

Article

# Coronavirus and the Curtailment of Religious Liberty <sup>†</sup>

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

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

## 1. The Pandemic

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

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

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

<sup>1</sup> For a comprehensive repository of COVID-related regulations and guidance in the United Kingdom (together with advice issued by religious organisations) see the designated page on *Law and Religion UK*. <https://www.lawandreligionuk.com/2020/08/20/covid-19-coronavirus-legislation-and-guidance/>.

<sup>2</sup> The national governments made different provision for Wales, Scotland and Northern Ireland, leaving the Westminster Parliament to legislate for England alone.

<sup>3</sup> *Dolan, Monks and AB v Secretary of State for Health*: Reasons for Grant of Permission to Appeal, 4 August 2020, per Hickinbottom LJ.

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

## 2. Religious Liberty—General Overview

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

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

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

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

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

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

<sup>4</sup> M Hill, ‘Locating the right to freedom of religion or belief across time and territory’ in (Ferrari et al. 2020).

<sup>5</sup> See (Ferrari et al. 2020).

<sup>6</sup> Note also the right to marry.

<sup>7</sup> For a detailed discussion of the ambit and reach of Article 9, see (Hill and Barnes 2019).

<sup>8</sup> This language is near identical with that of Article 18 of the United Nations Covenant on Civil and Political Rights.

<sup>9</sup> *Darby v. Sweden*, 9 May 1989, European Commission on Human Rights, Application No. 11581/85, para. 44. As Queen Elizabeth I reputedly stated: ‘I would not open windows into men’s souls’: letter drafted by Francis Bacon. See JB Black, *Reign of Elizabeth 1558–1603* (1936).

<sup>10</sup> A state is permitted to derogate from its obligations under Article 9 ‘[i]n time of war or other public emergency threatening the life of the nation’ as permitted by Article 15. The United Kingdom has not, as yet, purported to invoke this derogation.

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

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

As Professor Christopher McCrudden has observed,

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

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

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

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

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

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

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

<sup>13</sup> (McCrudden 2020).

<sup>14</sup> March 2020. [https://ec.europa.eu/info/sites/info/files/communication\\_-\\_a\\_european\\_roadmap\\_to\\_lifting\\_coronavirus\\_containment\\_measures\\_0.pdf](https://ec.europa.eu/info/sites/info/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf).

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

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

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

ceremonies, may inevitably lead to arguable complaints under the above provisions. It is for the authorities to ensure that any such restriction, whether or not it is based on a derogation, is clearly established by law, in compliance with relevant constitutional guarantees and proportionate to the aim it pursues.

While heightened restrictions to the above-mentioned rights may be fully justified in time of crisis, harsh criminal sanctions give rise to concern and must be subject to a strict scrutiny. Exceptional situations should not lead to overstatement of criminal means. A fair balance between the compulsion and prevention is the most appropriate, if not the only way, to comply with the Convention proportionality requirement.<sup>18</sup>

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

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

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

### 3. The Constitutionality of Government Responses

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

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

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

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

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

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

<sup>22</sup> 'The longer these emergency procedures are used, the less Rule of Law compliant they are': (Cormacain 2020).

<sup>23</sup> For an outspoken critic of the British government, see (Sumption 2020b).

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

#### 4. Assessing Risk and Deference to Government

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

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

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

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

<sup>25</sup> Para 10.2.1.

<sup>26</sup> Para 7.1.

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

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

<sup>29</sup> Petition 120 of 2020 (Covid 025).

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

<sup>31</sup> *Loielov Giles* [2020] VSC 619 (24 September 2020). [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2020/619.html?fbclid=IwAR3R1XFw0N16TxlWml4S51xoUhcB2IW85QL5eVzwFlf-TUU9qRJa\\_aYprO8](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2020/619.html?fbclid=IwAR3R1XFw0N16TxlWml4S51xoUhcB2IW85QL5eVzwFlf-TUU9qRJa_aYprO8). I am grateful to Professor Neil Foster of the University of Newcastle, Australia, for bringing this judgment to my attention in a recent Facebook post.

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

<sup>33</sup> The redaction included passages concerning the application of the right to freedom of religion: s 14 of the Charter.

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

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

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

## 5. The UK Government’s Response—An Overview<sup>36</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>41</sup> Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg 6(1)(k).

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

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

<sup>44</sup> The Archbishop of Canterbury offered this clarification during a television interview on Easter Day.

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

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

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

<sup>48</sup> It was not unusual for government guidance to precede publication of the very regulations which they were designed to explain and amplify.

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

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

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

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

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

## 6. The Reaction of Religious Organisations

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

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

<sup>51</sup> *COVID-19: guidance* (above) para 3.

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

<sup>53</sup> *COVID-19: guidance* (above) para 4.

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

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

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

<sup>57</sup> By way of example, Church of England guidance on the reception of the sacrament encouraged each communicant to sanitise their hands before and after removing their face covering to receive the bread, and before and after putting it on again: [https://mcusercontent.com/14501d5eebc3e98fa3015a290/files/e3431843-273b-403d-9c70-aed1a0678ae7/COVID\\_19\\_Advice\\_on\\_the\\_Administration\\_of\\_Holy\\_Communion\\_v4.1\\_0.pdf](https://mcusercontent.com/14501d5eebc3e98fa3015a290/files/e3431843-273b-403d-9c70-aed1a0678ae7/COVID_19_Advice_on_the_Administration_of_Holy_Communion_v4.1_0.pdf).

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

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

3. We take seriously our responsibility to minister to the welfare of the Community, both worldly and next-worldly. This involves a recognition of the serious importance that our religion places on life, health, community, and spiritual well-being. To trivialise any aspect of this would be an error. As our scholarly tradition demands, our approach in the Guidance is directed by consideration of what is essential, recommended, and desirable. This includes a keen understanding of when (and which) religious rulings may be suspended due to temporary harms or hardship.

5. In the event that government directives are issued over-riding any part of the guidance relating to gathering in public or private spaces, then the government directives would take priority.

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

## 7. Mandatory or Advisory?

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

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

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

<sup>59</sup> (Mirvis 2020).

<sup>60</sup> (Rocker 2020).

<sup>61</sup> The imposition of criminal sanctions in the form of £10,000 fines for those organizing gatherings (including protests) was a particularly draconian response.

<sup>62</sup> (Hickman 2020).

<sup>63</sup> For example, the instruction not to live-stream liturgies from closed churches, discussed above.

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

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

## 8. Challenging Government Restrictions—United Kingdom

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

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

Swift J held:

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

<sup>64</sup> See (Cormacain 2020).

<sup>65</sup> (Petrov 2020).

<sup>66</sup> [2020] EWHC 1392 (Admin).

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

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

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

<sup>70</sup> A city in northern England with a large Muslim population.

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

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

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

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

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

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

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

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

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

<sup>74</sup> [2020] EWHC 1786 (Admin).

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

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

## 9. Challenging Government Restrictions—USA

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

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

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

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

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

<sup>77</sup> (Addison 2020).

<sup>78</sup> See also (Cranmer and Pocklington 2020).

<sup>79</sup> The Archbishop of Canterbury’s power to authorise a marriage in Wales by Special Licence predates the disestablishment of the Welsh dioceses of the Church of England. The Welsh Church Act 1914 did not remove that power.

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

<sup>81</sup> *South Bay United Pentecostal Church v. Gavin Newsom, Governor of California* 590 U. S. (2020).

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

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

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

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." [ ] When those officials "undertake [ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." [ ] Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. [ ]

That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.<sup>83</sup>

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

As a general matter, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." [ ] This Court has stated that discrimination against religion is "odious to our Constitution." [ ] To justify its discriminatory treatment of religious worship services, California must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." [ ] California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens. But "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." [ ]

What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap. California has not shown such a justification. [ . . . ]

The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: the State may not discriminate against religion.

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

<sup>84</sup> Joined by Justices Thomas and Gorsuch.

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

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

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

In Justice Alito's opinion,

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

He considered the initial response was understandable.

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

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

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

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<sup>85</sup> *Calvary Chapel Dayton Valley v. Steve Sisolak*, Governor of Nevada 591 U. S. (2020).

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

<sup>87</sup> One can assume they were probably similar to those articulated by Roberts CJ in *South Bay*, set out above.

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

Justice Alito concluded:

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

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

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

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

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

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

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

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

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

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

## 10. Coronavirus and Abortion

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

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

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

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

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

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

## 11. Global Issues<sup>95</sup>

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

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

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

## 12. Some 'Covidential' Matters

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

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

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

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

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

### 13. Conclusions

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

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

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