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The Coronavirus Pandemic and Religious Freedom: Judicial Decisions in the United States and United Kingdom

Guy Baldwin

PhD Candidate, University of Cambridge

1. Restrictions imposed by governments in response to the spread of the novel coronavirus SARS-CoV-2 have presented a human rights challenge around the world. The difficulty of balancing public health against human rights has been particularly acute in relation to freedom of religion,[1] as measures limiting attendance at places of worship or requiring their temporary closure have been challenged in the courts. This article analyses judicial decisions in the US and UK that have considered the lawfulness of restrictions on places of worship.[2] Although the legal approaches to assessing violations of freedom of religion in the US and UK are different, both approaches have led to the similar result of courts taking issue with the imposition of certain public health restrictions on places of worship.

2. In the US, where the current, albeit controversial, understanding of the requirements of the Free Exercise Clause of the First Amendment invites attention to the neutrality and general applicability of a law, the Supreme Court initially declined to grant injunctive relief against coronavirus restrictions on places of worship, before reversing course in *Roman Catholic Diocese v Cuomo*.[3] In the UK, assessing the question under art 9 of the European Convention on Human Rights (ECHR), as incorporated into UK law by the Human Rights Act 1998, the Outer House of the Court of Session in *Philip* found that Scottish coronavirus restrictions were not proportionate to their legitimate end.[4] This article argues that these decisions exhibit a number of problems, and the preferable view is that restrictions on religious practice to save lives in a pandemic can be legally justified on a temporary basis.

[1]As this article focuses on interference with religious practice, it is not necessary to consider the ways in which legal protections extend to non-religious forms of conscientious belief. On this, see generally John Adenitire, *A General Right to Conscientious Exemption: Beyond Religious Privilege* (OUP 2020).

[2]The US and UK have been selected as the focus for this article because they are both common law systems with protections for religious freedom that have experienced significant levels of COVID-19 cases during the pandemic. For analysis of other countries, see, e.g. Anne Fornerod, 'Freedom of Worship during a Public Health State of Emergency in France' (2021) 10 *Laws* 15; George Androutsopoulos, 'The Right of Religious Freedom in Light of the Coronavirus Pandemic: The Greek Case' (2021) 10 *Laws* 14; Javier Martínez-Torrón, 'COVID-19 and Religious Freedom: Some Comparative Perspectives' (2021) 10 *Laws* 39.

[3](2020) 141 S Ct 63.

[4][2021] CSOH 32, 2021 SLT 559.

3. The article is structured in four parts. In Part 1, it will set out the legal test for the protection of free exercise of religion under US constitutional law, and how it was applied in a series of applications for injunctive relief heard by the US Supreme Court in 2020 and 2021. In Part 2, it will turn to the situation in the UK, setting out the test under art 9 ECHR, and the decisions that have considered this article in the context of coronavirus restrictions. In Part 3, it will identify four areas of difficulty with the decisions: the role of comparisons between the regulation of secular and religious activities; the use of a tailoring or less intrusive means tests; the significance of the temporariness of the restrictions imposed; and the relevance of rights of others in this context. Part 4 concludes that there may be lessons for practitioners and courts in the differing approaches taken in the two countries.

1. United States case law

4. The First Amendment provides, in relation to religion, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. These two clauses are known as the Establishment Clause and the Free Exercise Clause respectively.

The test under the free exercise clause

5. The Supreme Court's current approach to the Free Exercise Clause is governed by the decisions of *Employment Division v Smith*[5] and *Church of Lukumi Babalu Aye v Hialeah*.[6] In those decisions, it was held that if a law that burdens religious practice is neutral and of general applicability it does not violate the Free Exercise Clause. However, if such a law is not neutral and of general applicability, it needs to be justified on the basis of strict scrutiny, that is, the law must be narrowly tailored to serve a compelling state interest.[7] These cases represented a controversial departure from prior case law.[8]

6. The case of *Smith* concerned the claimants' religious use of peyote, a hallucinogenic drug, which had resulted in their dismissal from employment. The question was whether finding this use to be 'misconduct', disqualifying them from receipt of Oregon unemployment compensation benefits, violated the Free Exercise Clause. The claim was dismissed. Justice Scalia, delivering the opinion of the Court, said that the right of free exercise did not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'.[9] Applying a balancing test was inappropriate, according to Scalia J:

[5](1990) 494 US 872.
[6](1993) 508 US 520.
[7]ibid 531–532.
[8]See Michael W McConnell, 'Free Exercise Revisionism and the *Smith* Decision' (1990) 57 *University of Chicago Law Review* 1109; Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books 2008) ch 4. For historical analysis, see Michael W McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion' (1990) 103 *Harvard Law Review* 1409.
[9]*Smith* (n 5) 879, quoting *United States v Lee* (1982) 455 US 252, 263.

> To make an individual's obligation to obey … a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' – permitting him, by virtue of his beliefs, 'to become a law unto himself' – contradicts both constitutional tradition and common sense.[10]

7. It was not until *Lukumi* – a case concerning a city's prohibition on animal slaughter that was found to target Santeria religious practices – that an explanation of the concepts of neutrality and general applicability emerged. Delivering the opinion of the Court, Kennedy J explained that

> if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral … There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct.[11]

8. In other words, the neutrality of a law is determined by its 'object'; it is not neutral if this object is the 'suppression of religion or religious conduct'. He went on to say that '[t]o determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face'.[12] However, '[f]acial neutrality is not determinative. … Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality'.[13]

9. In *Lukumi*, the use of the words 'sacrifice' and 'ritual' in the city's prohibition on animal slaughter was not conclusive of facial discrimination, because of their possible secular meanings.[14] However, Kennedy J nonetheless found that the law was not neutral, on two bases. First, the record compelled the conclusion that 'suppression of the central element of the Santeria worship service' was the object.[15] Second, the effect of the law suggested that it was targeting religious practices, given that 'almost the only conduct subject to [the ordinances] is the religious exercise of Santeria church members'.[16] The ordinances were not general either because they were 'underinclusive' – they 'fail[ed] to prohibit nonreligious conduct that endangers these interests [of protecting the public health and preventing cruelty to animals] in a similar or greater degree than Santeria sacrifice does'.[17] Since the ordinances were neither general nor neutral, they had to survive strict scrutiny to be valid.[18] They did not, because they were 'overbroad or underinclusive', and '[t]he proffered objectives [were] not pursued with respect

[10] *Smith* (n 5) 885 (citation omitted). Despite the claim that this contradicted 'constitutional tradition', in reality *Smith* was a departure from the earlier approach set out by the US Supreme Court in *Sherbert v Verner* (1963) 374 US 398, and therefore constituted informal constitutional change. On informal constitutional change generally, see Rosalind Dixon and Guy Baldwin, 'Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate' (2019) 67 *American Journal of Comparative Law* 145.
[11] *Lukumi* (n 6) 533 (citations omitted).
[12] ibid.
[13] ibid 534.
[14] ibid 533–535.
[15] ibid 534–535.
[16] ibid 535.
[17] ibid 543.
[18] ibid 546.

to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree'.[19]

The US Supreme Court's coronavirus restriction cases

10. A series of applications for injunctive relief before the US Supreme Court challenged state coronavirus restrictions under the Free Exercise Clause.[20] Initially, the Court refused injunctions against the enforcement of attendance limits at places of worship. In *South Bay United Pentecostal Church v Newsom*,[21] decided on 29 May 2020, the applicants sought an injunction to enjoin enforcement of an executive order limiting attendance at places of worship in California to 25% of building capacity or a maximum of 100 attendees. Chief Justice Roberts, in his concurring opinion, reasoned that:

> Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.[22]

11. Justices Thomas, Alito, Gorsuch and Kavanaugh dissented. Justice Kavanaugh, with whom Thomas and Gorsuch JJ joined, said that '[t]he basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries'.[23] Given this, strict scrutiny applied. California 'undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens', but it was necessary that there be 'a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap'.[24] California had not shown such a justification: 'Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?'[25]

[19]ibid. The test introduced by *Smith* and *Lukumi* has obvious difficulties. It seems to overlook the fact that neutral laws of general applicability could heavily burden religious freedom in unjustifiable ways, or, conversely, that it might be necessary to respond non-neutrally to an especially problematic religious practice. The cases also raise doubts on their facts: as a consequence of applying the test of neutrality and general applicability in the circumstances, *Lukumi* found what was arguably animal cruelty to be constitutionally protected while *Smith* found what was arguably victimless drug use not to be constitutionally protected, a highly counterintuitive result. *Smith* and *Lukumi* have significant detractors among the current members of the US Supreme Court, but remain the law at least for now: see *Fulton v City of Philadelphia* (2021) 141 S Ct 1868.

[20]The First Amendment is applicable to the states because of incorporation through the Due Process Clause of the Fourteenth Amendment: see *Hamilton v Regents of the University of California* (1934) 293 US 245; *Cantwell v Connecticut* (1940) 310 US 296.

[21](2020) 140 S Ct 1613.

[22]ibid 1613 (Roberts CJ, concurring).

[23]ibid 1614 (Kavanaugh J, dissenting).

[24]ibid 1614–1615 (Kavanaugh J, dissenting).

[25]ibid 1615.

12. In *Calvary Chapel Dayton Valley v Sisolak*,[26] decided on 24 July 2020, the Court again split 5–4, with the majority dismissing an application for an injunction against Nevada's 50-person limit on religious attendance. Justice Alito, with whom Thomas and Kavanaugh JJ joined, considered that the Governor's directive was not neutral because it 'specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people' – houses of worship were limited to 50 persons, while other facilities hosting indoor activities like bowling alleys, breweries, fitness facilities and casinos could operate at 50% capacity.[27] Justice Alito distinguished *South Bay* on the basis that in these facilities, 'people congregate in large groups and remain in close proximity for extended periods'.[28] The discriminatory treatment could not withstand strict scrutiny, since '[h]aving allowed thousands to gather in casinos, the State cannot claim to have a compelling interest in limiting religious gatherings to 50 people'.[29] Justices Gorsuch and Kavanaugh wrote similar dissents.

13. Following those decisions, the Court's composition changed, with Ginsburg J passing away on 18 September 2020 and Barrett J being confirmed to join the Court by the US Senate on 26 October 2020. The Court began granting injunctions, beginning with the *Roman Catholic Diocese v Cuomo* decision on 25 November 2020. This case concerned 10- and 25-person occupancy limits on attendance at religious services in New York. The *per curiam* said that 'the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment' relative to businesses.[30] The *per curiam* found that the measures failed strict scrutiny because of their restrictiveness.[31] Justices Gorsuch and Kavanaugh wrote separate concurrences. Chief Justice Roberts and Breyer J each dissented on the basis that the designations had changed and the places of worship were no longer subject to the challenged restrictions. Justice Sotomayor, with whom Kagan J joined, dissented on the basis that the prior cases provided a 'clear and workable rule' to state officials – '[t]hey may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict' – and New York's restrictions satisfied this rule.[32]

14. In the second *South Bay United Pentecostal Church v Newsom* case,[33] decided on 5 February 2021, the Court granted an injunction against a prohibition on indoor worship services, but refused the application with respect to percentage capacity limitations and a prohibition on singing and chanting during indoor services. Chief Justice Roberts and Barrett J, with whom Kavanaugh J joined, concurred in the

[26](2020) 140 S Ct 2603.
[27]ibid 2605 (Alito J, dissenting).
[28]ibid 2609 (Alito J, dissenting).
[29]ibid 2608 (Alito J, dissenting).
[30]*Roman Catholic Diocese* (n 3) 66 (*per curiam*).
[31]ibid 67 (*per curiam*).
[32]ibid 79 (Sotomayor J, dissenting).
[33](2021) 141 S Ct 716.

partial grant of the application for injunctive relief. Justice Gorsuch, with whom Thomas and Alito JJ joined, would have granted the injunction in full. Justice Kagan, with whom Breyer and Sotomayor JJ joined, dissented, stating that 'the State's policies treat worship just as favorably as secular activities (including political assemblies) that, according to medical evidence, pose the same risk of COVID transmission'.[34] She said that the Court required the state to 'treat worship services like secular activities that pose a much lesser danger'.[35]

15. The last application was *Tandon v Newsom*,[36] decided on 9 April 2021. The Court granted an injunction against limits on religious gatherings in homes to three households because

> California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time.[37]

16. Justice Kagan, with whom Breyer and Sotomayor JJ joined, dissented, noting that the state 'has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike'.[38] Chief Justice Roberts also would have denied the application (but did not write a dissent on this occasion).

2. United Kingdom case law

17. In the UK, freedom of religion is protected under art 9 ECHR, as incorporated into Sch 1 to the Human Rights Act 1998.[39] Article 9(1) provides that:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

18. Article 9(2) provides that:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[34] ibid 720 (Kagan J, dissenting).
[35] ibid.
[36] (2021) 141 S Ct 1294. The Court also made a series of orders in February 2021 in response to applications brought against the Governor of California, Gavin Newsom, that related to the implementation of the decision of *South Bay v Newsom* (n 33): see *Harvest Rock Church v Newsom* (2021) 141 S Ct 1289; *Gish v Newsom* (2021) 141 S Ct 1290; *Gateway City Church v Newsom* (2021) 141 S Ct 1460.
[37] *Tandon* (n 36) 1297 (*per curiam*).
[38] ibid 1298 (Kagan J, dissenting).
[39] Reform of human rights legislation in the UK is under consideration: see UK Government, *Human Rights Act Reform: A Modern Bill of Rights* (2021) <www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights> accessed 1 March 2022. It remains to be seen what, if any, impact such reform (if enacted) will have on freedom of religion.

The test under art 9

19. Article 9 covers both religious and non-religious belief, as explained by the European Court of Human Rights (ECtHR):

> It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[40]

20. Freedom to manifest one's religion is 'not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"'.[41]

21. As the text of art 9(2) states, to validly limit the manifestation of a religion or belief, the measure must be 'prescribed by law' and be 'necessary in a democratic society' for a legitimate aim (in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others). This concept of necessity in a democratic society entails proportionality. The approach to proportionality in the UK context has been set out by Lord Reed JSC in *Bank Mellat v Her Majesty's Treasury (No. 2)*:

> it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.[42]

22. Restrictions on the activities of religious organisations have often been held by the ECtHR to violate art 9. In *Barankevich v Russia*,[43] the Court found a ban on a religious assembly to violate art 11 interpreted in the light of art 9. In *Cyprus v Turkey*,[44] the Court found a violation of art 9 in relation to restrictions on movement of the enclaved Greek-Cypriot population, affecting access to places of worship. In *Manoussakis v Greece*,[45] legislation making it difficult to set up churches outside the Greek Orthodox Church was found in violation of art 9. In *Metropolitan Church of Bessarabia v Moldova*,[46] a refusal to recognise a church (without which recognition it was not allowed to be active) was a violation of art 9. However, none of those cases dealt with the exigencies of a pandemic.

[40] *Kokkinakis v Greece* (1994) 17 EHRR 397 [31].
[41] ibid.
[42] [2013] UKSC 39, [2014] AC 700 [74].
[43] (2007) 47 EHRR 8 [35].
[44] (2002) 35 EHRR 30 [246].
[45] (1997) 23 EHRR 387 [53].
[46] (2002) 35 EHRR 13 [130].

Challenges to the coronavirus restrictions

23. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, made by the Secretary of State for Health on 26 March 2020,[47] required that any person responsible for a place of worship had to ensure that the place of worship was closed, with the exception of certain permitted uses listed at reg 5(6), such as funerals, broadcast of acts of worship and the provision of support services or urgent public support services. Regulation 7 prohibited gatherings of more than two people in any public place, with the exception of certain specified purposes, which did not include attendance at an act of worship.

24. In *R (Hussain) v Secretary of State for Health and Social Care*,[48] an application for interim relief was heard and decided on 21 May 2020, challenging the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. The claimant complained that the restrictions prevented collective prayer at the Barkerend Road Mosque, and in particular the Jumu'ah or Friday afternoon prayer, and further this was the case during Ramadan (which had commenced on 23 April 2020).[49] He sought interim relief in the form of an order prohibiting enforcement of regs 5, 6 and 7 so far as they prohibited attendance at Friday prayers at Barkerend Road Mosque, on the basis of art 9 of the ECHR.[50] Mr Justice Swift accepted that 'the cumulative effect of the restrictions contained in the 2020 Regulations is an infringement of the Claimant's right to manifest his religious belief by worship, practice or observance' given the religious obligation to attend Friday prayers.[51]

25. However, the interference concerned 'only one aspect of religious observance', and did not render his art 9 rights 'illusory', though the interference that did exist was 'an important matter'.[52] Further, 'the duration of the interference will be finite'.[53] He also cited a document published by the British Board of Scholars and Imams stating that 'government directives would take priority' in the context of the pandemic and lifting the obligation of Jumu'ah from UK Muslims.[54] The judge concluded that if the matter went to trial, it was 'very likely' that the Secretary of State would succeed on the submission that 'interference with the Claimant's article 9 rights as a result of the 2020 Regulations is justified', and therefore the strong prima facie case required for interim relief was not established.[55] That was because '[t]he Covid-19 pandemic presents truly exceptional circumstances, the like of which has

[47]See Jennifer Brown and Esme Kirk-Wade, *Coronavirus: A History of 'Lockdown Laws' in England* (House of Commons Library, 2021) 26.
[48][2020] EWHC 1392 (Admin).
[49]ibid [6]–[7].
[50]ibid [8]–[9].
[51]ibid [11].
[52]ibid [12].
[53]ibid [13].
[54]ibid [14]–[16].
[55]ibid [18].

not been experienced in the United Kingdom for more than half a century', and the regulations rested on scientific advice about the contagiousness of the virus at gatherings indoors.[56]

26. *Dolan v Secretary of State for Health and Social Care*,[57] decided on 6 July 2020, was a judicial review challenge in the High Court against the 2020 Regulations. Mr Justice Lewis (as he then was) refused permission to apply for judicial review on all grounds.[58] Following the hearing on 2 July 2020, regulations were made at 10am on 3 July 2020 that permitted places of worship to hold acts of communal worship for up to 30 people with effect from 4 July 2020.[59] Thus, the judge adjourned consideration of the art 9 issue to determine whether the claim had become academic.[60] He then refused permission to advance this ground in an order sealed on 22 July 2020.[61] An application for permission to appeal the order refusing permission to apply for judicial review was made to the Court of Appeal and heard on 29 and 30 October 2020, before Lord Burnett of Maldon CJ, King and Singh LJJ, who delivered a joint judgment on 1 December 2020. Because of the repeal of the regulations, the challenge had become academic, and the Court did not consider it appropriate to consider the merits of the argument under art 9 given the possible continuation of the claim in *Hussain*.[62]

27. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 11) Regulations 2021 entered into force on 8 January 2021. These regulations required places of worship to close in 'level 4' areas in Scotland, except for certain permitted uses such as funerals or broadcasting acts of worship. The challenge in *Philip*, decided on 24 March 2021 by Lord Braid in the Outer House of the Court of Session in Scotland, was brought by Reverend Dr William Philip and 26 other ministers and church leaders of Christian churches of various protestant denominations.[63] A Roman Catholic priest, Canon Thomas White, also joined the proceedings in support of the petitioners.[64] There were two issues in the case: first, a 'constitutional' issue relating to the restriction of worship in Scotland; and, second, a human rights issue under the ECHR.[65] This article focuses on the latter (human rights) issue, as the former issue is peculiar to Scotland.

[56]ibid [19].
[57][2020] EWHC 1786 (Admin), (2020) 23 CCL Rep 481.
[58]ibid [114]–[118].
[59]ibid [87].
[60]ibid.
[61]*Dolan v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [2021] 1 WLR 2326 [25].
[62]ibid [39]–[42], [98]–[100].
[63]*Philip* (n 4) [1].
[64]ibid [4].
[65]ibid [1]. The first issue relates to a division in Scotland between the spiritual authority of the church and the civil authority of the state. For background on this issue, see *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28.

28. It was common ground that there had been an interference with the right to manifest religion.[66] Turning to justification, the regulations were prescribed by law.[67] They had a legitimate aim '[i]nsofar as they pursue the protection of public health and preservation of life'.[68] Since 'the closure of places of worship combined with the stay at home requirement will inevitably reduce human interaction', there was a rational connection between the regulations and the aim.[69] However, there were less intrusive means of 'reducing risk to a significant extent' given the possibility of 'effective mitigation measures', 'good ventilation' and 'admit[ting] a limited number of people for communal worship'.[70] In case he was wrong about less intrusive means, Lord Braid also found that the regulations failed the balancing stage because 'mitigating factors are known to reduce the risk of transmission, even indoors' and the right to manifest one's religion was 'an important right to which much weight must be attached'.[71]

3. Issues

29. These decisions raise a number of concerns, relating to the role of potentially malleable comparisons, the use of a tailoring or less intrusive means analysis that may reflect a value judgment, the limited or no significance attributed to the temporariness of the measures in some of the judgments, and the relevance of the rights of others in an assessment of the validity of coronavirus restrictions on religious practice.

Role of comparisons

30. There was a difference between the US and UK cases in how much emphasis was placed on comparisons between the regulation of secular and religious activities. These comparisons were particularly important in the US because they are relevant to neutrality – that is, whether the object of a law is the 'suppression of religion or religious conduct' – whereas in the UK they form only part of a wider proportionality analysis. In both jurisdictions, different approaches have emerged about how to compare like with like, and the comparisons have seemed malleable and uncertain. This, in turn, 'can lead to unpredictable and inconsistent results'.[72]

31. In the US, the position as it is apparently supposed to be was spelled out in *Tandon*. The *per curiam* said that 'government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise',

[66] *Philip* (n 4) [96].
[67] ibid [98].
[68] ibid [99].
[69] ibid [103].
[70] ibid [115].
[71] ibid [119]–[120].
[72] Note, 'Constitutional Constraints on Free Exercise Analogies' (2021) 134 *Harvard Law Review* 1782, 1783.

where '[c]omparability is concerned with the risks various activities pose'.[73] But despite this focus on activities that were comparable *in the sense of risk level*, that approach was not applied by the majority in the prior decision of *Roman Catholic Diocese*. The *per curiam* in that case said:

> In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish. And the list of 'essential' businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. … The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.[74]

32. No analysis was included that explained why, for example, meeting one-on-one with an acupuncturist carried a comparable risk profile to gathering indoors in a group.

33. The concurrences showed the same flaw, with those in the majority in these cases invoking secular examples that were less restricted than the religious activities. For example, Gorsuch J, pointing out that essential businesses had no capacity restrictions, said that according to the Governor of New York, 'it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians'.[75] He added sarcastically: 'Who knew public health would so perfectly align with secular convenience?'[76] But walking into a shop to buy a bottle of wine and then walking out again does not have the same risk profile as gathering indoors with other people for an extended period. Justice Kavanaugh, concurring in the grant of injunctive relief in *Roman Catholic Diocese*, similarly complained that '[i]n a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction'.[77] Again, this reasoning is not permissible according to the test as later stated in *Tandon* because the comparison is not differentiated according to risk.

34. Hence, Sotomayor J argued in her dissent in *Roman Catholic Diocese* that New York applied similar or more severe restrictions to comparable secular gatherings like lectures, concerts, movie showings, spectator sports, and theatrical performances, 'where large groups of people gather in close proximity for extended periods of time', and treated more leniently only dissimilar activities such as operating grocery stores, banks and laundromats, 'in which people neither congregate in large groups nor remain in close proximity for extended periods'.[78] She added that

[73] *Tandon* (n 36) 1296 (*per curiam*).
[74] *Roman Catholic Diocese* (n 3) 66 (per curiam).
[75] ibid 69 (Gorsuch J, concurring).
[76] ibid.
[77] ibid 73 (Kavanaugh J, concurring).
[78] ibid 79 (Sotomayor J, dissenting), quoting *South Bay* (n 21) 1613 (Roberts CJ, concurring).

Gorsuch J did not 'even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID-19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time'.[79]

35. But questionable applications of the test of neutrality might not be confined to these later cases. In *Calvary Chapel*, the Court prior to its change of composition declined to enjoin enforcement of Nevada's 50-person limit on religious attendance even though casinos (as well as restaurants, bars and gyms) were allowed up to 50% of their capacity, including for shows. No one in the majority wrote to explain the Court's order, so it is not apparent what their reasoning was. In dissent, Alito J objected that

> [a] church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy – and in the case of gigantic Las Vegas casinos, this means that thousands of patrons are allowed.[80]

36. Justice Kavanaugh claimed that the 'risk of COVID-19 transmission is at least as high' in venues like casinos as in religious services because 'people congregating … often linger at least as long as they do at religious services'.[81] On this occasion, the concerns seem valid and it is at best doubtful that neutrality was shown.

37. Because the test in the UK is proportionality, these comparisons between the regulation of secular activities and religious activities are less important, but they may still be relevant. In the early decision of *Hussain* the claimant pointed to other activities permitted by the regulations, such as 'taking exercise, including with one member of another household; visiting parks and open spaces for recreation; visiting houses in connection with the purchase, sale, rental of a residential property; going to local tips and recycling centres', but Swift J said that there was a

> qualitative difference in terms of the risk of transmission of the virus between a situation such as a religious service where a number of people meet in an enclosed space for a period of an hour or more, and the transitory briefer contact likely in a setting such as that of shopping in a garden centre.[82]

38. However, in *Philip* Lord Braid drew a quite strained comparison when finding that the regulations were not proportionate. He accepted that 'it is difficult to draw a meaningful comparison between places of worship and some premises which are exempt from the requirement to close, such as bicycle shops' but said that 'a more meaningful comparison can perhaps be drawn with the continued use of cinemas as jury centres' because '[l]ike places of worship, they involve people from different

[79] ibid 79 (Sotomayor J, dissenting).
[80] *Calvary Chapel* (n 26) 2604 (Alito J, dissenting).
[81] ibid 2610 (Kavanaugh J, dissenting).
[82] *Hussain* (n 48) [20], [23].

households coming together repeatedly to congregate indoors in a confined area'.[83] But there was little explanation of this comparison, and it raises questions: a jury comprises only a few people, so why did these jury centres have a similar risk profile to gathering in a place of worship? Further, to focus only on juries – one example – in circumstances where more obvious activities that are similar in risk level to gathering in places of worship, such as watching a movie at the cinema, attending a sports stadium and gathering in a conference centre, were all prohibited, seems like cherry-picking.

39. The analysis of whether regulation is discriminatory towards religion does capture something important, in that negative discriminatory treatment of religion may be problematic. But comparisons drawn between secular and religious activities are malleable, with judges in both the US and the UK fastening upon implausible comparators to reach the seeming desired outcome. That is perhaps inevitable in the US, where the *Smith-Lukumi* test implies that even harsh restrictions on religious exercise should be upheld, provided that they are neutral and of general applicability. Perhaps the majority of the US Supreme Court shied away from that implication, applying strained comparisons with dissimilar secular activities in order to injunct severe restrictions on religious exercise. Nonetheless, the strained reasoning evident in many of the US and the UK cases illustrates the limitations of such comparisons. That makes it unfortunate that in the US they are a central feature of the *Smith-Lukumi* test. In contrast, the use of comparisons between the regulation of secular and religious activities in the UK cases of *Hussain* and *Philip* was far briefer and less significant to the analysis.

Tailoring or less intrusive means

40. At times, it seemed that members of the US Supreme Court were particularly concerned about the severity of the restrictions that were being imposed on religious practice. For example, in the second *South Bay* decision, Roberts CJ said nothing about neutrality and general applicability, only expressing the view that the state's determination that 'the maximum number of adherents who can safely worship in the most cavernous cathedral is zero … appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake'.[84] Similarly, Roberts CJ in *Roman Catholic Diocese* stated that '[n]umerical capacity limits of 10 and 25 people … do seem unduly restrictive',[85] while Kavanaugh J observed that 'New York's 10-person and 25-person caps on attendance at religious services in red and orange zones (which are areas where COVID-19 is more prevalent) are much more severe than most other States' restrictions'.[86] These observations do

[83] *Philip* (n 4) [114].
[84] *South Bay* (n 33) 717 (Roberts CJ, concurring in the partial grant of application for injunctive relief).
[85] *Roman Catholic Diocese* (n 3) 75 (Roberts CJ, dissenting).
[86] ibid 72–73 (Kavanaugh J, concurring).

not seem consistent with the first stage of the *Smith-Lukumi* test, in which the issue is not the severity of restrictions, but their neutrality and general applicability.

41. The severity of the restrictions does matter in relation to the second stage of the test (strict scrutiny), which applies if a law is not neutral and of general applicability. That may make it surprising that in *Roman Catholic Diocese*, the *per curiam*'s strict scrutiny analysis was very brief: two paragraphs. The *per curiam* first of all accepted that '[s]temming the spread of COVID-19 is unquestionably a compelling interest'.[87] However, it went on to say that it was 'hard to see how the challenged regulations can be regarded as "narrowly tailored"' because

> [t]hey are far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services.[88]

42. But the fact that some other states have looser restrictions does not demonstrate that the measures were not narrowly tailored, since those states may have underreacted. Noting the size of the churches and synagogues in question, the *per curiam* said that 'there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services'[89] – that is, the Court considered that the state could do less to 'minimize' the risk, though it is implicit that such measures would not necessarily be as effective as the caps that the state imposed. The point seemed to be that lesser measures would minimise the risk *enough*, though it was not clear how the Court drew this line.

43. The crux of Lord Braid's proportionality analysis in *Philip* was, similarly, a conclusion that the state could do less. After considering a number of factors, the judge concluded that there were less intrusive means available:

> [T]he respondents have failed to show that no less intrusive means than the Regulations were available to address their aim of reducing risk to a significant extent. Standing [*sic*] the advice they had at the time, they have not demonstrated why there was an unacceptable degree of risk by continuing to allow places of worship which employed effective mitigation measures and had good ventilation to admit a limited number of people for communal worship. They have not demonstrated why they could not proceed on the basis that those responsible for places of worship would continue to act responsibly in the manner in which services were conducted, and not open if it was not safe to do so; in other words, why the opening of churches could not have been left to guidance. Even if I am wrong in reaching that conclusion, the respondents have in any event not demonstrated why it was necessary to ban private prayer, the reasons which were given for that recommendation being insufficient to withstand even the lowest degree of scrutiny.[90]

[87]ibid 67 (*per curiam*).
[88]ibid.
[89]ibid.
[90]*Philip* (n 4) [115].

44. This is peculiar reasoning because the test under *Bank Mellat* is supposed to be whether a less intrusive measure could have been used 'without unacceptably compromising the achievement of the objective'.[91] Yet it seems obvious that the less intrusive measure that Lord Braid is suggesting – opening places of worship with mitigation measures – would be less effective at preventing transmission than a closure of places of worship, so clearly it compromises the objective. Perhaps the question is whether it compromises the objective 'unacceptably'. This seems, again, to boil down to a value judgment about whether it would be acceptable for the state to take less effective measures that are less intrusive. As Movsesian observes, the decision in *Philip* involved 'intuitive judgments' on '[w]hether a public-health measure goes too far', and 'a judge with contrary views could just as plausibly have drawn the lines differently'.[92]

45. Given the resemblance in these cases between the less intrusive means stage of proportionality and the strict scrutiny stage of the *Smith-Lukumi* test, it seems correct to say that there are 'affinities' between the tests in the US and UK.[93] However, the affinities have limitations, as the approach did differ in certain respects. First, the role of comparisons was much larger in the US cases because of the first stage of the *Smith-Lukumi* test. If a law is neutral and of general applicability then, unlike in the UK, the court does not reach tailoring. Second, the tailoring analysis (when reached) tended to be cursory in the US cases, whereas in *Philip* balancing – employed in some form in the third and fourth stages of the *Bank Mellat* test – was the focus of the exercise. Third, the final stage of proportionality in the UK was different from tailoring in the US. This balancing exercise weighs not merely ends and means as in the case of strict scrutiny, but the effect on rights against the importance of the objective. In *Philip*, this final stage offered another reason for Lord Braid to conclude that the law was invalid – one that was even more in the nature of a value judgment, since this stage of proportionality is often criticised as a weighing of incommensurables.[94]

Temporariness

46. Legal responses to public health crises vary depending on the circumstances.[95] In the present pandemic, there was little reason to doubt that restrictions would be lifted as soon as the circumstances allowed. However, the cases have exhibited differing approaches to the significance of this temporariness.[96] In most of the US decisions, the temporary character of the restrictions was not even mentioned. In his concurring opinion in the second *South Bay* case, Gorsuch J addressed the argument that the

[91] [2013] UKSC 38, [2014] AC 700 [74].
[92] Mark L Movsesian, 'Law, Religion, and the COVID-19 Crisis' (2022) *Journal of Law and Religion* 1, 7.
[93] ibid 3, 13, 16.
[94] See, e.g. Ariel L Bendor and Tal Sela, 'How Proportional Is Proportionality?' (2015) 13 *International Journal of Constitutional Law* 530, 540–544.
[95] See Pedro A Villarreal, 'Public Health Emergencies and Constitutionalism before COVID-19: Between the National and the International' in Richard Albert and Yaniv Roznai (eds), *Constitutionalism under Extreme Conditions* (Springer 2020) 217.
[96] On the relevance of temporariness, see Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1030; John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 *International Journal of Constitutional Law* 210, 212.

temporariness of the restrictions was relevant to their constitutionality. Considering the point briefly, he doubted that this temporariness offered any kind of justification:

> No doubt, California will argue on remand, as it has before, that its prohibitions are merely temporary because vaccinations are underway. But the State's 'temporary' ban on indoor worship has been in place since August 2020, and applied routinely since March. California no longer asks its movie studios, malls, and manicurists to wait. And one could be forgiven for doubting its asserted timeline. Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner. As this crisis enters its second year – and hovers over a second Lent, a second Passover, and a second Ramadan – it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could.[97]

47. The rhetorical emphasis on the crisis entering its second year – as though that demonstrates how unacceptable any invocation of temporariness is – may seem surprising, because serious crises often last much longer than a year; sometimes they go on for several years. The coronavirus pandemic is perhaps the worst public health crisis in 100 years, if not longer, so the notion that it needed to be over in less than a year seems to evince a lack of perspective. The pandemic has in fact eased relatively quickly due to the unprecedented speed at which vaccines were developed. The position that governments are only given a narrow window of time in which to respond to a crisis of this kind before their response ceases to be temporary is peculiar, and Gorsuch J does not offer any explanation for why that should be so.

48. In the two cases in the UK, the courts addressed the issue of temporariness in different ways. In *Hussain*, Swift J emphasised that 'the duration of the interference will be finite' since the regulations were due to expire in September 2020 and also had to be reviewed every three weeks.[98] There was also a government 'route map' that envisaged lifting restrictions on attendance at public places, including places of worship, in early July.[99] This contrasts with the approach in *Philip*. In assessing proportionality, Lord Braid took into account the temporary character of the restrictions, but went on to say as follows:

> As for severity of effect, it is all too easy to argue, as the respondents in effect do, that 'it doesn't really matter' that places of worship are closed because it's only for a short period, and those who wish to do so can go on-line. The first of those points is valid to an extent, although it should be pointed out that 3 weeks became 6 became 9, and that by the time the Regulations (we are told) will be revoked or amended with effect from 26 March 2021 they will have been in force for 11 weeks.[100]

49. Again, 11 weeks is not a particularly long period of time in the span of a global pandemic. Linked to this question of the temporariness of the restrictions was also a

[97] *South Bay* (n 33) 720 (statement of Gorsuch J).
[98] *Hussain* (n 48) [13].
[99] ibid.
[100] *Philip* (n 4) [3], [58], [121], [133]–[134].

difference of approach about whether to address restrictions that were about to be lifted or had even already been lifted. In *Philip*, Lord Braid found the restrictions invalid on 24 March 2021 even though public worship was due to be permitted from 26 March 2021 anyway.[101] However, in the *Dolan* appeal, the academic nature of the challenge against the repealed restrictions meant that permission to bring a claim for judicial review was granted only in respect of the vires ground, since it would serve the public interest to consider it given that new regulations continued to be made under the same enabling power.[102] In *Roman Catholic Diocese*, the Court issued an injunction even though the restrictions had been lifted in the relevant areas, because of the 'constant threat' that they would be re-imposed.[103]

50. The courts also differed on how much leeway or deference to grant the executive in the circumstances. Mr Justice Swift in *Hussain* allowed the Secretary of State 'a suitable margin of appreciation to decide the order in which steps are to be taken to reduce the reach and impact of the restrictions',[104] but Lord Braid in *Philip* considered that the margin of appreciation, while 'still a relevant factor at several of the stages', was 'not the complete answer to a challenge that a decision or legislation is not proportionate'.[105] He also did not consider that the court should defer to the expertise of the executive:

> As regards whether the decision involved a scientific judgment best left to an executive armed with expertise and experience not available to the court, I do not consider that the decision can be categorised in that way. As the petitioners point out, the science is not in dispute. It is accepted that Covid-19 is an extremely serious and highly transmissible disease which can result in serious illness and death. The scientific material on which the respondents based their decision is either available to the court or ought to have been made available. It should also be pointed out that also not in dispute is that mitigating measures such as social distancing, face masks, hand washing and good ventilation are known to reduce the risk of transmission.[106]

51. The *per curiam* in *Roman Catholic Diocese* struck a similar note. It accepted that '[m]embers of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area', but said that, 'even in a pandemic, the Constitution cannot be put away and forgotten'.[107] In dissent, Sotomayor J highlighted the severity of the situation in the US at that time, saying that the 'Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily'.[108] Justice

[101] ibid [3].
[102] *Dolan* (n 61) [41]–[42].
[103] *Roman Catholic Diocese* (n 3) 68 (*per curiam*).
[104] *Hussain* (n 48) [21].
[105] *Philip* (n 4) [100].
[106] ibid [111].
[107] *Roman Catholic Diocese* (n 3) 68 (*per curiam*). On the lack of deference shown by this decision, see Cass R Sunstein, 'Our Anti-*Korematsu*' (2021) 1 *American Journal of Law and Equality* 221.
[108] *Roman Catholic Diocese* (n 3) 79 (Sotomayor J, dissenting). Chief Justice Roberts had a similar approach in the first *South Bay* decision, stating that '[w]here … broad limits are not exceeded, [politically accountable officials] should not be subject to

Sotomayor's criticisms have salience. Although it is no doubt true that courts cannot abdicate their role in adjudicating rights violations, even in exceptional circumstances,[109] because of the risk of abuse and overreach,[110] courts' oversight role should be conducted carefully. In particular, they should at least factor in as a significant consideration when restrictions are made on a temporary basis to address an emergency.

The rights of others?

52. A final issue is how the rights of others – those who are sought to be protected by restrictions designed to inhibit the spread of the coronavirus – entered into consideration. In the US case law, it does not seem to be possible to consider the rights of others affected by religious practice at least in the first stage of the *Smith-Lukumi* test because of the focus on whether the law limiting religious freedom is neutral and of general applicability. In focusing on the nature of the law, this test does not consider the rights of those the law may be protecting against religious practice. Questions of justification do arise in the strict scrutiny analysis, but this strict scrutiny analysis, at least in some recent cases,[111] has been treated briefly and almost as an afterthought in which possible justifications are summarily dismissed. In the coronavirus restrictions cases, the rights of others – their lives and bodily integrity as safeguarded by preventing transmission of the virus – did not expressly factor in the analysis.

53. In the UK, art 9(2) permits limiting religious manifestation 'for the protection of the rights and freedoms of others' (as well as for the 'protection of … health'). But, apart from when quoting art 9,[112] the 'rights and freedoms of others' were never mentioned by Lord Braid in *Philip*. This is a strange omission as the 'rights and freedoms of others', including their right to life, would seem important in assessing the permissibility of restrictions designed to protect people's lives from the coronavirus. The failure to consider the rights and freedoms of others is striking as they have been taken into account many times by the ECtHR and UK domestic courts when considering limitations under art 9(2).[113]

second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people': *South Bay* (n 21) 1613–1614 (Roberts CJ, concurring). In the second *South Bay* decision, he again emphasised that 'federal courts owe significant deference to politically accountable officials with the "background, competence, and expertise to assess public health"', but said that '[d]eference, though broad, has its limits': *South Bay* (n 33) 716–717 (Roberts CJ, concurring in the partial grant of application for injunctive relief).

[109] cf Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (OUP 2006). On the possibility of political controls, see Mark Tushnet, 'The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation' (2007) 3 *International Journal of Law in Context* 275.

[110] See, e.g. Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006) 81, 83, 264.

[111] See, e.g. *Masterpiece Cakeshop v Colorado Civil Rights Commission* (2018) 138 S Ct 1719.

[112] *Philip* (n 4) [90].

[113] See, e.g. *Kosteski v Former Yugoslav Republic of Macedonia* (2007) 45 EHRR 31; *Leela Förderkreis EV v Germany* (2009) 49 EHRR 5; *Schilder v The Netherlands* App no 2158/12 (16 October 2012); *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.

54. The respondents also cited art 2, although it is not entirely clear from Lord Braid's summary what argument was being made about it.[114] Article 2 would seem to be implicated in the case because the state does have a positive obligation under art 2 to respond to threats to the right to life, and a pandemic is undoubtedly such a threat. To quote the ECtHR in the case of *Öneryildiz v Turkey*:

> [the] positive obligation to take all appropriate steps to safeguard life for the purposes of Art 2 entails above all a primary duty on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.[115]

55. Further, in that case there was a 'real and immediate risk to a number of persons living near' a particular rubbish tip and consequently the Turkish authorities 'had a positive obligation under Art 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect' them.[116] Since infection with a virus is a threat to life,[117] in the circumstances of a pandemic these positive obligations would seem to necessitate at least some kind of state response.[118]

56. Thus, an apparent deficiency of the *Philip* judgment is that the argument was not considered that the rights of others – and perhaps, in particular, their right to life – may justify the limitation on manifestation of religious beliefs imposed by the coronavirus restrictions. It might be said that Lord Braid implicitly took into account the rights of others by addressing the legitimate aim said to be served by the coronavirus restrictions in Scotland, which involved the 'protection of public health and preservation of life'.[119] But it seems to colour the analysis to consider, as he did, that there was only one right under threat in the circumstances. Instead of recognising that the state was in an invidious position in needing to address rights under both arts 2 and 9, the analysis proceeded from an incorrect premise and failed to take account of the importance of life as a right under the ECHR.

57. In assessing whether to uphold a limitation on the manifestation of religious belief in order to protect life, it would be important to consider how much the right to manifest religious belief was actually limited. The UK cases demonstrated markedly different approaches to that issue. On the one hand, Swift J downplayed the extent of the burden in *Hussain*:

> [T]he interference relied on in these proceedings concerns only one aspect of religious observance – attendance at communal Friday prayers. This is not to diminish the significance of

[114] *Philip* (n 4) [94].
[115] (2005) 41 EHRR 20 [89].
[116] ibid [101].
[117] See *GN v Italy* App no 43134/05 (ECtHR, 1 December 2009); *Oyal v Turkey* (2010) 51 EHRR 30.
[118] See *Le Mailloux v France* App no 18108/20 (ECtHR, 5 November 2020). The ECtHR has a number of other pending cases relating to the pandemic in its docket: see European Court of Human Rights, *Factsheet – COVID-19 Health Crisis* (2022) <www.echr.coe.int/Documents/FS_Covid_ENG.pdf> accessed 1 March 2022. These matters will likely be clarified once the ECtHR rules on the pending cases.
[119] *Philip* (n 4) [99].

> that requirement, yet it is relevant to the scope of the interference that is to be justified. In submissions it was suggested that the inability to attend Friday prayers in a mosque rendered the Claimant's Article 9 rights to manifest his religious belief illusory. The Claimant's evidence does not make that case good, albeit it is clear that the Claimant considers, and I accept, that the interference that does exist is an important matter.[120]

58. Lord Braid took the opposite tack:

> I accept the evidence of the petitioners and of the additional party that worship in their faiths cannot properly take place on-line, by means of internet platforms. The respondents have produced various Decrees and other documents issued to Bishops … giving advice as to alternative means of celebration of the liturgy, but these can best be described as 'work-arounds' during the pandemic (and are time-limited). The same can be said of other on-line broadcasts and services. *These are best viewed as an alternative to worship, rather than worship itself.* While certain church practices – the reading of prayer, preaching and teaching – may be observed, or even, in the case of live streaming, participated in to a certain extent, on a computer screen or a television whilst alone, in the solitude of one's own home, that does not amount to collective worship. The essential features of worship identified above – including communion and baptism – cannot take place by those means.[121]

59. The logic of this passage seems to be that unless online worship has all the features of worship in person, it is not even worship at all, but merely an alternative to it.[122] But this seems like an overstatement. Just as those who worked from home during the pandemic were still working – not engaged in an 'alternative' to work – even though they might not be able to engage in every aspect of what they would usually do in the office, when much of what happens during religious services did indeed move online during the lockdowns, it seems more apposite to acknowledge that, although there are limitations, what takes place online is still 'worship'. Lord Braid's peculiar language here obscured a point that should have been relevant to assessing the proportionality of Scotland's restrictions: that the temporary burden of coronavirus restrictions, although significant, was not completely inhibiting religious manifestation, but instead putting religious practice on similar footing to a wide range of other activities that were taken online during the coronavirus lockdowns.

4. Conclusion

60. More than two years after the beginning of the pandemic, we are still learning to live with the coronavirus. Some may wonder whether this was avoidable: if countries had sought to eliminate SARS-CoV-2 in 2020 – as was pursued in some parts of the

[120] *Hussain* (n 48) [12].
[121] *Philip* (n 4) [61] (emphasis added).
[122] The *per curiam* in *Roman Catholic Diocese* made a similar point, stating that the challenged restrictions, if enforced, would cause 'irreparable harm' since many would be unable to attend in person, and although watching services on television would be possible, 'remote viewing' was not the same as personal attendance as 'Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance': *Roman Catholic Diocese* (n 3) 67–68 (*per curiam*).

world[123] – rather than merely to 'flatten the curve', might it have been possible to end the pandemic once and for all? The answer is lost to history. In any event, the vaccination programmes in 2021 changed the situation and now, politically and perhaps also legally, lockdowns are difficult to justify, at least so long as the vaccines continue to work. However, judicial decisions taking issue with coronavirus restrictions *prior* to the achievement of widespread vaccination seem particularly lacking in perspective about the nature of the emergency during which they were imposed.

61. Religious freedom is not an absolute right. That seemed at times to be forgotten in the US cases. In *Roman Catholic Diocese*, Gorsuch J wrote that 'we may not shelter in place when the Constitution is under attack'.[124] As mentioned above, the *per curiam* said that 'even in a pandemic, the Constitution cannot be put away and forgotten'.[125] That is one characterisation of what is at stake. But the opposing view is that the US Constitution would only be under attack or forgotten if it were accepted that there was an absolute right to religious exercise irrespective of the circumstances, and the right has never been construed in that way. That view says that given the circumstances of a pandemic, it is legitimate to accept temporary restrictions on an emergency basis to protect people's lives. As Goldberg J, writing the US Supreme Court's opinion in *Kennedy v Mendoza-Martinez*, famously said: 'while the Constitution protects against invasions of individual rights, it is not a suicide pact'.[126]

62. The UK cases tended to avoid the kind of language used by Gorsuch J, and it was clearer that what the courts were undertaking was a balancing exercise involving a qualified right that could legitimately be restricted. Lord Braid in *Philip* did not suggest that the ECHR was 'under attack' due to the fact that the Scottish government had struck the balance differently from the way that he would have preferred. Rather, he accepted that the matter was 'finely balanced'.[127] That acceptance was surely correct in circumstances where he was making a value judgment on which reasonable minds could differ. Viewed against the UK cases, the bombast of Gorsuch J seems even more jarring and inapposite. Of course, it is true that the courts do play a supervisory role and, even in an emergency, there have to be limits. But the issue in these cases was how to assess restrictions on religious freedom bearing in mind the possibility of valid limitations on that right.

63. A further issue was the malleability of comparisons between the regulation of secular and religious activities. In the US cases, comparisons were often not differentiated

[123]See generally Anita E Heywood and C Raina Macintyre, 'Elimination of COVID-19: What Would It Look Like and Is It Possible?' (2020) 20 *The Lancet* 1005; Miquel Oliu-Barton et al, 'Elimination versus Mitigation of SARS-CoV-2 in the Presence of Effective Vaccines' (2022) 10 *The Lancet* e142. But see also Regina Jefferies, Jane McAdam and Sangeetha Pillai, 'Can We Still Call Australia Home? The Right to Return and the Legality of Australia's COVID-19 Travel Restrictions' (2022) *Australian Journal of Human Rights* 211.
[124]*Roman Catholic Diocese* (n 3) 71 (Gorsuch J, concurring).
[125]ibid 68 (*per curiam*).
[126](1963) 372 US 144, 160.
[127]*Philip* (n 4) [126].

according to risk as was later said to be required in *Tandon*. Instead, members of the Court pointed to less restrictive regulation of lower-risk secular activities as reason to strike down more restrictive regulation of higher-risk religious activities. The role of comparisons was at the fore in the US case law because of the *Smith-Lukumi* test, and the difficulties experienced by the Court raise further questions about this already controversial test. In the UK context, where the test is proportionality, comparisons between regulation of secular and religious activities were less important. Nonetheless, to the extent that a comparison was employed in *Philip*, it too raised unanswered questions. Practitioners and courts might draw, from the US Supreme Court's zigzagging case law, a lesson about being careful to compare like with like.

64. Tailoring analysis in the US cases tended to be very brief, whereas in *Philip* the consideration of less intrusive means was more substantial. Nonetheless, in both jurisdictions, the courts made what was essentially a value judgment that coronavirus restrictions could be less strict and that would still be acceptable. It is difficult to discern on what basis this value judgment was made, particularly as the measures preferred by the courts were evidently going to be less effective than the measures that they had found invalid. That much was plain in *Philip*, where it was unclear how a less intrusive measure was available without 'unacceptably compromising the achievement of the objective'. From a practical standpoint, these cases suggest the critical importance of the tailoring or less intrusive means stage of the analysis – being decisive in both jurisdictions – as well as the apparent risk that that kind of analysis will lead to a court telling the government to accept less *effective* means.

65. One other issue concerned the temporary nature of the restrictions. Most of the US decisions overlooked the temporary nature of the restrictions completely, while Gorsuch J in the second *South Bay* decision was dismissive of it.[128] In the UK, temporariness was emphasised by Swift J in *Hussain*,[129] but Lord Braid in *Philip* said it was 'all too easy' to cite the temporariness of the restrictions.[130] Yet it seems apparent that the longer restrictions run, the heavier the burden on religious freedom may be, which makes temporariness an important consideration in the proportionality analysis. That much was clear at the time, but after widespread vaccination and a lifting of lockdown restrictions – which have not returned since, even during the omicron wave – the impatience of courts, in being unable to abide a brief period of restrictions during a genuine crisis, is all the more striking.

66. A final difficulty was the lack of consideration of the rights of others. That omission in the context of the Free Exercise Clause is not surprising, because the focus of the *Smith-Lukumi* test is elsewhere. In the UK, it is more peculiar, because the 'rights

[128]*South Bay* (n 33) 720 (statement of Gorsuch J).
[129]*Hussain* (n 48) [13].
[130]*Philip* (n 4) [121].

and freedoms of others' constitute an express basis for limiting the right to manifest religious belief under art 9(2). Positive obligations under art 2 may also be relevant in this context. Of course, positive obligations under art 2 cannot serve as a blank cheque. States cannot automatically justify any action designed to increase public safety by reference to the right to life, as is plain from ECtHR case law in the terrorism context.[131] But when considering the validity of restrictions designed to protect life, art 2 would seem to merit mention.

67. A further point that emerges from the foregoing is that although some states chose to derogate under art 15 of the ECHR on the basis of the pandemic,[132] it arguably should not be necessary to do so at least in relation to art 9, because a qualified right of that nature – one that refers expressly to limitations for the protection of 'health' and the 'rights and freedoms of others' – can already accommodate restrictions required to address the pandemic. Whether that contention is correct as a matter of law may become clearer once the ECtHR rules on three pending applications relating to coronavirus restrictions and art 9: *Spînu v Romania*, *Association of Orthodox Ecclesiastical Obedience v Greece*, and *Magdić v Croatia*.[133] Under the US Constitution, there is no possibility of derogating, making it all the more necessary to construe the First Amendment in a practically workable way.

68. Since these decisions, attention has turned away somewhat from the issue of the validity of coronavirus restrictions on religious exercise and towards the issue of vaccine mandates. The interplay between vaccine mandates and the Free Exercise Clause has already been initially considered by the US Supreme Court, with injunctive relief being denied, over the dissents of Thomas, Alito and Gorsuch JJ, in applications challenging state vaccine mandates for health care workers.[134] On one level, these mandates might be thought to pose a more difficult question than restrictions on attendance at places of worship: whereas limitations on association clearly prevent transmission, it is not altogether clear as yet whether and how much vaccination actually prevents transmission and protects others.[135] Thus, the rights of others may loom less large in respect of this question than in respect of public health measures designed to protect the public from the transmission of the virus.

[131]See *A v UK* (2009) 49 EHRR 29.
[132]See Council of Europe, *Derogations Covid-19* <www.coe.int/en/web/conventions/derogations-covid-19> accessed 1 March 2022.
[133]See European Court of Human Rights, *Factsheet – COVID-19 Health Crisis* (2022) 7–8 <www.echr.coe.int/Documents/FS_Covid_ENG.pdf> accessed 1 March 2022.
[134]*Does 1–3 v Mills* (2021) 142 S Ct 17; *Dr A v Hochul* (2021) 142 S Ct 552. See also *National Federation of Independent Business v Department of Labor* (2022) 142 S Ct 661; *Biden v Missouri* (2022) 142 S Ct 647. Some human rights scholars have argued in support of mandatory vaccination: see Jeff King, Octávio Luiz Motta Ferraz and Andrew Jones, 'Mandatory COVID-19 Vaccination and Human Rights' (2022) 399 *The Lancet* 220.
[135]Chris Stokel-Walker, 'What Do We Know about Covid Vaccines and Preventing Transmission?' (2022) 376 *British Medical Journal* o298. A further argument for mandatory vaccination may be that it helps to prevent overwhelming the health system, but this might depend on the circumstances of a country's health system.

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ORCID

Guy Baldwin http://orcid.org/0000-0003-2765-4437