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CLOSING PLACES OF WORSHIP AND COVID-19: TOWARDS A CULTURE OF JUSTIFICATION?

Alan Greene

INTRODUCTION

In *Reverend Dr William JU Philip and others for Judicial Review of the closure of places of worship in Scotland* (*Philip*), Lord Braid in the Court of Session upheld a challenge by the leaders of several Christian denominations to the Scottish Government's COVID-19 regulations that required the closure of all churches for congregational worship and private prayer.[1] The closures were in response to increasing COVID-19 cases and the particular risk posed by the new B117 variant which emerged in late 2020. The petitioners raised two distinct issues: firstly, that the respondents lacked any constitutional power to restrict the right to worship in Scotland; and secondly, that even if it did have that power, the closure was nevertheless an unjustified infringement of their right to manifest their religious beliefs under Article 9 ECHR and to associate with others under Article 11 ECHR.

As to the first question regarding the constitutionality of the measures, the applicants highlighted the separation between church and state as affirmed in the Acts of Union and Article IV of the Declaratory Articles appended to the Church of Scotland Act 1921. This was dismissed by the Court, noting that if the state's civil power could allow for a more draconian interference with worship such as the imposition of a curfew, then logically, a less draconian interference must also be permissible too.[2] The principal question for the Court therefore was not whether to draw a clear demarcating line between church and state but rather a question of proportionality as to where the line must be drawn.[3] Here, the Court assessed the proportionality of the measures' impact on the petitioners' right to manifest their religious beliefs under Article 9 read in conjunction with their right to associate with others under Article 11 ECHR.

The Court found that these measures were a disproportionate interference with the right to freedom of religion under Article 9 ECHR as the Government failed to show that no less intrusive means other than the closure of places of worship were available to address the legitimate aim of reducing the risk of the spread of COVID-19 by a significant extent.[4] On its face, this looks like a victory for human rights enforced by a muscular judiciary scrutinising closely the justifications proffered by the political branches of government; yet overall, the judgment is unsettling as to the conception of human rights and the rule of law being protected.

LEGITIMATE AIM AND THE STATE'S OBLIGATIONS IN A PANDEMIC

[1] [2021] CSOH 32. This was done under the Health Protection (Coronavirus (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3) (hereinafter 'the regulations'), enacted under the powers devolved to Scotland by section 49 of the Coronavirus Act 2020.

[2] Ibid [75].

[3] Ibid [182].

[4] Ibid [115].

This problematic conception of human rights first arises in the Court's finding of the legitimate aim the regulations were geared towards as 'suppressing the virus to the lowest possible level.'[5] In doing so, the Court agreed with the petitioners' contention that:

> …it would not be a legitimate aim to pursue the elimination of all death, or even all premature death, which would, as the petitioners and the additional party point out, be impossible, and it could not be a legitimate aim to pursue the impossible.[6]

Despite this bald assertation, many states across the world have, in fact, adopted what has become termed a 'Zero Covid' approach to the pandemic. New Zealand, for instance has reported just 26 deaths from the pandemic at the time of writing.[7] While this total is not zero, 'Zero Covid pursues the elimination of all in-community transmission of the virus and, by extension, the elimination of all deaths. Consequently, this goal is not impossible and the Court's assumption that the only correct approach to a pandemic is to mitigate the spread of a virus rather than to contain it entirely is myopic and, further, would substantially restrict any response to a future pandemic.[8]

Related to this myopia is the absence of any regard to the legitimate aim of protecting the rights of others, despite the very clear reference to this qualification in Article 9.2 ECHR. Throughout the pandemic, public discourse has been dominated by a libertarian conception of rights as creating a zone of non-interference around a person.[9] Former UK Supreme Court Judge Jonathan Sumption has been in the vanguard of this movement, alongside some Conservative MPs who established a 'Covid Recovery Group,' concerned about the impact of COVID-19 restrictions on civil liberties.[10] Human rights, according to this understanding, align with Isaiah

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[5] ibid[99].

[6] Ibid.

[7] 'New Zealand: WHO Coronavirus Disease' *World Health Organisation* (last updated 4 June 2021) < https://covid19.who.int/region/wpro/country/nz> accessed 4 June 2021.

[8] Rachel P Walensky and Carlos del Rio, 'From Mitigation to Containment of the COVID-19 Pandemic: Putting the Sars-CoV-2 Genie Back in the Bottle' (2020) 323(19) *Jama Network* 1889,1889

[9] See for instance Jonathan Sumption, 'This is how freedom dies': The Folly of Britain's Coercive Covid Strategy' *The Spectator* (28 October 2020) < https://www.spectator.co.uk/article/-this-is-how-freedom-dies-the-folly-of-britain-s-coercive-covid-strategy> accessed 4 June 2020. This has impacted upon how fields other than law conceptualise human rights issues raised by pandemics. For instance, a King's College London Study seeking to analyse the link between lockdown scepticism and Brexit conceptualised the human rights issues in a pandemic solely in terms of 'limits on civil liberties'. See James Dennison and Bobby Duffy, 'Lockdown Scepticism and Brexit Support: Products of the same values divide?' *The Policy Institute: Kings College London* (February 2021) < https://www.kcl.ac.uk/policy-institute/assets/lockdown-scepticism-and-brexit-support.pdf> accessed 7 June 2021, 7-9.

[10] See Robert Sutton, 'The Protection of civil liberties must be placed at the heart of a reformed Public Health Act' *Conservative Home* (1 January 2021) < https://www.conservativehome.com/platform/2021/01/robert-sutton-the-protection-of-civil-liberties-must-be-placed-at-the-heart-of-a-reformed-public-health-act.html> accessed 4 June 2021.

Berlin's negative conception of liberty, essentially requiring a state to refrain from acting rather than taking positive steps to protect and vindicate rights.[11]

Absent from this conception of rights are the positive obligations human rights law places on states to protect and vindicate these rights. In a pandemic, the state has a positive obligation to protect people's right to life under Article 2 and to ensure that conditions in hospital do not deteriorate to such an extent that people are subject to inhuman and degrading treatment in violation of Article 3.[12] While it may be the case that a political decision was taken by governments across the UK not to frame the state's response to the pandemic in terms of its human rights obligations, there is no reason why the judicial branch could not make the positive obligations to protect human rights in a pandemic clearer. To this end, Lord Braid's silence on the state's duty to protect the rights of others is further underlined by his quoting with approval of US Supreme Court's Gorsuch J's contention that 'Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical'.[13] Gorsuch J's judgment in *Roman Catholic Diocese of Brooklyn v Cuomo* legitimates minimal, if any, obligations on the part of the state to protect and vindicate the rights of others vis-à-vis the rights of the individual.[14] The implied endorsement of such an overly-libertarian conception of rights by Lord Braid would absolve the state of any obligation to rights and, in turn, diminish the emancipatory potential of human rights, the very reason the human rights movement has been so successful.[15]

PROPORTIONALITY, DEFERENCE AND A CULTURE OF JUSTIFICATION

Upon satisfying himself that the measures pursued a legitimate aim, Lord Braid followed the four-stage proportionality test as set down by the Supreme Court in *Bank Mella v Her Majesty's Treasury (No 2)*: firstly, whether the objective being pursued is sufficiently important to justify the limitation of a protected right; secondly, whether the measure is rationally connected to the objective; thirdly, whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and fourthly, whether, 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, the former outweighs the latter.[16] The Court found that the Government had failed the third stage—whether a less restrictive measure could have been deployed:

> Standing the advice they had at the time, they have not demonstrated why there was an unacceptable degree of risk by continuing to allow places of worship which employed effective mitigation measures and had good ventilation to admit a limited number of people for communal worship. They have not demonstrated why they could not proceed on the basis that those responsible for places of worship would

[11] Isaiah Berlin, *Four Essays on Liberty* (OUP 1969) 119-172; Alan Greene, *Emergency Powers in a Time of Pandemic* (Bristol University Press, 2020) 41-43.
[12] Greene ibid Ch 2.
[13] *Philip* (n 1) [125]
[14] *Roman Catholic Diocese of Brooklyn v Cuomo* (2020) 592 US ___ 3.
[15] Greene (n 11) 41-43.
[16] *Philip* (n 1) [100]; [2013] UKSC 39, [68].

> 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 lowers degree of scrutiny.[17]

In reaching this conclusion, Lord Braid makes frequent reference to the 'margin of appreciation' afforded to the Government when assessing whether a measure is rationally connected to the objective and also when assessing the proportionality of the measures enacted. The reliance upon this doctrine of the supranational European Court of Human Rights (ECtHR) by a domestic court is confusing and the concept of deference— the respect accorded to the initial decision-maker on the grounds of their superior expertise, competence, or legitimacy—better encapsulates what Lord Braid is referring to when discussing the margin of appreciation. [18] Lord Braid rejected the respondent's contention that a decision involving scientific judgment is best left 'to an executive armed with expertise and experience not available to the court'; however, the judgment misses the ideal opportunity to further demarcate and clarify the constitutional function of the judiciary in a pandemic when contrasted with the performance of courts in national security crises..[19] National security crises tend to see courts take a deferential approach to emergency powers, owing to the executive's perceived democratic legitimacy and expertise. While the question of democratic legitimacy is still relevant to pandemic emergency powers, claims regarding the executive's expertise are significantly weaker. In contrast to national security crises, there is no reason why information pertaining to pandemic decision-making cannot be as transparent as possible and cannot be made available to courts or the legislature to scrutinise. Claims from the executive branch that it has superior expertise or that it cannot 'show its work' to the other branches of government should be rejected; deference, if there is to be any, must be earned. Instead, Lord Braid focuses primarily on dismissing the contention that the science was in dispute rather than on this issue of the constitutional checks and balances on the executive in a time of emergency.

By refusing to defer to the executive and, instead, closely scrutinising executive's reasons for closing places of worship, Lord Braid found that the factual information upon which the decision was based was wrong.[20] He referred to the basis of the respondent's finding that 800,000 people in Scotland regularly engaged in congregational worship. The Court interrogated this figure arguing that the contention that it was estimated based upon a percentage of the some 2.9 million people who declared some religious affiliation in the 2011 census data was erroneous. This was compounded by the failure to have any regard to the 'spiritual harm' potentially caused by an inability to worship.[21]

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[17] Ibid [115]
[18] Aileen Kavanagh, 'Defending deference in public law and constitutional theory' (2010) 126(Apr) *Law Quarterly Review* 222, 223.
[19] *Philip* (n 1) [111].
[20] ibid [113].
[21] Ibid [46].

LORD BRAID AND A CULTURE OF JUSTIFICATION

This degree of scrutiny deployed by the Court in assessing the government's figures regarding the 800,000 people in Scotland regularly engaged in worship has the potential to align with and facilitate the development of 'a culture of justification':

> … a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not in the fear inspired by the force at its command.[22]

A culture of justification thus conceptualises all branches of government as involved in protecting and vindicating the rule of law. Through transparency, scrutiny and accountability, a culture of justification can foster healthy scrutiny of decision-makers and, in turn, encourage better decision-making. A culture of justification is based on a thicker conception of the rule of law than most formalist understandings of it, imbuing it with more substantive values of which, human rights tend to feature prominently.[23]

However, concluding that this judgment is a step towards a culture of justification would be premature as the judgment ultimately results in a rather confusing and muddled conception of the rule of law being vindicated. Firstly, as noted above, the substantive conception of the rule of law purportedly vindicated is problematic in light of overly-libertarian view of the legal subject whose rights are being protected. Secondly, the conception of the rule of law defended by Lord Braid is further confused by his finding that guidance had not been considered as a less restrictive approach to the question of the operation of places of worship during a pandemic. In essence, Lord Braid is suggesting that vaguer norms of questionable legitimacy should have been considered as a means of regulating places of worship during a pandemic. The problems that this vagueness can cause is evident from Ireland's approach to religious worship during the pandemic; a jurisdiction expressly acknowledged by Lord Braid in *Philip*, noting that Ireland prohibited religious worship during the pandemic. While this may be true from the first lockdown, it is unclear whether religious worship was actually prohibited during Level 5 restrictions (the highest level of COVID-19 restrictions) in effect during the second lockdown.[24] Despite the Minister for Health telling the Dáil that holding religious services was not a criminal offence but that religious services are 'required to move online', reports emerged of An Garda Síochána (the Irish police force) threatening prosecution of those who organised or attended religious services.[25] In May 2021, however, the Irish High Court refused to hear a challenge to the COVID-19 restrictions on religious worship as the regulations

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[22] Etienne Mureinik, 'A Bridge to Where: Introducing the Interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* 31, 32.

[23] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006) 12–13; See also Thomas Poole, 'Constitutional Exceptionalism and the Common Law' (2009) 7 *ICON* 247, 264

[24] Oran Doyle, 'Religious Services and the Rule of Law: Authority and Coercion' *COVID-19 Law and Human Rights Observatory* (9 March 2021) < https://tcdlaw.blogspot.com/2021/03/religious-services-and-rule-of-law.html> accessed 3 June 2021.

[25] Ibid.

had lapsed and so were moot.[26] The Irish experience raises questions as to the Court of Session's contention that less restrictive measures such as 'guidance' were not given due consideration by the Scottish authorities and so rendered the regulations disproportionate. Here, the Court overlooked the potential damage to the rule of law caused by guidance rather than formal legal measures. Relying upon guidance may align to an extent with the idea of policing by consent or seeking to use the least coercive measures possible. However, reliance on guidance raises questions as to what actually law is, particularly in the eyes of non-legally trained persons. Clarity and certainty in ex-ante prescribed laws are core elements of even the thinnest conception of the rule of law; yet the Court in *Philip* found that vaguer norms of uncertain legitimacy in the form of government guidance should have been considered. [27] It is somewhat ironic, bordering on contradictory that a measure that is prescribed by law, thus satisfying the first requirement of Article 9 can then fall foul of a proportionality test on the basis that guidance was not considered.

CONCLUSIONS

Lord Braid's judgment does not necessarily mean that places of worship could never be closed in a pandemic. If better evidence had been adduced by the executive that such closures were necessary, this could potentially satisfy Article 9. A judge placing greater emphasis on the rights of others may also come to a different conclusion. Finally, the option would also be open for a state to derogate using Article 15 ECHR. The UK was not one of 10 states that derogated from any provision of the Convention in response to COVID-19; however, no state expressly derogated from Article 9 ECHR.[28] If a government wishes to close places of worship for more than two months, it may be that the correct approach to do so would be through Article 15 ECHR rather than under the ordinary proportionality test built into qualified rights or the stated limitations in limited rights such as Article 5. The use of derogations would facilitate the necessary exceptional response to the pandemic while preventing the interpretation of the ordinary ambit of Convention rights to accommodate them. This, in turn can mitigate the possibility of these powers becoming permanent or, as is more likely in the context of pandemic emergency powers, their precedent being used to justify similar powers being deployed outside of the pandemic.

In the instant case, however, it would have been for the UK government rather than the Scottish Government to derogate from the Convention. Given the devolved nature of the UK's coronavirus response, coupled with the frequency with which regulations and guidance changed across the different regions of the UK and, indeed, states in general, a case could be made that this fluidity means that derogations are ill-suited to confront a pandemic. This, however, assumes that the derogation notification

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[26] Mary Carolan, 'Declan Ganley's case of Covid-19 restrictions on Mass now moot, judge says' *The Irish Times* (18 May 2021) < https://www.irishtimes.com/news/crime-and-law/courts/high-court/declan-ganley-s-case-over-covid-19-restrictions-on-mass-now-moot-judge-says-1.4568591> accessed 4 June 2021.

[27] Joseph Raz, *The Authority of Law* (2nd ed OUP 2009) 226.

[28] 'Reservations and declarations for Treaty No.005—Convention for the Protection of Human Rights and Fundamental Freedoms' *Council of Europe* (Status as of 8 June 2021) https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations accessed 8 June 2021.

process is cumbersome, requiring a detailing of the various regulations in question and the Convention articles being derogated from. The Council of Europe, however, has been extremely lax with regards to the level of detail required for a valid derogation. A derogation notice does not have to outline the specific provisions of the Convention being derogated from and while some furnishing of the emergency legislation and regulations in question is necessary, the requirement of notification is not a prior one if there are good reasons for delaying the notification. [29] It is likely therefore that a broad derogation notice with regular furnishing of the relevant regulations to the Council of Europe would satisfy the procedural requirements of Article 15. For example, Serbia's derogation from the Convention did not stipulate which provisions of the Convention it was derogating from and the notification of its withdrawal of derogation listed a series of varying regulations.[30]

Ultimately, *Philip* has seen pandemic emergency powers declared unlawful due to their impact on human rights. However, the judicial reasoning deployed raises deeper questions as to the conception of human rights protected, the separation of powers, and the formulation of the rule of law that shaped the judgment. There is no clear-cut thread running through Lord Braid's judgment that demonstrates a coherent understanding of these three distinct but interlinked and fundamentally important aspects of constitutionalism and constitutional theory. At times, Lord Braid strays towards the idea of a culture of justification; however, the overly libertarian conception of rights latent in his judgment that fails to consider the right to life of others, compounded to an extent by the failure to consider the negative aspects of relying upon executive guidance rather than formally prescribed powers substantially undermines this culture of justification thesis. To conclude therefore that this judgment is a victory for human rights and the rule of law would be premature.

[29] *Ireland v United Kingdom* (1960–61) 3 ECHR (Ser.A).
[30] Reservations and declarations for Treaty No.005—Convention for the Protection of Human Rights (n 30).