighting battlefield scrambling for resources.

The Venn diagram (Figure 5) illustrates the necessary and sufficient conditions (independent, moderating variables) contributing to effective and efficient national performance (dependent variable).

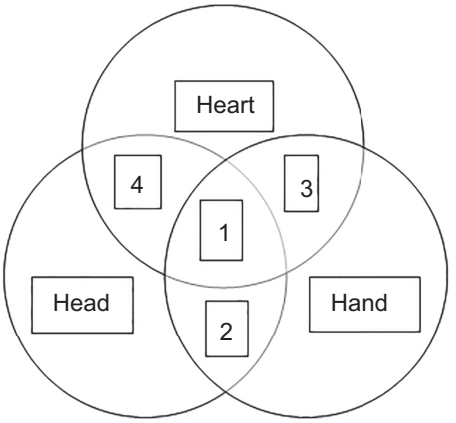
Four case scenarios

Case 4 - Effective leadership (H1) and sound strategy (H2) are in place but lacking competent healthcare professionals (HCPs) (H3).

Case 3 - Effective leadership (H1) and HCPs (H3) in place but lacking sound strategy (H2).

Case 2 – Sound strategy (H2) and HCPs (H3) are in place but lacking effective leadership (H1).

Case 1 – Integration of domains of H1, H2 and H3 shall secure the necessary and sufficient conditions for effective and efficient national performance in combating COVID-19 pandemic.



Source: Yu (2020)

Figure 5.
The necessary and sufficient conditions for holistic pandemic management

The 3H framework posits that the effective and efficient pandemic management hinges on the level of synthesis among H1, H2 and H3 domains of the nation as indicated at Case 1 – intersection of three circles in the centre. This is a holistic approach, arguably the way to minimise the country's number of deaths, infected cases and lower economic costs.

Research method

A descriptive case was created based on content analysis conducted on over 100 credible reports, press releases from different respected sources, e.g. *The Lancet*, WHO statistics, interview transcripts and broadcasting stations' video clippings. Interpretive analysis with pragmatism approach has been conducted in analysing the data and information derived from the content analysis. Triangulation, wherever possible, has been done to validate the data and information. The assumptions of the study are created with the following literature and tested with supporting conversational and or textual statements.

3H framework related literature and concepts

Each H domain of the 3H framework has an array of established theoretical groundworks rooted from well-established literature in the respective fields.

Broadly, H1 Heart-related literature: Organisational behaviour related (e.g. motivation, emotion, commitment, engagement, satisfaction, trust); leadership, management of change; values and organisational culture, cross-cultural management; communication; managing groups and teams. Based on this literature, for instance, Bass's (1995) works on transformative leadership, particularly emotional appeal, over the long-term rather than the transactional relationship with followers are emphasised in this domain.

H2 Head-related literature: Organisation architecture (organisational design, structure, alignment); strategic management related (e.g. macro-industry analysis, institution, resource-based view, value chain, levels of strategy); management planning and control (e.g. balanced scorecard, strategy map). Strategic thinking and planning in this domain are represented by Mintzberg's (1987) crafting, people engaging rather than formulating or mechanical approach.

H3 Hand-related literature: Competence related; functional strategy and practices, e.g. HR, Operations, Finance, IT related. The competence and competitive advantages of a firm are analysed with Barney's (1996) resource-based theory with special reference to his views on path dependence and social complexity.

Underlying assumptions of the 3H framework for applying for this study

Literature based assumptions have been created, which is first referred to a H domain number and the number within that domain, e.g. the first assumption of the Heart domain is referred as: H1-1 (Table 2).

Domain	Assumptions and literature based
Heart (H1) **It should be coded as H1-1, H1-2 and so on**	1. Heart-to-heart and reciprocal behaviour goes side-by-side and it maintains long-term relationship (Hinton, 2013; Hu *et al.*, 2011). 2. People are willing to sacrifice for a honourable cause, purpose, shared value and belief (Carton, 2018; Sussman *et al.*, 1983). 3. Heart-oriented leader shall create a conducive climate for uniting people to achieve common national goals (Bui *et al.*, 2017; Hunt, 2017). 4. Human nature has both good and bad elements, Heart-oriented leader shall help employees develop their good selves and have them behaved themselves to control their bad elements (Hinton, 2013; Gurbuz *et al.*, 2014). 5. An effective Heart-oriented leader would yield committed followers who wanted to get the jobs done well. It is transformational-based (Asencio, 2016; Lehmann *et al.*, 2013).
Head (H2)	1. Effective strategic planning process is a necessary factor for national project success (Bryson *et al.*, 2018; Genc and Sengul, 2015). 2. Planning, organising and controlling process calls for rational, logical and strategic thinking to address short-, medium- and long-term needs of the national project (Hussey, 1999; Menon, 2018). 3. However, effective strategy translation and communication across different levels of organisation is a necessary management responsibility and it is an art more than a science (Tam *et al.*, 2005). 4. Head-oriented leadership concerns more on rational rather than emotional aspects in leading. At best, people are convinced that they ought to do the assigned jobs but they may not be committed or interested in doing it. It is transactional-based (Asencio, 2016).
Hand (H3)	1. Efficient execution of strategy with required competence and resources is a necessary factor for national project success (Grant, 1991). 2. Agility and speed to satisfy people's needs are useful criteria for evaluating the competence of the nation in managing the incumbent project (Yu, 2020; Yu *et al.*, 2016). 3. Leaders should know the level of competence that his followers possessed. If they do not possess the required skills or knowhow, leaders should ensure they will be trained to learn it or mobilise support from other sources; otherwise, that may be a main cause of resistance or unnecessary wasting of resources and time (Kor and Leblebici, 2005; McGrath *et al.*, 1995).
3H - integrated	1. Holistic management of people and organisation means all 3H domains are synergistically integrated with one another, neither one nor a couple of H are sufficient for national project success (Senge, 1990; Yu, 2020). 2. It is the national leader's responsibility to ensure all 3H domains are effectively in congruent with one another (Hinton, 2013; Rogers, 2010). 3. 3H framework aims to holistically manage people and organisation issues, which will lead to people wanted to do the purposeful right jobs and able to do it right every time (Carton, 2018; Sussman *et al.*, 1983; Yu, 2020).

Table 2. Underlying assumptions of each 3H domain with relevant literature for the study

Applying 3H framework to analyse China's strategy in combating the coronavirus pandemic

Testing the proposed necessary and sufficient factors

From the leadership perspective of the H1 domain, it can be broadly divided into the Heart- and Head-oriented perspectives. The Heart-oriented perspective puts people's lives and health over all other considerations; whereas the Head-oriented approach is rational and puts economic and political interests first.

H1. Heart-oriented leadership that can engage and motivate followers is the first necessary factor.

On 7 February, 2020, President Xi spoke on the phone with US President Donald Trump, stressing that "China is committed to safeguarding the lives and health of not only its own people but also those around the world". He also speaks at the G20 Leaders' Summit on COVID-19 on 26 March: "From day one of our response to the epidemic, we have made life and people's health a priority" (CGTN, 2020) (H1-1).

Unfortunately, some country leaders deliberately played down or dismissed the threats.

Heart-oriented leadership emphasises on uniting people and engaging them to achieve common goals and to promote reciprocity supports between the government and people. President Xi made the following announcements after Wuhan's lockdown.

> Xi: The Chinese nation has experienced many ordeals in its history, but it has never been overwhelmed. Instead, it has become more and more courageous, growing up and rising up from the hardships. The epidemic situation remains grim and complex and it is now a most crucial moment to curb the spread. (*Xinhua*, 2020) (H1-2).

> Xi asked Party committees and governments at all levels to continue to make unremitting efforts in various prevention and control work and resume work and production in an orderly manner. (*Xinhua*, 2020) (H1-3)

In February, massive communication through national-wide television and social media reported the honourable missions of the healthcare workers across the country, left their families in Chinese New Year went to Wuhan to save lives. Such a heroic act boosted the patriotic spirit and led to enthusiastic support and cooperation of the national policies and measures in combating the coronavirus war. However, if a country leader instead of uniting different states with common goals to fight the pandemic war, he divides the country that would create a hunger game mentality among people – mayors would scramble for each other's healthcare resources. The ugly side of human behaviour may prevail (H1-4).

The remarkable success of China's containment strategy, 85% of the country's total infected case contained in Hubei (mostly in Wuhan), will not be possible without Xi's transformational-based leadership (Asencio, 2016) as illustrated in health administration section described above and people's trust on their President thus full commitment to the State's draconian containment measures (Lehmann *et al.*, 2013) (H1-5).

The above analysis also indicates that Heart-oriented leadership that could engage, motivate and unite people is the first and arguably the most important necessary factor in beating the national pandemic. On the contrary, as Allen (2020) posits, the lack of common social purpose, poor leadership and federalism could lead to devastating outcomes.

3H framework argues effective leadership alone, while essential, is not sufficient to win the war against COVID-19. It requires a robust strategy and effective execution to fulfil the other necessary factors. This leads us to examine the strategic planning for the COVID-19 pandemic.

H2. Head domain driven effective strategy planning process is the second necessary factor.

Bruce Aylward, Team Leader of the China-WHO Joint Mission, spoke highly of the effectiveness of China's coronavirus strategy and execution discussed above; with which China has triumphed in the pandemic war (WHO, 2020a).

Judging from the remarkable outcomes noted by the editors of the *New England Journal of Medicine* (2020), the strategy appears to have been coherently developed and precisely addressed the emergency and long-term goals (H2-2). Countries with less effective nationwide united strategies are typically ad hoc, fire-fighting, piecemeal basis.

President Xi-led Central Committee has mobilised the national propaganda machinery to explain and teach people how to help execute the short- to long-term strategies. Apart from getting the strategy well communicated to all targeted audiences, the way to do it was engaging and motivational (H2-3).

It appears if country leaders' minds are occupied by their personal political interests, people's lives and health would not be protected with rigorous public health prevention and control strategies. Consequently, as the editors of the *New England Journal of Medicine* (2020) condemned: "[O]ur leaders have failed the [leadership] test. They have taken a crisis and turned it into a tragedy." (H2-4).

If the nation is fortunate to have a heart-oriented leader and a comprehensive strategy for combating the coronavirus, the last hurdle is fulfilling the Hand domain – effective execution of the strategy with an appropriate set of competence.

H3. Hand domain that developed the competence to efficiently execute strategic goals is the third necessary factor.

The execution of the public health administration strategy discussed above is examined to test the H3 Hand domain assumptions below.

The operation strategy of detection, reporting, isolation and treatment has proven to be effective in containing the outbreak in Wuhan, Hubei and subsequently in other parts of China. Such arduous tasks commanded superior healthcare management and technical competences (H3-1).

Rapid and flexible improvement in treatment capacity – in swiftly expanding temporary treatment capacity discussed is in world-recorded speed and scale. It requires distinct organisational agility and competence to accommodate massive, urgent demands for hospital beds and treatment capacity (H3-2).

Apparently, at the peak of the coronavirus outbreak, there were shortages of experienced healthcare workers everywhere. NHC, in order to ensure professional standards in treatment practice across the country, it promoted best practice sharing and coaching new healthcare workers with publications, such as versions of *Multilingual epidemic control manuals for COVID-19*, *Protocol for Prevention and Control of COVID-19 Cases*, *Diagnosis and Treatment Protocol for COVID-19, Guidelines for Investigations and Management of Close Contacts* (H3-3).

The sufficient factor – effective integration of 3H domains

Even though China has a sound strategy with thousands of professional healthcare volunteers flocking to Wuhan, if leaders fail to properly team up and deploy them to the right places, they would not be able to function effectively. National leaders are entrusted with the responsibility of creating the sufficient factor to ensure the effective strategy be executed holistically; judging from the seamless integration among the leadership, strategy and execution, China has created an effective holistic model (3H-1).

President Xi could raise the level of solidarity and patriotism to the highest level during a deep pandemic crisis that demonstrated exemplary holistic leadership (3H-2).

With reference to the governance structure discussed above, we saw the critical roles that President Xi, Premier Li Keqiang and other central government leaders walked the talk and

spearheaded executions help engage their people as evidenced by hundreds of thousands of volunteers from different parts of China responded to the leader's call and enthusiastically participated in fighting against the coronavirus at Hubei. All these outcomes evidenced the synergies created from the effective integration of 3H domains and hence meeting the sufficient condition of the holistic management on the pandemic (3H-3).

Limitations

China's lockdown, isolation and quarantine measures prevented the author from validating the case information with the protagonists and other relevant personnel and could not make a personal on-site observation or interview with informants in person. Therefore, the reporter's information may be biased albeit the author has tried to validate the case information by handpicking credible sources, verifying data and views by triangulation. For example, a conversational statement by President Xi Jinping has been cross-checked with text, video from the mainland, Hong Kong or international (e.g. WHO, BBC, Bloomberg, SCMP) sources. Some of the assumption tests were based on anecdotal evidence that may be subjective. The development of the theoretical framework with this study is intended to be exploratory, hence its assumption test is not meant to be confirmatory.

Conclusion

The episode of COVID-19 pandemic teaches us that countries even with world-class healthcare specialists, advanced medical technologies, well-equipped hospitals and ample time for preparation could still badly lose in the pandemic war if their leaders are concerned about political or economic interests more than their people's lives or failed to unit and engage all people to fight against the pandemic war. With the 3H framework's lens in examining China's strategy and execution in combating the pandemic, it shows that China has achieved a high score in all H domains, particularly on the Heart dimension. Unsurprisingly, China has low casualties and could recover rapidly, resulting in much lower social and economic costs in this coronavirus pandemic. The framework appears to be useful in predicting the effectiveness of a country's pandemic strategy and execution. The mission of "Putting people's lives and health first", which was identified as the key success factor in winning the pandemic war, is not necessarily driven by ideology or "ism" – it is more related to the leader's humane orientation and vision. Similarly, the holistic approach to public health administration amidst pandemic crisis is not an exclusive competence of democratic or autocratic regimes – it is a matter of sound public governance.

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An analysis of Indonesian government policies against COVID-19

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Abstract

Purpose – COVID-19 cases in Indonesia continue to increase and spread. This article aims to analyse the Indonesian government policies as a response in dealing with COVID-19.
Design/methodology/approach – This article is a narrative analysis with the approach of a systematic literature review.
Findings – This article found that the Indonesian government responded slowly to the COVID-19 pandemic at the beginning of its spread in March 2020. The government then issued some policies such as physical distancing, large-scale social restriction (PSBB - *Pembatasan Sosial Berskala Besar*) and social safety net. These policies will only work if the society follows them. The society could be the key to success of those policies, either as the support or the obstacles.
Practical implications – This policy analysis with literature review, conducted from March to July 2020 in Indonesia, provides experiences and knowledge in how to respond to the dynamic problems of public policy in dealing with the COVID-19 outbreak, especially in the context of a developing country.
Originality/value – The novelty of the article lies in the unique policy response in a diverse society. It suggests that the policymakers should pay more attention to the society's characteristics as well as the mitigation system as a preventive measure and risk management to make clear policy in the society.

Keywords Policy analysis, COVID-19, Large-scale social restriction, Physical distancing, Social safety net, Systematic literature review
Paper type Research paper

Introduction

The aim of this article is to analyse the Indonesian government policies in facing COVID-19 as a global pandemic, as well as the society's responses to those polices. The focus is to investigate the dynamics and variation of the policies fulfilled by the Indonesian government. There are sections for the discussion. It analyses what policies have been made by the Indonesian government in response to the pandemic, such as physical distancing, regional quarantine, and other social safety net policies. Those policies do not guarantee the effect to

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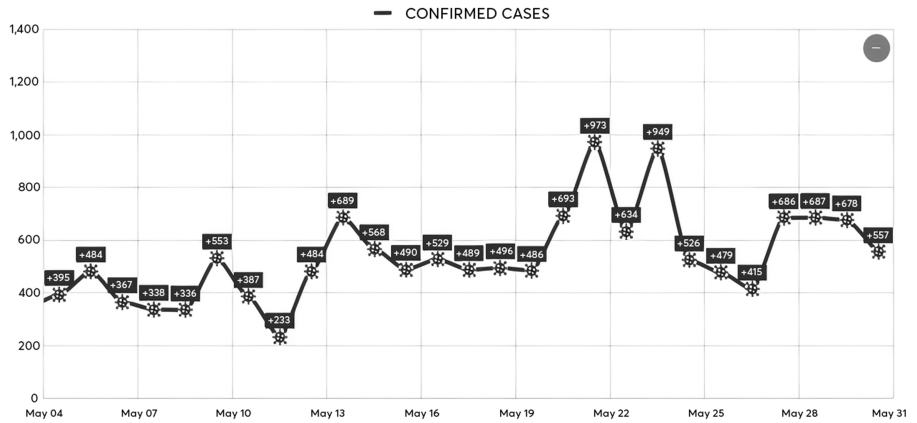
reduce or eliminate the pandemic from Indonesia. The authors found that the highlight of the implementation of such policies lies in the hand of the society, not in the policies themselves. Society involvement becomes the subject of the policies.

Since its appearance in Wuhan City, Hubei Province, China, at the end of 2019, COVID-19 has rapidly spread worldwide (WHO, 2020). The scientists have explained that the coronavirus outbreak came from the virus called Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), which was then called simply COVID-19. This virus attacks the human respiratory system. Some general symptoms include fever, dyspepsia, aches, dry coughing, and shortness of breath. COVID-19 is quite deadly with respiratory failure and multiorgan dysfunction (Sohrabi *et al.*, 2020; Weible *et al.*, 2020). It is more deadly to the elderly and those with pre-existing complication conditions. The World Health Organization (WHO) announced the coronavirus as a global pandemic on 11 March 2020 (Djalante *et al.*, 2020).

The first case of COVID-19 in Indonesia was announced by the President at the beginning of March 2020. At that time, two people were infected (*Kompas*, 2020a). Previously, Japanese citizens living in Malaysia had visited Indonesia in early February (*The Jakarta Post*, 2020). That case was called the Jakarta cluster as the result of the Malaysian government's tracing. Since this pandemic was new, the government lacked a mitigation system (Djalante *et al.*, 2020) as well as policies to respond to it, resulting in some national panics. No one knew how to respond quickly to this pandemic (Olivia *et al.*, 2020). This condition was worsened by statements from several Indonesian government officials which said that Indonesia was free from COVID-19, while some epidemiologists believed that the coronavirus had existed since mid January to February 2020 (*Kompas*, 2020b).

The spread of COVID-19 in Indonesia cannot be separated from crisis management and less than adequate mitigation (Madhav *et al.*, 2018; Winanti and Mas'udi, 2020). Some of them are related to authority or responsibility and public communication in handling outbreaks. The wide spread of COVID-19 in Indonesia (Figure 1) demanded fast and proper response by the government, not only in health sector, but also in other aspects, such as gender, labor, environment and manufacture (Barneveld *et al.*, 2020); tourism (Gössling *et al.*, 2020); governance and government aspects (Moon, 2020; Oh *et al.*, 2020); and socioeconomics in general (Shammi *et al.*, 2020). Suryahadi *et al.* (2020a) gave an example that, if workers were contaminated, then production output would be limited. Therefore, as the part of the government's output, science and fact-based policies would resolve the problem precisely whereas unprecedented complex problems would also impact (Weible *et al.*, 2020).



Source: Adapted from COVID-19 Task Force (2020)

Figure 1.
Graphic of positive cases in Indonesia (From day per day until 31 May 2020)

Both proper response and policies from the government are essential to handle the spread of COVID-19 (Moon, 2020). Society, which initially was the subject for the policies, also had a significant role for the implementation of a policy itself.

Public policy: a response

Making a policy is an effort to combine technical knowledge with a complex political and social reality (Buick *et al.*, 2016). Fawcett *et al.* (2018) stated that policy is meeting boundaries between administration and politics. A policy taken by public organizations is to answer the problems experienced by the society. Policy studies have three characteristics: first, as a framework to solve a problem; second, the nature of policy is multidisciplinary and, policy is normative or value oriented (deLeon, 1992). Traditionally, a public policy approach consists of choices which would be taken by the decision-makers by calculating expected impact through the consideration of costs and benefits (Mueller, 2019). In developing countries like Indonesia, a public policy has a hierarchical scope, whether it is local, national, regional, or even international. Public policy is a set of activities issued by the government to resolve any problems in the society, direct or indirect, through various influential institutions in the society (Wang and Wei, 2009).

Public policy which is complex and multidisciplinary often fails to realize its purpose in society (Mueller, 2019). Swift actions by the government can reduce the socio-economic impact and deaths resulting from COVID-19 (Balmford *et al.*, 2020). In the context of policies regarding COVID-19, previously the Indonesian government did not have adequate policies in an outbreak. The Law Number 24 of 2007 concerning Disaster Management and Law number 6 of 2018 concerning Health Quarantine were deemed unable to accommodate the current policy response needed. This situation eventually led to a policy crisis, until finally the Indonesia's government issued technical regulations.

The world is in the midst of the most severe pandemic in the history of human civilization and it has had unprecedented effects (Weible *et al.*, 2020). The effect goes far beyond the healthcare system. It has an effect across every sector of society, i.e. economic, technical, and social system such as religion, education, work patterns and social communications. According to the WHO cited in Sohrabi *et al.* (2020), the spread of COVID-19 could be inhibited by early detection, isolation, and effective treatment and contact tracing of patients. China as an early country in the epicentre of the spread of COVID-19 carried out regional quarantine or lockdown for several months to suppress the spread of coronavirus outbreaks (Gong *et al.*, 2020; Liu *et al.*, 2020). Several countries for instance Malaysia, Iran, Singapore, the US, Germany, Italy, the UK and most countries in the EU, Asia, North Africa, and Australia implemented regional quarantine and lockdown (Zowalaty *et al.*, 2020). There were some countries, such as South Korea, that did not implement lockdown but successfully suppressed the spread of COVID-19 cases (Oh *et al.*, 2020), by incorporating testing, early separation, and free care of positive cases together with digital technology (Lee *et al.*, 2020).

Methods

This article uses narrative analysis (Creswell *et al.*, 2007), with a systematic literature review approach. According to Liberati *et al.* (2009), systematic reviews are a critical resource to accurately and consistently summarize proof. Based on the guidelines, there is a 27-item checklist included in the guidance of PRISMA (Preferred Reporting Items for Systematic reviews and Meta Analyses) as summarized in Appendix 1.

Policy responses against COVID-19

The WHO has announced that the coronavirus outbreak has become a global pandemic (Shammi *et al.*, 2020; Tosepu *et al.*, 2020). Globally, transmission of this virus has spread very

fast. There are around 215 countries that have coronavirus cases (Ministry of Health Republic of Indonesia, 2020). Not only Indonesia but also many countries experienced confusion in dealing with the COVID-19 pandemic situation (Mas'udi and Winanti, 2020).

There was variability in science that was used as a policy approach. Some scientific approaches attempted to suppress or control the spread of the coronavirus through the use of information technology and collaboration between institutions as used in China (Yang *et al.*, 2020). Almost all countries have imposed several restrictions on the community. This complex and dynamic situation demanded a policy elaboration from government authorities (Nicholls, 2020). A comprehensive and coordinative policy was necessary in dealing with this outbreak. The government had to be adaptive and agile in responding to all the problems developing in society (Moon, 2020). The Indonesian government under Joko Widodo's leadership formulated several policies. There were at least nine legal products for the COVID-19 handling, namely four Presidential Decrees, two Presidential Regulations, one Government Regulation, one Presidential Instruction, and one Government Regulation in lieu of Law.

These regulations were directly or indirectly related to the COVID-19 had an impact on communication and the coordination nature of policy actors and caused overlap between policies. As a large country which implements a decentralized system, Indonesia has a variety of institutions and it also implements diverse local policies. Totally, there are 24 provinces, 514 regencies, 70,244 sub-district and 81,626 villages. The result is that policies from one region to another can differ in response to COVID-19. Due to many policies issued by the government, the authors summarize some fundamental policies which became a public concern in Indonesia.

(1) Social/Physical distancing

Firstly, the Indonesian government issued an appeal to implement physical distancing. This was preceded by a presidential speech to work at home, worship at home, and study at home on 16 March 2020. Social or physical distancing was considered the most effective way to suppress COVID-19 cases. This was an effort to keep a distance of at least 1 meter and to reduce crowds of people. Physical distancing was a form of mitigation or prevention of the spread of COVID-19 (*Kompas*, 2020d). It was also a suggestion from WHO (Susilo *et al.*, 2020). Prevention was considered the most rational measure that could be done because the vaccine had not been developed yet.

Indonesia has social ties that are still strong in society. The community was accustomed to social togetherness, cooperation, solidarity and other social interactions prior to COVID-19 (*Kompas*, 2020c). Many public facilities in Indonesia such as malls, places of worship, bus stations, and airports were still crowded. The unsuccessful implementation of physical distancing was a communication crisis about COVID-19 (Winanti and Mas'udi, 2020). There was so much information that flowed to the public, especially by online media, and which included the rise of information mixed with false information, that people became confused, and then ignored it. On the other hand, the government was not able to prepare access to information that was valid, official and integrated. Nevertheless, in its development, the government succeeded in creating an official channel named as: https://covid19.go.id/.

(2) Regional PSBB (Partial Lockdown)

The less than optimal implementation of physical distancing in suppressing the spread of COVID-19 cases in Indonesia led the government to compile other binding and coercive policy instruments which were said to have some distortion (Wang and Wei, 2009). According to Wang and Wei (2009), the distortion in question is that the implementer always choses policies which have beneficial value for policy makers.

This is quite rational, because through physical distribution, people are still able to carry out economic activities and this greatly contributes to maintain the economic stability of the country. The Indonesian terminology used is PSBB (Large-Scale Social Restrictions), and the implementation of PSBB in these regions was considered far more realistic than the full implementation of lockdown in all regions of the country.

The implementation of this PSBB refers to Presidential Decree No. 11 of 2020 concerning the Establishment of Public Health Emergency and Government Regulation No. 21 of 2020 concerning Large-Scale Social Restrictions. PSBB in an area can be performed after obtaining approval from the Indonesian Minister of Health. Additionally, PSBB request can also be submitted by the COVID-19 response team. Furthermore, almost all regions in Indonesia implemented regional PSBB, both province and region depending on how the development of COVID-19 cases in the area occurred. As of early June, four provinces and ten regencies/cities implemented PSBB (*CNN Indonesia*, 2020).

According to Denny JA's LSI Survey (Indonesian Survey Institute) report, there are 33 provinces with COVID-19 cases that have implemented PSBB (LSI Indonesia, 2020). Furthermore, it also explained that, although PSBB was implemented, it did not guarantee a decrease in the daily COVID-19 case rate. However, it appears that PSBB can relatively control the distribution of COVID-19 in an area. A top down PSBB policy has actually adopted the principles of policy implementation according to Wang and Wei (2009), for instance, careful planning, rapidity, veracity, agility, innovation, and consideration of various aspects, even though the aspect of speed of policy making in dealing with COVID-19 was a bit late. The implementation of PSBB in several regions of Indonesia had a negative impact on various aspects of life.

COVID-19 brought the impact of vulnerability on some groups of society, especially the informal sectors. Community groups that rely on daily income such as online taxi bike, taxi drivers, street vendors, and unskilled laborers are increasingly having trouble to obtain earnings. They have been forced to suspend economic activities outside the home even if a small number of community groups still carry out economic activities to meet their daily needs. In addition, approximately 3.05 million employees were laid off from employment (Tempo, 2020). This effect was positively correlated with the rising of unemployment in Indonesia, which was predicted to be as many as 6.88 million people (Gusman, 2020). Therefore, the government needs to formulate social policies to protect the most affected groups from the COVID-19 outbreak.

(3) Social Safety Net

The socioeconomic impact arose from the implementation of physical distancing and PSBB was certainly a severe blow to all, particularly for middle and lower class groups. The lower middle class group had most of the work in the informal sector; they did not get daily income for approximately one to two months. Without a strong social safety net, informal workers will face a deep crisis. Who then are the informal workers? *Eddyono et al.* (2020) divided informal workers into two large categories namely paid and non-paid workers. Apart from informal workers, vulnerable groups of people are the poor.

The current crisis has implications of the decline of poor communities. According to Suryahadi *et al.* (2020b), the existence of COVID-19 has had an impact on the number of poverty population, which increased to 12.4% or around 8.5 million.

The government issued a social safety net policy to improve the protection of the community with health programs to provide facilities and infrastructure (COVID-19 Task Force, 2020). There were a number of social policies which included additional recipients of the Family Hope Program (PKH), Staple Food Cards, Pre-Employment Cards, electricity subsidies, additional market and logistical operations, and credit payment relief for informal workers (KSI, 2020) and Village Fund BLT (direct cash assistance).

1. PKH

   The Family Hope Program (PKH) is the flagship program in the Joko Widodo's administration aimed to maintain purchasing power to meet basic needs for underprivileged community groups, especially during the current crisis. The government increased the social assistance budget by 25% and there was a change in the amount received by the Family Beneficiary (KPM). For example, mothers with children aged 0-6 years to Rp. 250,000 per month, for elementary school children to Rp. 75,000 per month, secondary school children reached Rp. 125,000 per month, high school children became Rp. 1,656 per month, and people with severe disabilities and for people aged 70 and older became Rp. 200,000 per month. Totally, budget was Rp 37.4 trillion and the total recipients reached 10 million KPM/target group (Detik, 2020).

2. Staple Food Cards

   Based on Presidential Regulation No. 63 of 2017 concerning Distribution of Social Assistance on a non-cash basis, it has been replaced by a Staple Food Card in its development. The purpose of this policy is to meet the basic needs of the weak economic community. The distribution was carried out through RT/RW (Neighbourhood/Community Association) with a target of 20 million families in the mid-distribution channel from April to September 2020. Recipient communities received Rp 200,000 of groceries that can be spent in the outlets (*e-warong*), in cooperation with the distribution bank (AIDRAN, 2020).

3. Pre-Employment Cards

   Pre-Employment Cards are a social empowerment specifically for pre-work groups in increasing competence in the world of work. This empowering assistance was based on Presidential Regulation No. 36 of 2020 concerning Development of Work Competence. In this program, the beneficiary group must be pro-active by registering on prakerja.go.id. Furthermore, this program is also intended for workers who were laid off during the pandemic. Beneficiaries get incentives of Rp. 1,000,000/training, incentives of Rp. 600,000-/month and work incentives of Rp. 150,000- (AIDRAN, 2020). The target recipient of this assistance is 5.6 million people.

4. Electricity subsidies

   As an effort to ease the burden on the community, especially the poor during the pandemic, the government also subsidized basic electricity tariffs to the people who had 450 kV and 900 VA electricity capacities (AIDRAN, 2020). The subsidy was given as much as 50% of highest monthly electricity rate for the past four months prior to April 2020 and was valid from April to June 2020 with a target recipient of 24 million users.

5. Additional market and logistical operations

   During the pandemic, logistical transportation was limited. This was designed to break the spread of COVID-19. Furthermore, due to limited logistical mobility and the availability of increasingly depletion of goods, this had an impact on rising prices of basic commodities. Therefore, the presence of additional market and logistics operations coordinated by BULOG (State Logistics Agency) was beneficial for the community so the poor could meet basic needs easily and affordably.

6. Credit payment relief for informal workers

   Informal workers in Indonesia in 2019 reached 70.49 million people (BPS Indonesia, 2020). The majority were engaged in services and traded on a small and medium scale. Therefore, the government eased credit interest to them and SMEs for one year. This relief policy was regulated in the Financial Services Authority Regulation (POJK) No. 11 of 2020 concerning National Economic Stimulus as a Countercyclical Policy on the Impact of Coronavirus Disease 2019.

7. Village Fund BLT

   Since many villagers are also affected by the COVID-19 pandemic, the government provides Direct Cash Assistance (BLT), particularly for the poor whom have not received the aid scheme described in the previous points. The Village Fund BLT refers to the Regulation of the Minister of Villages, Development of Disadvantaged Regions and Transmigration (Permendes PDTT) No. 6 of 2020 concerning Amendments to the Regulation of the Minister of Villages, Development of Disadvantaged Regions, and Transmigration No. 11 of 2019 concerning Priority of the Use of Village Fund BLT in 2020 (Figure 2).

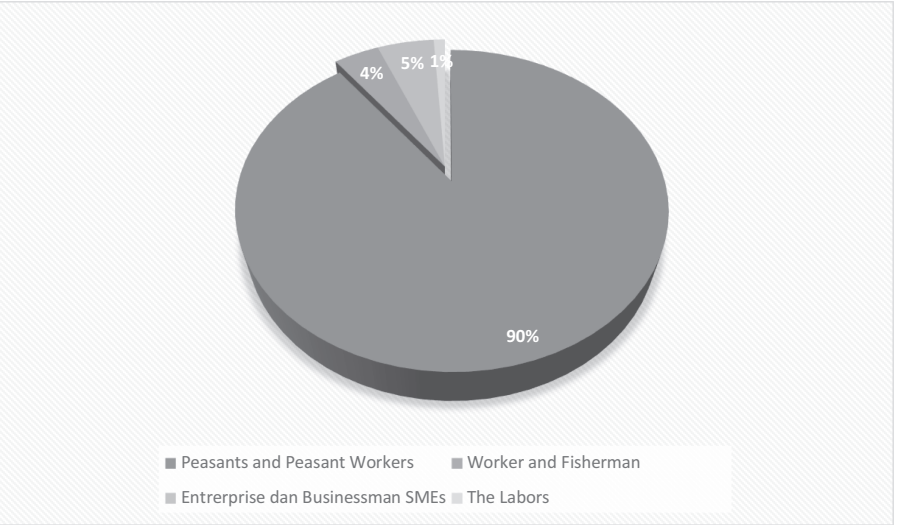


Figure 2.
Distribution of Village Fund BLT

Source: Adapted from Ministry of Village, Development of Disadvantaged Regions And Transmigration (2020)

The communities that are entitled to get this assistance are:

a) Registered as poor citizens through RT/RW (Neighbourhood/Community Association) data collection in the village area;

b) Not registered as a beneficiary in the following Social Aid Program: Ministry of Social Affairs Family Hope Program, Non-Cash Food Aid, Pre-employment Card;

c) Do not have family members who are vulnerable to chronic illness;

d) Loss of livelihood due to COVID-19;

e) If they are not registered as recipients of Social Aid by the central or regional government and are also not recorded in the RT/RW data collection as well, then they can communicate with village officials / authorized apparatus;

f) If the prospective beneficiary is eligible, but does not have NIK/KTP (identity card), then the person can still receive the assistance without having to make KTP first and the domicile address in the village will be recorded as a substitute.

Figure 2 indicates this beneficiary group received assistance of Rp. 600,000/KK (Head of Family) during the period April-June 2020. The total number of Village Fund BLT recipients was targeted to reach 7.74 million KPM (Family Beneficiary), consisting of 90% of peasants and peasant workers of the total recipients. The other 4% was fishermen and fishermen workers, 5% was traders of micro, Small and Medium Enterprises (SMEs) and 1% of the labors.

Society as a key of success and obstacles of policy

There were many stakeholders in various sectors who took part in determining the success of a policy. It means that the success of a policy was influenced by the behavior of policy actors, especially the community as a target group of a policy (Strassheim, 2019) in which people's behavior was influenced by the level of cognitive knowledge possessed. Traditionally, the community in policy studies has always been placed as an object (Roziqin, 2018). However, according to Bernauer *et al.* (2016) a policy obtains more legitimacy when the majority of people are actively involved and have a role. This was confirmed by the fact that in contemporary policy studies in various sectors, people were placed as subjects (Király and Miskolczi, 2019). Moreover, waiting and following the policies taken by policy makers must be based on adequate science (Spalding *et al.*, 2020).

Government policy in Indonesia in handling COVID-19 can be discussed with three elements: ideas, institutional, and interests (Carter and May, 2020). The idea in such crisis situation was about the purpose of the policy being implemented. Reducing COVID-19 case numbers; minimizing socio-economic impacts and breaking the chain of distribution are the objectives of several policies taken by the government. A comprehensive and mature idea is very much needed in dealing with the crisis. Then, the institutional structure involved in policy needs to facilitate and share information. In the situation, both formal and informal institutions do not only act administratively, but are able to understand and mitigate conflicts between jurisdictions and organizational boundaries (Kettl, 2003). Furthermore, both political and operational interest can ensure public participation.

In the process of COVID-19 handling, the Indonesian government did not have the same understanding as the communication process did not run well, especially at the government level. Atkinson *et al.* (2020) explained that government communication could assist to deliver information so that people participated and received benefits. Besides, the abundance of information available on social media influenced people's social cognition (Hartley and Vu,

2020; Yu *et al.*, 2020). Accordingly, people tended to be confused as to which information was worth following. Finally, the decision that most people made was to ignore information. This implied that people were ignorant of the policies taken by the government. Public policy can also be seen as an elusive concept, but closely related to information (Stewart, 2013). It means that this information can affect public knowledge (Hale, 2011).

Information in policy internships plays an important role in conveying the substance of the policy. Society, as the subject of policy, also requires valid information as a basis of involvement in achieving policy objectives. The emphasis of the relationship between policy makers and the public should be clearer. It was confirmed by Sabatier's statement to be made in 1993 (Malloy, 1999) that policy is a unity of vision between the state and community actors. All elements of society were important parts in breaking the chain of the spread of COVID-19, including lower levels of society namely the village government. Communities at this level can be the last bastion as well as the beginning of the policy in handling COVID-19. The bottom-up policy model will be far more understandable and in accordance with the characteristics of the community.

Indonesian top-down policy in handling COVID-19 emphasized more on aspects of bureaucratic structure (Malloy, 1999). Doern (1993) suggests that policies that are clear and originate from the policy paradigm and regulate ideas or principles; organization and bureaucratic power; and policies in the community can contribute to the development. The third point assumes that if the policy is formulated with a bottom-up model, then the level of community acceptance will at least continue. This means that community involvement and compliance can be increased. Public discipline is a separate problem. Some policies which have been prepared by the government will be useless if the community is neglectful by ignoring these policies. This implies that the role of the community in a policy is very important. In the context of COVID-19 handling in Indonesia, the *indonesiaterserah* (with literal meaning of "Indonesia, we don't care") sarcasm arose, which means that people were ignorant about health protocol and tended to not care about the COVID-19 pandemic. On the other hand, there were other persuasive efforts informed to the public that discipline is the most important thing. Until the adage appeared, the best vaccines were discipline – discipline in implementing social distancing, discipline in implementing health protocols, and discipline in policy.

Conclusion

The Indonesian government issued various policies in handling the spread of COVID-19 cases. Even though the Indonesian government's initial response was not good, and there was a policy crisis, some policies were directly related to the handling of COVID-19, including physical distancing and Large-Scale Social Restriction (PSBB). Besides, several policies were resulted from socio-economic impacts which created social safety net. This study shows that some policies made by the government were not effective in suppressing the number of COVID-19 cases, as such type of policy is more top-down. The community became the target group of the policy and it was less acceptable to them. This means that, in the case of COVID-19 handling in Indonesia, the community can be a determinant of the success or failure in handling COVID-19.

Policy crisis at the beginning of handling of COVID-19 caused people's negligence. In addition, in responding to the COVID-19, policy makers need to pay attention to community characteristics and to involve in all stages of the policy so as to increase the level of acceptance in the community. Consistent with the situation is as an effort to minimize the socioeconomic impact on society, policy makers can make social safety network policies so that the crisis caused by COVID-19 will not intensify. This research does not imply that other developing countries have to adopt the same policies as

Indonesia's, including social security network policies. We suggest that further research has to focus more on the social aspects of the community in responding to outbreaks. Society is the subject to determine the success or failure of the policies in achieving goals. More policy studies are suggested to investigate the public response to the policies. In addition, future research can explore the level of community compliance and acceptance if the policies are developed bottom-up.

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Appendix 1.
Checklist of items to systematic literature review

Section	Item	Checklist of item	Applicable in this paper
TITLE	Title	Identify the research through systematic review, meta-analysis, or both.	The researchers identify Indonesia's policy in responding to COVID-19 with systematic review.
ABSTRACT	Structured summary	Provide a structured summary including, as applicable: background; objectives; data sources; study eligibility criteria, participants, and interventions; study appraisal and synthesis methods; results; limitations; conclusions and implications of key findings.	The researchers convey a summary of this research.
INTRODUCTION	Rationale	Describe, in the sense of what is already understood, the reasoning for the study.	The researchers conducted a review of COVID-19 with a policy approach and the impact of the policies taken by the Indonesian government in dealing with COVID-19.
	Objectives	Provide an explicit statement of questions being addressed with reference to participants, interventions, comparisons, outcomes, and study design.	This article aims to analyse the Indonesian government's policies as a response in dealing with COVID-19 with systematic literature review from various sources.
METHODS	Protocol and registration	Indicate if a review protocol exists, whether it can be accessed and where it can be accessed.	The researchers conducted a review of several publishers, e-books, book chapters, and research reports that discuss public policy and COVID-19.
	Eligibility criteria	Specify study characteristic.	The researchers conducted a review between March and July 2020, and all publications are peer reviewed.
	Information sources	Describe all information sources.	For journal articles, the researchers used the Scopus database published from several publishers such as Emerald, Springer, Taylor and Francis (Routledge), ScienceDirect, Sage and Wiley.
	Search	Present a systematic electronic search strategy for at least one database, including any applicable restrictions, so that it can be replicated.	In the Scopus database, the researchers provide search limits on policy and COVID-19, besides a systematic literature review to support these methods.
	Study selection	State the process for selecting studies	Most literatures are published in 2020, and some previous literatures are used to support the authors' arguments.
	Data collection process	Describe method of data extraction from reports.	The authors search for literature by online books and book chapters about COVID-19.
	Data items	Data items in this research.	The important variables in this research are policy response, COVID-19, society, and Indonesia.
	Risk of bias in individual studies	Describe methods used for assessing risk of bias of individual studies.	To reduce individual bias, the authors combine the updated data in several trusted media and research institutions.
	Summary measures	State the principal summary measures.	Searches in the Scopus database were carried out randomly with the keyword COVID-19 in Title-Abs-Key and Policy on the next keywords.
	Synthesis of results	Describe the methods of handling data and combining results of studies.	We search for journal articles in several reputable publishers with two important keywords, namely COVID-19 and Policy. The keyword Indonesia is used for the uniqueness of this study.
	Risk of bias across studies	Specify any assessment of risk of bias that may affect the cumulative evidence.	Combine many resources.
	Additional analyses	Describe methods of additional analyses.	The analysis supported by official reports and previous studies.

(*continued*)

Section	Item	Checklist of item	Applicable in this paper
RESULTS	Study selection	Give numbers of studies screened, assessed for eligibility, and included in the review.	There are 1999 documents discussing COVID-19 in the Scopus database (Per October 2020). Then selected by adding the keyword Indonesia to the search strategy, the results were 79 articles discussing COVID-19 and Indonesia. However, authors only took 39 articles that were relevant and published in reputable publishers.
	Study of characteristic	Describe of each study characteristic.	This period is limited to the time between March to July 2020 and limited to the issue of COVID-19 and the policy response.
	Risk of bias within studies	Present data on risk of bias of each study.	To reduce analysis bias, authors only used 36 journal articles and the rest of the references came from book chapters, official government reports and trusted media.
	Results of individual studies	Provide simple summary data.	Team interpretation in this result.
	Synthesis of results	Present the main results of the review.	Team interpretation in this result.
	Risk of bias across studies	Present outcomes of any risk evaluation of prejudice through studies.	The results were described and narrated with the literature collected.
	Additional analysis	Give results of additional analyses.	The researchers added some data and arguments from the media and research reports on the development of COVID-19 in Indonesia,
DISCUSSION	Summary of evidence	Summarize the main findings.	Narrative of this research
	Limitations	Discuss limitation of study.	Time of this study was five months and the case study was in Indonesia.
	Conclusion	Provide a general interpretation of the results and implications for future research.	The conclusion is interpretation of the results in Indonesia's policy response to against COVID-19.
FUNDING	Funding	Describe sources of funding for the systematic review and other support.	There is no funding in this study.

Source: Adapted from Liberati *et al.* (2009)

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