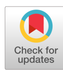

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ARTICLE

Man shall not live by bread alone? Freedom of worship, COVID-19 and the Courts

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Abstract

This article discusses the application of the proportionality test which the Court of Session in Scotland and the European Court of Human Rights carried out when reviewing the limitations to worship and public gatherings imposed during the COVID-19 pandemic. The article concludes that judges should not use the proportionality standard of review as an avenue to circumvent their duty of neutrality towards religious dogmas.

Keywords: article 9 ECHR; judicial restraint; proportionality review; religious neutrality; Scotland

Part I: *L'église au milieu du village* – freedom of religion and the COVID-19 challenge

In his seminal work *The Elementary Forms of Religious Life*, Émile Durkheim famously noted that, throughout humankind's history, one cannot find religion without a church. Religious life happens within a definite group and 'religion must be an eminently *collective* thing'.[1] The outbreak of the COVID-19 pandemic led governments, legislative bodies and public health agencies to undermine this Durkheimian aspect of public worship.

Prominent scholars have argued that the pandemic offered an unparalleled space for authoritarianism to override the rule of law and for the collective exercise of freedom of religion or belief in public to be severely restricted.[2] Indeed, a large number of judicial decisions have struck down restrictive regulations concerning religious activities over the last few years on a global

[1] É Durkheim, *The Elementary Forms of Religious Life* (New York, 1995), 44, emphasis added.
[2] M Hill, 'Locating the right to freedom of religion or belief across time and territory' in S Ferrari, M Hill QC, Arif A Jamal and R Bottoni (eds), *Routledge Handbook of Freedom of Religion or Belief* (London, 2020), 3–7, at 5.

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scale.[3] Although the Director-General of the World Health Organisation recently stated that COVID-19 no longer constitutes an emergency of international concern,[4] a range of cases challenging the legitimacy of restrictive measures introduced during the pandemic are still pending or awaiting trial at both national and international level.[5]

Since the very beginning of the pandemic, proportionality has been identified as a foundational principle of the joint European strategy to tackle COVID-19 transmission. The Council of Europe issued a toolkit for its member states in early 2020. This document recalled Europe's longstanding commitment to the safeguard of democracy, the rule of law and human rights, and it invited the States to adopt effective policies 'ensuring that these measures remain *proportional* to the threat posed by the spread of the virus'.[6]

When a measure restricting the manifestation of freedom of religion or belief is examined through the lens of proportionality review, courts are generally expected to abide by judicial restraint and avoid theologically driven reasoning. The choice to refrain from delving into the religious realm, and particularly into the distinctive traits of religious denominations, is a well-rooted judicial attitude both in the UK[7] and in the ECtHR case-law.[8] The advent of COVID-19, however, has tested the principle of religious neutrality.[9]

This article investigates and critically discusses the extent to which judges have failed to respect the principle of religious neutrality when striking a

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[3] Data resulting from the 'Covid-19 litigation database', available at <www.covid19litigation.org>, accessed 30 May 2023.

[4] 'Statement on the fifteenth meeting of the IHR (2005) Emergency Committee on the COVID-19 pandemic', 5 May 2023, available at <www.who.int>, accessed 1 May 2023.

[5] Most recently, see *Figel' v Slovakia*, App no 12131/21 (ECtHR, pending case lodged on 24 February 2021) (the applicants challenge the anti-COVID measures taken in Slovakia, entailing, *inter alia*, a ban on public religious services) and, for other examples, *Piperea v Romania*, App no 24183/21 (ECtHR, 1 September 2022) (relating to a citizen's refusal to wear a mask at the supermarket); *Pierrick Thevenon v France*, App no. 46061/21 (ECtHR 13 September 2022) (relating to the refusal to mandatory vaccination).

[6] Council of Europe, 'Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis', SG/Inf(2020)11, 7 April 2020, available at <www.coe.int>, at 2, italics added.

[7] On this doctrine (and its exception), see R Sandberg, *Law and Religion* (Cambridge, 2011), at 200 ff. See, e.g., *HH Sant Baba Jeet Singh Ji Maharaj v Eastern Media Group & Anor* [2010] EWHC 1294 (QB) at para 5, referring to 'the well-known principle of English law to the effect that the courts will not attempt to rule upon doctrinal issues or intervene in the regulation or governance of religious groups'; *R v Secretary of State for Education and Employment and others, ex parte Williamson* [2005] UKHL 15 at para 22, stating that 'it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard'.

[8] M Hunter-Henin, 'Religious Neutrality at Europe's Highest Courts: Shifting Strategies' (2022) 11 *Oxford Journal of Law and Religion* 23–46, at 27. See, e.g., *Metropolitan Church of Bessarabia and Others v Moldova*, App no 45701/99 (ECtHR, 13 December 2001) at para 117: 'the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of [...] the ways in which those beliefs are expressed'; *Bayatyan v Armenia*, App no 23459/03 (ECtHR, GC, 7 July 2011) at para 120: '[t]he State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs'.

[9] J Collings and S Hall Barclay, 'Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty' (2022) 63:2 *Boston College Law Review* 453–520.

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balance between the need to protect people's lives from COVID-19 and the duty to guarantee the enjoyment of fundamental rights and freedoms, such as the right to worship and to peaceful assembly. This article will discuss a selection of judicial decisions issued at both national and international level dealing with these issues. In particular, Part II will analyse Lord Braid's opinion in the Scottish decision of *Philip* (handed down by the Outer House of the Court of Session). Part III will adopt a comparative approach and analyse the approach taken by the Strasbourg system of fundamental rights protection to the issue of religious neutrality.

Based on this analysis, it will be argued in Part IV that the courts should not wield the sword of proportionality review as a tool to bypass their duty of neutrality towards religious dogmas.

Part II: A tale of a contested ban – a Scottish case study

The COVID-19 pandemic put the exercise of freedom of worship around the globe to a severe test, and the United Kingdom was certainly no exception.[10]

Health policy is a devolved matter across the UK.[11] It is not at all surprising, therefore, that there were different regional approaches (and, in particular, different *legislative* responses) to the COVID-19 outbreak across the four nations of England, Scotland, Wales and Northern Ireland. A potent example of the asymmetric strategies aimed at tackling the spread of the pandemic in the UK can be seen in the introduction, and subsequent easing, of restrictions pertaining to places of worship.

In early 2021, legislation in force in Scotland still made it a criminal offence to attend places of worship whilst legislation in England and Wales permitted the reopening of, and attendance at, places of worship (as long as certain safety measures were taken).[12] The stricter set of limitations imposed at the time on Scottish worshippers compared with their English and Welsh counterparts had its legal basis in the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 11) Regulations 2021 ('the Local Levels Regulations').

[10] For a comparative analysis of the relations between law and religion at the time of the COVID-19 pandemic in a wide number of legal orders and religious communities see, *ex multis*, A Madera (ed), 'The Crisis of Religious Freedom in the Age of COVID-19 Pandemic' (2021) *Laws*, Special Issue, 1–174; P Consorti (ed), 'Law, Religion and Covid-19 Emergency', (2020) *DiReSoM Papers 1*, available at <www.diresom.net>, accessed 30 May 2023; F Balsamo and D Tarantino, 'Law, Religion and the Spread of Covid-19 Pandemic' (2020) *DiReSoM Papers 2*, available at <www.diresom.net>, accessed 1 May 2023.

[11] Health and social services are among the main devolved powers of the Scottish Parliament as first set out in the Scotland Act 1998, although the existence of a separate health service in Scotland (and in each UK nation) pre-dates the devolution reform.

[12] For a thorough account of the policies and approaches taken by the UK and devolved governments in relation to freedom of religion during the pandemic see, among others, F Cranmer and D Pocklington, 'The Impact of the Covid-19 Pandemic on the Exercise of Religion in the United Kingdom' (2020) 54 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 1–36; K Braginskaia, 'Impact of the Covid-19 pandemic on religion in the UK', 2020, available at <www.eurel.info>, accessed 1 May 2023.

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The Local Levels Regulations came into force on 8 January 2021 and were approved by resolution of the Scottish Parliament on 20 January 2021 (pursuant to the powers conferred on the Scottish Government under the Coronavirus Act 2020).[13] In a nutshell, not only did the Local Levels Regulations effectively bring about (1) the closure of all places of worship throughout mainland Scotland (except for specified purposes including marriages and funerals, although excluding others such as communion or baptisms), they also (2) prohibited communal worship indoors or outdoors in response to the risks posed by the new variants of the virus which were circulating at the time for all areas demarcated 'Level 4' (which, at least on 5 January 2021, was the whole of mainland Scotland).[14] Any person opening a place of worship, or congregating indoors or outdoors to worship, thus contravening any of the restrictions or requirements laid down under the Local Levels Regulations, would have been committing nothing less than a criminal offence.[15]

The inevitable echo of this blanket ban on public worship in Scotland did not take long to reach the courtrooms. The Reverend Dr William Philip and 26 other ministers and leaders of Christian Churches of various protestant denominations promptly challenged, by means of judicial review, the lawfulness of the enforced closure of places of worship.[16] The petitioners' arguments raised two intertwined issues before the Outer House of the Court of Session: the unconstitutionality of the State's interference with the right to worship at common law (i.e. 'the constitutional issue') and the unjustified infringement of the right to manifest religious beliefs, as well as to assemble with others in order to exercise that right, under Articles 9 and 11 ECHR (i.e. 'the Convention issue').

After hearing the case, on 24 March 2021, Lord Braid delivered an Opinion addressing the thorny issue of reconciling public health exigencies with the curtailment of the fundamental (albeit not absolute) right of freedom of religion or belief.[17] The court first considered the constitutional issue of whether the draconian measures adopted by Holyrood had trespassed into the realm of spiritual matters, and so had encroached upon the independence of the church, based on the petitioners' view that the Regulations embodied 'an interference

[13] See section 49 of the Coronavirus Act 2020.

[14] See Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020, Schedule 5, para 1A, as amended by regulation 4(b) and regulation 4(e)(i) and (f)(i) of The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3); see further *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32 at para 20.

[15] See regulation 5 of the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 and *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32 at para 21.

[16] The involved protestant denominations included the Free Church of Scotland (Continuing), the Baptist Church and others. However, it should be noted that the individual religious representatives were speaking for themselves as the Church of Scotland did not support their legal action at the Court of Session. The action was also supported by Canon Thomas White, of the Roman Catholic Church, who was allowed to participate in the process as a person directly affected by the issues raised in the petition.

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

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with the practice of the Christian religion in Scotland, unprecedented since the persecution of the Presbyterian church instituted by the Stuart kings'.[18]

All parties in *Philip* accepted that the effect of the series of statutes culminating in the Church of Scotland Act 1921 is that the Church has exclusive jurisdiction in matters spiritual, and the state has exclusive jurisdiction in matters civil.[19] After rehearsing the various arguments on this issue, the court avoided formally determining whether or not the Local Levels Regulations fell into the spiritual or civil realm.[20] However, the court ultimately rejected the petitioner's argument that any interference with their right to worship by the State, no matter how proportionate, was *ultra vires*.[21] Lord Braid dealt with this issue in this way:[22]

> It is arguable that the state has not merely the power to act to preserve public health and life, but that it has a constitutional duty to do so. In this case, that duty has come into conflict with its duty not to interfere in matters which are the sole province of the church. The petitioners argue that there are no circumstances in which the state's powers could trump their right of worship, no matter the scale of the public health emergency faced by the state, but that is not an attractive outcome, and is not one supported by the additional party [Canon Thomas White, a Roman Catholic Priest] albeit he approaches it from a different religious perspective. The question rather is how, where state and church come into conflict in this way, the line is to be drawn.

In the final analysis, the two issues summarised above – the constitutional issue and the Convention issue – merged into one and the question before the court was effectively re-cast. Lord Braid held that 'any interference in worship by the state will be lawful if (and only if) it is a proportionate and necessary response to a civil matter in which the state is entitled to legislate'.[23] And that issue fell to be determined by a consideration of the ECHR jurisprudence.

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[18] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32 at para 64.

[19] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32 at para 73.

This dividing line is clearly set out in Article IV of the Declaratory Articles appended to the Church of Scotland Act 1921, under which the church alone has 'the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government and discipline in the church [...]'. In *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73, the majority of the House of Lords held that a discrimination claim did not constitute 'spiritual matters', Lord Hope noted that 'Article IV of the Declaratory Articles is sufficiently broadly worded for it to be possible [...] to say on which side of the dividing line between matters civil and matters spiritual this case lies'.

[20] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32 at paras 75–79.

[21] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32, at para 80. See further at para 79: '[...] any interference in worship by the state will be lawful if (and only if) it is a proportionate and necessary response to a civil matter in which the state is entitled to legislate'.

[22] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32, at para 78.

[23] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32, at paras 79 and 82.

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Turning, then, to the key concept of proportionality, this can be originally traced back to Aquinas, and it has evolved over centuries until being shaped in the case law of the European Court of Justice and the European Court of Human Rights.[24] The issue for determination at this stage was whether the restrictions imposed by the Local Levels Regulations fall within Article 9§2 ECHR, namely whether they (1) are prescribed by law, (2) pursue a legitimate aim, and (3) are necessary in a democratic society in the interests of public health.

The Local Levels Regulations passed stages (1) and (2) easily.[25] But at stage (3), Lord Braid found that the Local Levels Regulations were a disproportionate interference with the petitioners Article 9 ECHR rights.[26] Lord Braid's analysis at this stage, following Lord Reed's judgment in *Bank Mellat*,[27] comprised consideration of the following four questions:[28]

i. *Is the objective being pursued sufficiently important to justify the limitation of a protected right?*

Lord Braid answered this question in the affirmative (para 101).

ii. *Is the measure rationally connected to the objective?*

Lord Braid also answered this question in the affirmative, although detected a 'whiff of irrationality' when it came to the decision to close places of worship to *private prayer* which fell to be considered further in stage (iii) (paras 102–103).

iii. *Can a less intrusive measure have been used without unacceptably compromising the achievement of the objective?*

Lord Braid summarised the scientific advice available to the Scottish Government at the time the Local Levels Regulations were in force in paras 112–115 of his Opinion. He concluded that bearing in mind the advice the Government 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

[24] Among the vast literature on this principle, see E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (London, 1999). More recently, T Tridimas, *The Principle of Proportionality* in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order*, Vol I (Oxford, 2018), 243–264; T-I Harbo, *The Function of Proportionality Analysis in European Law*, Vol 8 (Leiden-Boston, 2015); W Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 *Cambridge Yearbook of European Legal Studies* 439–466. In the UK context, a four-stage approach to proportionality was set out by Lord Reed in *Bank Mellat v Her Majesty's Treasury* (No. 2) [2013] UKSC 39.

[25] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32, at paras 95–99.

[26] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32 at para 127.

[27] *Bank Mellat v Her Majesty's Treasury* (No. 2) [2013] UKSC 39 at para 74.

[28] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32 at para 100.

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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.

iv. *Balancing the severity of the measure's effect 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, does the former outweigh the latter?*

Lord Braid also went on, in paras 118–126, to consider the 'balancing' test for completeness and in case his conclusions at stage (iii) were wrong. It is important at this stage to reflect on Lord Braid's earlier conclusions (in para 61) as to what worship, properly understood, actually entails in the context of Christianity. He went as far as to acknowledge that the physical gathering for worship is not only part and parcel of the Christian faith, but rather it is an *essential* feature which could not be substituted by any kind of virtual event. While certain aspects of church services could be replicated by means of internet platforms, there are other aspects of worship such as communion, baptism and confession, which cannot properly take place online. In this regard, Lord Braid held that online broadcast and live streaming, at best, 'might be an alternative to worship but it is not worship'.[29] After rehearsing these points in para 121, Lord Braid concluded that 'it is impossible to measure the effect of those restrictions on those who hold religious beliefs. It goes beyond mere loss of companionship and an inability to attend a lunch club'.

Lord Braid's finding that the Regulations failed the balancing stage, on the grounds that the right to manifest one's religion is 'an important right to which much weight must be attached'[30] – explicitly engaging in what amounts to essential tenets of faith – marks a turning point in the UK context, and particularly in comparison with England, where previous applications for interim relief and judicial review of restrictions interfering with Article 9 ECHR rights had been refused.

A prominent example can be found in the *Hussain* case,[31] where the English Administrative Court considered the legality of the Health Protection

[29] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32, at para 62.

[30] Ibid, at 120.

[31] *R (Hussain) v Secretary of State for Health & Social Care* [2020] EWHC 1392 (Admin). The matter returned to the court in *R (Hussain) v Secretary of State for Health & Social Care* [2022] EWHC 82 (Admin). Another well-known example is the case of *Dolan & Ors v Secretary of State for Health and Social Care & Anor* [2020] EWHC 1786 (Admin), where Justice Lewis adjourned the

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(Coronavirus, Restrictions) (England) Regulations 2020.[32] The Claimant, namely the Chairman of the Executive Committee of the Barkerend Road Mosque in Bradford, challenged the lockdown Regulations in England so far as they prevented collective Friday prayer during Ramadan. Mr Justice Swift refused the application for interim relief by taking an approach markedly different from the one in *Philip*.

Although it was not disputed that the effect of the restrictions infringed Mr Hussain's right to manifest his religious belief by worship, practice or observance, there was no suggestion that Islam had been treated differently from other faiths because all religions having an obligation to undertake communal prayer or worship were equally affected by the Regulations.[33] Albeit a significant one, the interference with Article 9 ECHR was justified as it inhibited only one aspect of religious observance (i.e. the ability to attend Friday prayers), without preventing the Claimant from manifesting his religious belief.[34]

In assessing the temporary character of the restrictions, Swift J also emphasised that the duration of the interference would be finite,[35] while Lord Braid in *Philip* considered that it was 'all too easy' to downplay the burden on the petitioners by reason of its temporariness.[36] A further issue that the two decisions addressed in divergent ways involves the level of deference to be granted to the government. In *Hussain*, it was argued that the Secretary of State 'must be allowed 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'.[37] By contrast, in *Philip* the Outer House of the Court of Session highlighted that, despite being still a relevant factor, the margin of appreciation was 'not the complete answer to a challenge that a decision or legislation is not proportionate'.[38]

The importance attached in *Philip* (and, to a lesser extent, in *Hussain*) to the right to manifest religion and its limitations, whether in reliance to Article 9 ECHR or under domestic constitutions, also relied on foreign case law. The explicit references to decisions taken in other jurisdictions addressing the same issue bears witness to a growing judicial trend whereby a variety of courts around the world struck down restrictions on places of worship.[39]

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consideration of the ground for judicial review under Article 9 ECHR to determine the legitimacy of the use of a Roman Catholic church for communal worship and the taking of sacraments.

[32] See Health Protection (Coronavirus Restrictions) (England) Regulations SI 202/350, with specific regard to Regulations 5(5) and 5(6), 6 and 7.

[33] *R (Hussain) v Secretary of State for Health & Social Care* [2020] EWHC 1392 (Admin), at paras 10 and 27.

[34] *R (Hussain) v Secretary of State for Health & Social Care* [2020] EWHC 1392 (Admin), at para 12.

[35] *R (Hussain) v Secretary of State for Health & Social Care* [2020] EWHC 1392 (Admin), at para 13.

[36] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32, at para 121.

[37] *R (Hussain) v Secretary of State for Health & Social Care* [2020] EWHC 1392 (Admin), at para 21.

38 *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32, at para 100.

[39] In *Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32, at para 92, the petitioners referred to a varied series of cases from foreign jurisdictions, such as 1BvQ 44/20 (Federal Constitutional Court of Germany, 29 April 2020), which was also referred to by Justice Swift in *Hussain*; *De Beer v The Minister of Cooperative Governance and Traditional Affairs*, App

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Part III: From Edinburgh to Strasbourg – the approach of the European Court of Human Rights

Balancing the need to protect the health of citizens while respecting the line dividing the civil realm from the spiritual one is not only a legal issue limited, among many others, to Scotland. Questions about the legitimacy of the measures adopted during various waves of lockdowns have also involved the international and regional levels of human rights protection, including the ECHR system. Painting with a coarse brush, the European Court of Human Rights (hereinafter ECtHR) has adjudicated two types of cases so far. The first model relates to the restrictive measures and obligations that have been in place in different jurisdictions as regards vaccination, the use of masks as well as closures and lockdowns.[40] On the other hand, the Strasbourg Court also engaged with the issue of domestic authorities' inaction and failure to adequately protect the enjoyment of the ECHR rights and freedoms.[41]

With respect to freedom of religion or belief, several cases are currently pending before the ECtHR, including applications concerning the proportionality of closure of churches and other places of worship in the context of the COVID-19 health crisis. In *Association D'obédience Ecclésiastique Orthodoxe c Grèce*, for example, the applicants contested the Greek government's prohibition to worship collectively and in public for a four-month period including during Easter celebrations.[42] In *Mégard v France*, moreover, claimants challenged the prohibition of any gatherings or meetings, with the only exception of funerals, provided that fewer than thirty participants attended the religious service and complied with the specific access conditions to the religious premises set by the French authorities. In both cases, the applicants relied upon Article 9 ECHR to claim an infringement of their freedom of religion or belief due to the disproportionate effect of the limitations imposed on the right to worship with others and in public.

The Strasbourg decisions and judgments in this context are now numerous enough to display a specific corpus that could be referred to as 'Covid case law'.[43] It must be admitted that, for the time being, the ECtHR has only

no 21542/2020 (High Court of South Africa, 2 June 2020); *Capitol Hill Baptist Church v Muriel Bowser, in Her Official Capacity as Mayor of the District of Columbia*, App no 20-cv-02710 (United States District Court for the District of Columbia, 9 October 2020); *Roman Catholic Diocese of Brooklyn v Cuomo* [2020] App no 592 US ___ (2020)(Supreme Court of the United States, 25 November 2020); *South Bay United Pentecostal Church v Newsom* [2021] App no 592 US ___ (2021) (Supreme Court of the United States, 5 February, 2021.

[40] See, for example, *Piperea v Romania*, App no 24183/21 (ECtHR, 1 September 2022) (relating to a citizen's refusal to wear a mask at the supermarket); *Pierrick Thevenon v France*, App no. 46061/21 (ECtHR 13 September 2022) (relating to the refusal to mandatory vaccination).

[41] See *Feilazoo v Malta*, App no 6865/19 (ECtHR, 11 March 2021) (related to the immigration detention of a Nigerian citizen, placed together with other people in COVID-19 quarantine).

[42] *Association d'obédience ecclésiastique orthodoxe c Grèce*, App no 52104/20 (ECtHR 17 November 2020) (in French). See also *Figel' v Slovakia*, App no 12131/21 (ECtHR, 12 December 2022).

[43] L Graham, 'Challenging State Responses to the Covid-19 Pandemic before the ECtHR' (2022) *Strasbourg Observers* (Blog), 18 October 2022, available at <www.strasbourgobservers.com>, accessed 1 May 2023. However, at first, some procedural issues prevented the Court from

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partially addressed the issue of a government's interference with the exercise of Article 9 ECHR rights. However, careful consideration and comparison of two crucial decisions regarding, on the one hand, the limitations of attending religious ceremonies and, on the other hand, the prohibition of gatherings other than religious worship, can reveal the attitude that the ECtHR has adopted so far.

Constantin-Lucian Spînu c Roumanie: prisoners and freedom of religion

Mr Spînu is a Romanian citizen belonging to the Seventh-Day Adventist Church religious community. Before the outbreak of the global health crisis, the prison authorities gave him permission to attend Adventist services outside Jilava prison, where he had been detained since June 2019. In the midst of the sanitary emergency and during the state of alert, Mr Spînu applied unsuccessfully to attend Sabbath services, which took place on Saturdays in Sector 6 of Bucharest. Prison authorities denied his request on account of Section 61 of the Romanian Law no. 55 of 2020, which allows for restriction of day-release arrangements for prisoners in order to curb the propagation of the Sars-Cov-2 virus among the population and to protect the life and the health of prisoners living in closed environments.[44]

Mr Spînu challenged the prison's denial before the ECtHR, claiming that a breach of Article 9 ECHR had occurred since he had been prevented from manifesting his religion by worship, in public and with others. The court acknowledged that the interference with his Article 9 ECHR rights was based upon law and pursued the legitimate aim of protecting public health in general, according to Article 9§2.[45]

Prison governors were indeed under the duty to prevent the spread of infection among the prisoners or staff, and to provide adequate medical care if prisoners tested positive for the virus. Accordingly, the law provided the prison governors with a certain leeway to organise, supervise, and possibly restrict extramural activities.[46]

As to the necessity of the measure for a democratic society, the court cautiously analysed all the circumstances of the case through the principle of proportionality, and it focused on two main considerations in its legal reasoning. First, it noted that the applicant had not been completely prevented from practising religion in prison: only a single aspect of the manifestation thereof had been affected and for a limited period of time. As the performance of all religious services taking place outside prisons was conditioned by the respect of strict requirements (if not prohibited at all), Mr Spînu's manifestation of religion was certainly affected, but only as far as his attendance to worship outside the prison premises was concerned and as long as the changing circumstances of the health crisis could let him resubmit his requests.[47]

entering the merit of the cases concerned: see, for example, *Le Mailloux v France*, App no 18108/20 (ECtHR, 5 November 2020); *Zambrano v France*, App no 41994/21 (ECtHR, 21 September 2021).

[44] *Constantin-Lucian Spînu c Roumanie*, App no 29443/20 (11 October 2022), para 16 (in French only).

[45] *Constantin-Lucian Spînu c Roumanie*, App no 29443/20 (11 October 2022), at para 27 ff.

[46] *Constantin-Lucian Spînu c Roumanie*, App no 29443/20 (11 October 2022), at paras 32–39.

[47] *Constantin-Lucian Spînu c Roumanie*, App no 29443/20 (11 October 2022), at para 66.

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Furthermore, and most importantly for the purposes of this article, the court considered the reasonable efforts of national authorities to counterbalance Mr Spînu's prohibition to attend religious services outside the detention centre. Following the recommendation by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which encouraged national authorities to compensate for any restriction on contact with the outside world with 'increased access to alternative means of communication (such as telephone or Voice-over Internet-Protocol communication)',[48] the Jilava prison administration had set up a system to videoconference Adventist worship and online religious support.[49]

The ECtHR recognised that virtual liturgical participation could not substitute fully the unmediated participation in a religious ceremony, and it acknowledged that the applicant had always refused the opportunity to attend online services. However, this was not enough to follow the way paved by *Philip* in the Outer House of the Court of Session in Scotland. While the latter called for less intrusive means of limiting freedom of religion or belief in the name of the importance of the physical gathering for Christian theology, the ECtHR took into account, by contrast, the attempt of prison administration to facilitate the applicant's manifestation of religious freedom within the premises.[50]

According to the ECtHR, this choice fell within the wide margin of appreciation that, in the instant case, must be accorded to the respondent State.[51] Faced with unprecedented challenges since the outbreak of the pandemic, the Romanian authorities made significant efforts to guarantee freedom of religion or belief within the prison, without jeopardising the need to protect health in such a delicate time of emergency.[52] All this considered, the court declared unanimously that an infringement of Article 9 ECHR had not occurred.

Communauté genevoise d'action syndicale (CGAS) v Switzerland: the right to peaceful assembly of workers and trade unions

While the *Spînu* case involved an alleged breach of Article 9 ECHR rights due to the denied participation in a gathering with a very specific purpose (worship), in *Communauté genevoise d'action syndicale (CGAS) v Switzerland* the Court dealt with an application lodged by an association, claiming a violation of the right to peaceful assembly protected by Article 11 ECHR.[53]

[48] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (Covid-19) pandemic', CPT/Inf(2020)13, 20 March 2020, available at <www.rm.coe.int>, accessed 1 May 2023, pt 7.

[49] *Constantin-Lucian Spînu c Roumanie*, App no 29443/20 (11 October 2022), para 69.

[50] *Constantin-Lucian Spînu c Roumanie*, App no 29443/20 (11 October 2022), para 67.

[51] Moreover, pursuant to Article 15 ECHR, the respondent State informed the Secretary General of the Council of Europe of the intention to take measures derogating its obligations under the Convention: see *Constantin-Lucian Spînu c Roumanie*, App no 29443/20 (11 October 2022), at 48.

[52] *Constantin-Lucian Spînu c Roumanie*, App no 29443/20 (11 October 2022), at para 70.

[53] *Communauté Genevoise d'Action Syndicale (CGAS) c Suisse*, App no 21881/20 (15 March 2022) (in French).

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The applicant's stated purpose falls within the sphere of trade-union and democratic freedoms. CGAS is an association based in the Canton of Geneva, and one that defends the interests of working and non-working individuals by planning every year, among other things, a large manifestation on Labour Day. In early 2020, the worsening of the health crisis led the Swiss government to enact an *Ordonnance*[54] introducing an unprecedent blanket ban on gatherings and public meetings.[55] CGAS therefore applied to the ECtHR claiming that it had been deprived of its right to peaceful assembly, including the right to form and join trade unions.

While the Third Section found the Government's interference with CGAS's rights to be in accordance with the law, the legal reasoning focused upon more detailed and nuanced considerations as to the necessity of the restrictions. In particular, it found it compelling to balance the exercise of the right to peaceful assembly, which is of foundational importance in a democratic society, with the protection of the right to life and to health, these being conceived as 'opposing interests at stake in the very complex context of the pandemic'.[56]

In this context, the court reminds us that, even in times of pandemic, freedom of assembly remains worthy of protection in the delicate balance with other fundamental rights, such as the right to life and health. The court's reasoning, in fact, lacks an axiological hierarchy among the various rights and freedoms involved: by contrast, it considers all the interests at stake to be balanced one against the other.[57]

In their concurring opinion, Judges Krenc and Pavli described this concept with evocative words. They drew attention to the 'holistic approach to the Convention as a necessary starting point',[58] in order to avert the risk of justifying public actions and policies that, being driven by the legitimate objective of protecting legal goods of supreme importance, may turn out to be incoherent with respect to the whole set of values that are worthy of guarantee. The majority opinion also recalled that 'the Convention must be read as a whole and interpreted taking into account the harmony and internal coherence of its various provisions'.[59] It is therefore necessary to avoid legal solutions that would asymmetrically distribute, among all the individuals concerned, the sacrifices required for the enjoyment of their ECHR rights and freedoms.

Although the court did not linger in elaborating the concept of the holistic nature of human rights, this idea is well-rooted in the modern conception of human rights, conceived as inter-related one with the other and characterised

[54] Referred to in the judgment as 'Ordonnance O.2 Covid-19' of 16 March 2020: *Communauté Genevoise d'Action Syndicale (CGAS) c Suisse*, App no 21881/20 (15 March 2022), paras 19 ff.

[55] *Communauté Genevoise d'Action Syndicale (CGAS) c Suisse*, App no 21881/20 (15 March 2022), paras 5–15.

[56] *Communauté Genevoise d'Action Syndicale (CGAS) c Suisse*, App no 21881/20 (15 March 2022), at para 84 (translated from French by the Author): 'la Cour tient compte des intérêts opposés en jeu dans le contexte très complexe de la pandémie'.

[57] *Communauté Genevoise d'Action Syndicale (CGAS) c Suisse*, App no 21881/20 (15 March 2022), at para 51.

[58] Ibid, Concurring opinion, at pt II and at para 3 ff.

[59] Ibid, at para 84.

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by mutual interdependence and indivisibility, at least as their *minimum* protection is concerned: in other words, the legal protection of one right strengthens all the others, while the exercise of one right alone is meaningless if all the others are not guaranteed in a similar way.

Against this background, the court found that the Swiss government's strategy to contain the spread of the virus in early 2020 was inconsistent. On the one hand, the government allowed the simultaneous gathering of hundreds of people in workplaces, factories and offices, provided that appropriate precautionary measures such as personal protective equipment or social distancing were adopted. On the other hand, however, it provided for a general blanket ban on any other types of open-air meetings in public spaces, without even the possibility of exercising the right to peaceful assembly in compliance with social distancing and hygiene recommendations.[60]

As a consequence, the ECtHR found a breach of Article 11 ECHR in light of the importance of freedom of peaceful assembly in a democratic society and given the generalised nature and significant duration of the blanket ban. The court not only reiterated that the circumstances examined in the case of CGAS should have led the Helvetic government towards a different balancing exercise that would take into account the right to life or health alongside the right to freedom of assembly. It also required that, in the name of the 'holistic' model of protection of all Convention rights and freedoms, health policies and government actions shall be informed by reasonableness, proportionality and, especially in the case of the COVID-19 pandemic, scientific evidence.[61]

The European Court of Human Rights case law and a lesson of self-restraint

The valuable insights offered by these two ECtHR judgments contribute to the solid development of the Strasbourg case law on fundamental rights protection in time of emergency. The essence of the *CGAS* case is that legislation must always be clear, predictable and rational, especially in a time of pandemic. Without creating a hierarchy among Convention rights and freedoms, the judicial reasoning was driven by straightforward intuitions, although we would argue ground-breaking in their outcome: given the same level of risk that they entail in terms of circulation of a pandemic strain, any gathering aimed at work, demonstrations or worship should receive, in a democratic society, equal protection of the law. In addition to that, the court provided guidance on how to distribute the burdens that are necessary to face a challenge such as the one posed by the pandemic. Legislative provisions must be

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[60] This is a crucial point of the judgment. The court found that the Government failed to answer the applicant's question as to why two situations were regulated in rather different ways: working in factories and demonstrating in open-air. As a consequence, the Third Section underlined that, for a measure to be considered proportionate and necessary, 'the existence of a measure which less seriously undermines the fundamental right in question and which achieves the same objective must be excluded' (ibid, at para 87). It will be interesting to see how the Grand Chamber will consider this particular circumstance: the case was referred to the Grand Chamber on 5 September 2022 and judgment has not been delivered yet.

[61] On this, see A Pin, 'Giudicare la pandemia con la proporzionalità. Le misure anti-Covid-19, il vaglio giudiziario e il diritto comparato' (2020) 43 *DPCE Online* 2581–2595.

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guided by objective criteria that provide a solid science-based ground for decision-making. In this case, the Swiss Government failed to meet the burden of proof as to why a gathering in a workplace was permitted while a gathering for an open-air rally was forbidden.

The legal reasoning in *Spînu* differs from the one developed in *CGAS*. At first sight, it may seem that the need for the safety of prisoners and prison staff trumped the right to religious freedom and that the restrictions on freedom or religion or belief outside the prison could be compensated with online liturgical participation. Although one may not be pleased with the outcome, a closer look at the *Spînu* judgment shows that the court took a reasoned decision by which it avoided delving into the religious realm while also respecting the individual autonomy of the applicant.

On the one hand, the Romanian Government claimed that Mr Spînu's behaviour stood for poor adherence to the declared religious faith as he had applied to participate in rites of different religious denominations taking place outside the prison. Despite this, the ECtHR still considered the applicants' beliefs as sincerely held: it scrutinised the merit of the restrictive measures through proportionality review, without curtailing religious freedom by making a finding of inconsistent observance. In the ECtHR's view, physical and virtual attendance of religious ceremonies was not a trade-off and online services did not provide a valid alternative to in-person communal worship. However, in that specific case, as Pitto notes, the court did not consider worship-related aspects (either online or in-person) for their substantial capacity to satisfy the spiritual needs of the prisoner, but rather as merely witnessing the authorities' commitment to restrict freedom of religion or belief.[62]

Part IV: Beyond COVID-19 – the perils of a theologically driven case law

A common thread that we infer from the jurisprudence examined in this article lies in the controversial proportionality test. This proportionality scrutiny embodies the cornerstone of an *ex-post* assessment undertaken by the judiciary on an emergency basis. This proves to be especially crucial insofar as the complex operation of balancing competing rights, as is well known, cannot always be meaningfully carried out *ex-ante* (i.e. on a theoretical level) by the lawmaker. At the same time, the potential for the judiciary to yield to the temptation to review the validity of COVID-19 restrictions (and legislative measures in general) through an in-depth investigation of dogmas and values pertaining to the field of theology, rather than to the legal sphere alone, we suggest, is worthy of criticism.

Our analysis of the relevant ECtHR judgments in this area has shown that Strasbourg moves from the assumption that all fundamental rights and freedoms have equal standing: in order to legitimately impose limitations on one of them, the Convention requires that all the others should be considered together in the round. As a consequence, the court looks at the most critical situation during the

[62] S Pitto, 'La libertà religiosa dei detenuti durante l'emergenza da Covid-19 alla prova della Corte di Strasburgo. Alcuni casi a confronto tra le due sponde dell'Atlantico' (2023) 57 *DPCE Online* 1517–1528, at 1521.

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pandemic – the public gatherings – as a circumstance deserving legal protection from different angles, not only from the point of view of worshipping but also from the one of assemblies, protests and working. This approach is to be commended.

By contrast, in assessing the proportionality of the restrictions imposed on religious activities, we have shown that the approach adopted by the Outer House of the Court of Session in Scotland placed a stronger emphasis on the tenets and rituals peculiar to Christianity. This led to the proportionality test being tailored to the distinguishing features of that faith. We argue that the *ad hoc* analysis on the merits of the *essential* – and, vice versa, the *non-essential* – value attached to certain worship practices or activities within a given community of believers became an inappropriate watershed when the court balanced the specific weight that attaches to the right to freedom of religion and belief when compared with the exercise of other competing rights or freedoms.

Two considerations arise from the choice of judges to engage directly with the content and dogmas of specific religions and beliefs. On the one hand, the thriving judicial activism sparked by the exceptional circumstances of the pandemic, with the courts being at the forefront of the defence of the fundamental right to freedom of worship, provides the opportunity to counterbalance the arguable lack of consideration that domestic parliaments and governments give to religious demands when legislating. Religious freedom – often downplayed or disregarded by political decision-makers when weighed against other public interests perceived to be more pressing – appears to gain more space for proper consideration in the courtroom.

On the other hand, however, this endeavour to (re)attribute to freedom of worship – and, more broadly, to freedom of religion – a pre-eminent place within our fundamental rights, should not overstep the self-restraint attitude that one may expect by courts whenever they deal with the religious realm.[63] In particular, this means that the use of proportionality scrutiny as a means to undermine the separation between civil and spiritual matters should be avoided in cases such as *Philip*.[64] Although in times of emergency the boundary between these two domains becomes more blurred, a proportionality-based claim to establish from the outside any hierarchy of values between particular worship practices and dogmas for a given community of believers is neither a legitimate nor a desirable judicial prerogative.

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[63] *Contra*, see Laws LJ in *McFarlane v Relate Avon* [2010] EWCA Civ 880 at para 22.

[64] On this controversial separation see also, among others, *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73.

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