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Beyond Belief

Defending religious liberty through the British Bill of Rights

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Foreword *by David Burrowes MP*

I commend and congratulate ResPublica for the careful analysis and insight offered by this thoughtful Report on protecting religious liberty and literacy. I am delighted that *Beyond Belief: Defending religious liberty through the British Bill of Rights* is shedding light on this pressing, and often overlooked issue. Religious liberty and literacy are good partners, since illiteracy often forms the basis for a loss of religious liberty. Time is pressing as we have seen evidence of religious liberty being downgraded compared to other human rights.

Whilst Britain is a nation of great tolerance, I fear that religious liberty could go the same way as other countries where it becomes the poor relation in human rights. Religious freedom is a universal human right which is foundational to a good society. Public expression of religion is to be celebrated and encouraged, not shunned and marginalised.

As a Director of the Conservative Christian Fellowship and a member of both the Christians in Parliament and Religious Freedom and Belief All-Party Parliamentary Groups, I am delighted that ResPublica has published a report which highlights the key issues facing religious communities in the UK today.

It delivers a strong set of recommendations for the Government in light of future human rights based legislation. In the absence of a clear legal framework that protects religious freedom, we risk losing the public expression which has greatly benefitted British society. We need to look seriously at the Report's support for religious freedom to be enshrined in the British Bill of Rights, and monitored by the existence of a Religious Freedom Index and a Religious Policy Review Council.

The conclusions are clear that we must act to protect religious liberty and literacy. It is my hope that this report will add greatly to the academic debate amidst growing indifference and intolerance towards religious liberty.

I welcome the recommendations as to how the UK Government can ensure that religious tolerance and liberty is protected at law. The recommendations of this report should stand as a challenge to the developing status quo, and as a call to action for those who continue to turn their backs on religious rights as a fundamental human right sacred to us all.

1. Introduction

We are, nowadays, predisposed to think that the language of rights and equality is synonymous with the language of justice and goodness. We who believe in a free and plural society used to think that rights were meant to protect difference and ensure equity between those of different dispositions, faiths and creeds. But a curious inversion seems to have taken place. Where once rights were used to defend difference and were deployed to ensure society's plurality and diversity, now they are utilised to erode difference and enforce a uniform and unwelcome conformity on society in general, and on religious minorities in particular. Since we live under a liberal understanding of rights, it is almost as if liberalism has moved from a *modus vivendi* approach, in which a reasonable accommodation is made between conflicting parties to allow them all to live in peace, to a 'be like me' liberalism that insists that all share its worldview or suffer the consequences.

We would like to restore rights to their proper role and position, which is to help foster understanding and respect between the different communities and cultures that make up Britain. For that to happen, we have to rescue the language of rights from its current practice, where rights accrue not to who is right, but to whoever is the most politically connected and can persuade the state to take their side. What we are arguing for is a return to the original understanding of rights, where reasonable accommodation is made once more between different minorities and nobody is more equal than anyone else. The new British Bill of Rights, for us, currently represents the best opportunity to engender such a transformation.

2. What's Gone Wrong with Rights?

Rights do not tell us what is right. Rights, contrary to popular assertion, are neither primary nor self-evident. If they were, there would be little to say about them. Since rights are not primary, their legitimacy depends on a prior conception of what the 'good' is and how we know it. When rights replace the moral foundation from which they used to derive, they are made to carry more weight than they were ever supposed to bear. For rights to command assent, the foundation on which they rest must do so as well.

Yet if rights require us to recognise common values, we are in trouble. For we in the West are now deeply divided around issues of class, place, and race.[1] It is no longer clear that moral universals command widespread recognition or support. Instead, assertions of rights now generate far more dispute than agreement. And what this dispute reveals is how little we now agree on in terms of shared values and shared futures. Failure to agree on the 'thick' foundation on which rights-based discourse depends has resulted in a deeply damaging subjectification of rights. Once they lose any ground in the objective order, rights reflect nothing more than the moral perspectives of their bearers. Relativising rights disconnects them from their 'rightness' and correlates them instead to the political power of the group that invokes them.

Unless the intrinsic dignity of the human person is grounded in a social order that in turn understands itself to reflect a deeper normative reality, rights cannot any longer protect the human person. Without rehearsing the complex historical story of the relativisation of rights, it is worth pointing out that these developments were further compounded when this loss of objectivity was turned into an objective characterisation of rights by the cosmopolitan aims of those who drafted the United Nations Declaration of Human

Rights. Their understandable bid for universal consensus meant that they carefully avoided anchoring rights in any shared conception of objective right (except, perhaps, for somewhat unilluminating appeals to 'inherent dignity' and the 'human family'), but instead adopted as universal a particular liberal notion of right.

This decision ushered in a radically new and deeply incoherent understanding of subjective rights as foundational rather than derivative. What this has meant in practice is that liberal notions of rights as primarily about individual assertion and choice have been newly enthroned as the objective truth about rights, relegating all talk of virtue, character, duty, and the nature of the good to the margins of public discourse. In short, the uncoupling of rights from an objective foundation has allowed one ideology or group to capture the language and deployment of rights at the expense of everybody else.

So configured, rights are morphing into an engine for inequality and dissent between members of the very minority groups that they were supposed to protect. Modern liberalism is now in danger of transforming its greatest achievement into its most destructive legacy. It has, in effect, encouraged subjective rights to become legal weapons for one minority group to wield against another, driven the culture wars into the courtroom, and forced judges to settle questions of belief and practice about which they can be expected to know little.

Rights-based frameworks have helped to fuel the rise of politicised ideologies and incentivised minority groups to compete against each other in a bid for majority assent. As these conflicts intensify, so too does the perception that the bureaucratic state offers the only way of resolving them, which in turn strengthens the grip of the state on the liberties of its citizens as it assumes the role of ultimate arbiter of what constitutes human dignity and flourishing. Rights are spurring the disintegration of shared social norms and helping to awaken forms of political extremism not seen in the West for decades. As it becomes clear that some minority groups are more equal than others in the eyes of the law, resentment grows and with it the risk of political discord and civic unrest.

How, then, can we resist the sacrifice of our ancient liberties on the altar of new ideologies? First, we must all acknowledge that to differ with our fellow citizens is not to discriminate against them. Respecting difference is, in fact, the very cornerstone of our common life. Civic harmony is grounded in the reasonable accommodation of competing – even wholly irreconcilable – conceptions of human flourishing.

Second, we must recognise that legislative frameworks designed to uphold equality have unwittingly created the opposite. This is not because rights-based frameworks are unsuited to this task, but rather because rights have ceased to be anchored in a shared conception of the common good. They have been replaced by a complex network of statutory duties that work to disintegrate communities. It is time for us to accept that rights can only operate successfully if they are rooted in a no doubt contested but nonetheless common understanding of human liberty, dignity, and difference.

The most acute symptom of this crisis in Britain today is the steady erosion of the fundamental freedom to live according to beliefs held on the grounds of thought, conscience, and religious belief. This freedom is enshrined in every major international declaration of human

rights and effective in domestic law through the incorporation of Article 9 of the European Convention on Human Rights in Schedule 1 of the Human Rights Act 1998.

The provision expressly confers the 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.' Yet a growing body of legal judgments suggests that the courts have begun to develop a reductive conception of this freedom. Defence of the right to have and to practise certain beliefs is now mistaken for the defence of the content of those beliefs. But as the influential gay-rights campaigner Peter Tatchell argued in relation to a recent judgment, 'in a free society, people should be able to discriminate against ideas they disagree with.'[2]

Moreover, legislation is now being used to force free citizens to act in ways that contradict their beliefs and conscience. Isaiah Berlin once claimed that a hallmark of liberal pluralism was its subordination of positive liberty (the freedom to require others to do something for you) to negative liberty (the freedom not to be required to do something for others).[3] We are now entering an era in which the reverse is true.

The aim of this report is to draw attention to the implications of these incursions on religious freedom for the future of liberty and dignity of all, and to explore ways in which we can recover a place for the celebration of difference, a value that Britain has championed and safeguarded for centuries and without which it cannot hope to remain an authentically liberal society.

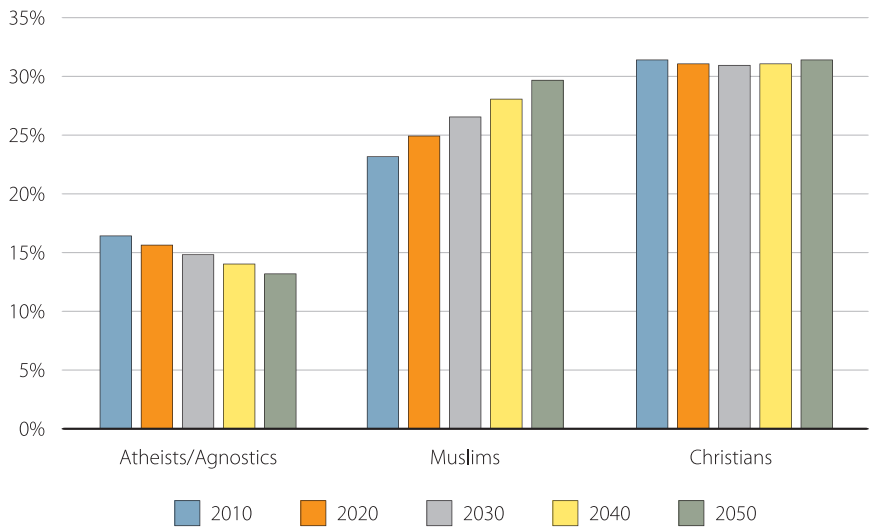
3. The Struggle for Religious Freedom in Britain

In the last days of New Labour, Royal Assent was given to the Equality Act 2010, which has brought a deluge of anti-discrimination laws in its wake. The scope of the legislation is so wide that it has made almost every action and decision taken by an employer or service-provider subject to a potential challenge in the English courts. Worse, the discretion conferred on judges to find an appropriate balance between competing rights is so broad that case-law provides very little prospective indication of how a scenario might be decided. The primary effect of the regime has been to fuel an atmosphere of deep mutual distrust between the groups constituted by the nine characteristics it was intended to protect.[4]

The legislation offers an especially stark example of the collapse of the legislature's confidence in our ability as employers, employees, service-providers and service-users to treat each other with respect for our differences. Ordinary social interactions and civic freedoms are increasingly policed by a ceaselessly expanding body of laws, regulations, and workplace policies. The erosion of religious liberties has licensed the state to extend its control over the liberties of all its citizens. The paradoxical effect of the new regime has been to suffocate rather than stimulate public debate about the meaning of equality and difference, values that Britain has championed for so long against their enemies.

Spirited and intemperate attacks on the content of ideological beliefs have formed part of the fabric of public life in Britain for centuries. What distinguishes challenges to religious belief in recent years is that they have received increasingly consistent backing from government, lawmakers, and judges. Magistrates, teachers, foster parents, doctors, and therapists have been disciplined, demoted, or sacked for living in accordance with their religious beliefs. A recent survey by the Equality

Figure 1: The Trend in Global Belief up to 2050



Source: Pew Research Centre (2015)

and Human Rights Commission of experiences concerning religious belief of employers, employees, service-providers and service-users indicates high levels of discrimination in recruitment processes, leave for religious holidays and holy days, and wearing religious symbols in the workplace.[5]

Quite apart from their wider import for the future of liberty and dignity in Britain, compromises to religious freedom seriously endanger the contributions of faith communities to the common good. We have analysed contributions made by the Church of England elsewhere,[6] and research has also shown that these strengths are shared by all mainstream Christian denominations as well as other religions.[7]

Yet the very freedoms that fostered these unique and lasting contributions are more energetically policed than ever before. Even though nearly 84 per cent of the world's population identify as religious, while those who self-identify as atheists or agnostics are expected to drop to 13 per cent of the world's population by 2050 (a dramatic fall from its peak of 20 per cent in the 1970s),[8] the increase in the popular appeal of secular humanism in Britain has made this global reality a difficult one for us to grasp. The graph above illustrates the anticipated decline in adherence to agnosticism and atheism.

Society must confront the fact that at a global and national level religious social capital is being jeopardised by incursions on the fundamental right of citizens to manifest religious belief.

In the British context, the loss of religious freedom is putting at risk a range of social goods that are difficult to quantify (and so routinely ignored).

Although only a small fraction of these incidents have been scrutinised in a judicial context, a body of evidence reveals a growing preference in the English courts for subordinating the right to manifest one's religious beliefs to the right not to be discriminated against on the basis of sexual orientation *even if* some form of reasonable accommodation between these rights is possible. The box below outlines this history.

Box 1: The Case History of the Encroachment on Religious Liberty

- In *Lee v. Ashers Baking Co.* (Court of Appeal in Northern Ireland) (October 2016), the Christian owners of a bakery who had refused to provide a customer with a cake decorated with a slogan in support of same-sex marriage were found to have unlawfully discriminated against him. The Court of Appeal further held that Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 were not incompatible with Articles 9, 10, and 14 of the European Convention on Human Rights.

- In *Bull & Bull v. Hall & Preddy* (Supreme Court) (November 2013), the Christian owners of a bed-and-breakfast who had refused to provide accommodation to male civil partners lost a claim against them under the Equality Act (Sexual Orientation) Regulations 2007 on the basis that their refusal could not be justified by their religious belief that sexual relations outside heterosexual marriage were sinful.

- In *Azmi v. Kirklees Metropolitan Borough Council* (Employment Appeal Tribunal) (March 2007), the EAT upheld a tribunal's finding that an instruction to the claimant to remove her veil when carrying out her duties as a bilingual support worker was neither direct or indirect discrimination on grounds of religion and belief.

- In *Eweida v. British Airways* (Court of Appeal) (February 2010), a Christian employee of British Airways who had been sent home without pay for refusing to remove or conceal a necklace with a silver cross lost a claim for indirect indiscrimination. Although the Supreme Court refused to hear her appeal, the European Court of Human Rights found that her right to manifest her religious belief under Article 9 of the European Convention on Human Rights had been infringed.

- In *R (Watkins-Singh) v. Aberdare Girls' High School* (High Court) (July 2008) a school's decision to refuse to allow a Sikh pupil to wear a religious steel bangle was held to constitute indirect discrimination on grounds of race under the Race Relations Act 1976 and on grounds of religion under the Equality Act 2006.

- In *Grainger Plc. v. Nicholson* (Employment Appeal Tribunal) (November 2009), it was held that belief in climate change constituted a 'philosophical belief' for the purposes of the Employment Equality (Religion or Belief) Regulations 2003 and that the jurisprudence on Article 9 of the European Convention on Human Rights was directly material.

- In *Ladele v. London Borough of Islington* (Court of Appeal) (November 2009), a Christian registrar who was dismissed for refusing to officiate at ceremonies for the civil partnerships of same-sex couples on the basis of her religious beliefs was found not to have been discriminated against. Her subsequent application to the European Court of Human Rights claiming that the United Kingdom had infringed her rights under Article 9 and Article 14 of the European Convention on Human Rights was dismissed.

Recent cases illustrate just some of the pressures being placed on one minority group to conform to the ideology of another.[9] This problem was especially acute in *Lee*, since it was clear in that case that the claimant's sexual orientation had no bearing on the defendants' decision to refuse to provide the service. The judgment highlights the degree to which sexual orientation is not only a protected characteristic, but also a protected ideology, an ideology that now appears to supersede in law the freedom to conduct oneself or one's business in any way that might signal disagreement with it.[10]

Although most of the leading legal cases deal with the freedom to manifest Christian beliefs, they raise issues that threaten the basic freedom of every citizen to manifest principled dissent on grounds of thought, conscience, or religion. The English courts have interpreted freedom of thought under Article 9 very broadly to include a range of philosophical beliefs, including political ideologies and even belief in anthropogenic climate change.[11]

We must also not overlook the treatment of religious groups that are so isolated from mainstream society that few of us are aware of the abuses of their freedoms of religion and conscience. Take, for example, the response to news that the Hasidic Belz sect, which runs two schools in Stamford Hill, had insisted that pupils be driven to school by men. Nicky Morgan (then Education Secretary) launched an immediate investigation, loudly condemning the practice as 'completely unacceptable in modern Britain.'[12] This heavy-handed attempt by the state to change the practice of a stable and peaceful religious community on the basis that it was insufficiently 'British' shows how much work remains to be done before we recover the authentically British virtue of accommodating social differences with sensitivity and respect.

4. The Costs to Society of Religious Freedom Denied

No segment of civil society can compete with the quantity and diversity of services that religious communities provide. Moreover, when weighing the social costs of constraints on religious freedom, it is necessary to bear in mind not only the *quantity* but also the *quality* of welfare that they can provide. It is now widely acknowledged that since the kind of welfare they provide is both local and personal, religious organisations are in a position to distribute welfare much more effectively than central or local government. This section outlines the costs to society of denying true religious liberty across different areas of public policy.

The Commercial Sector

Nearly a decade after the global financial crisis, religious freedom continues to be one of the most unacknowledged factors driving economic recovery around the world. The challenges of quantifying the socio-economic value of religion are considerable, but one recent report – the most rigorous and comprehensive of its kind – has indicated that contributions by religious individuals and organizations in the United States alone amount to around US$1.2 trillion annually.[13] Yet the hostility and litigiousness towards business-owners – florists, bakers, photographers, hoteliers, and restaurateurs – have now reached unprecedented levels. The epidemic of incursions on the religious freedom of business-owners by well-funded activist groups in the United States has now begun to affect commercial life in Britain. Until recently, the most fiercely contested areas in the struggle for religious freedom involved the public sector. But recent decisions have made it clear that freedom of conscience, thought, and religion are under threat in the private sector as well. In *Lee*, for example, it was held that suppliers of goods and services 'may provide the particular service to all or to none but not to a selection of customers based on prohibited grounds.'[14]

The implications of this trend for the retail and consumer industry in Britain are disquieting. It amounts, in effect, to an erosion of the basic principle that citizens should be free to operate businesses and to enter into contracts on terms of their choosing, so long as this is in accordance with the spirit of the law. The law should ensure that no one is required to choose between providing a good or service in a manner that requires them to act in violation of their deeply held religious belief, or withdraw from service provision with the potential loss of livelihood (or indeed non-religious beliefs as in the case of *Grainger*, detailed in Box 1).

These decisions imperil the flourishing of free enterprise, since they effectively exclude from the commercial sector *every* citizen who is unwilling to compromise rational and sincerely held beliefs about the nature of marriage, beliefs commonly associated with, but not confined, to religious teachings. This is not to say protections are not required against racial, gender and other forms of discrimination (as no recognised belief system advocates such discrimination), but when it comes to questions of religious belief or conscience, we believe that a certain degree of reasonable accommodation is required.

The Voluntary Sector

It is well known that religious believers tend to make greater contributions to social capital than their fellow citizens. These sociological effects seem to persist even after controlling for gender, education, age, political beliefs, and income.[15] It has been estimated that the Church of England alone reaches nearly 10 million people a year through its community projects in addition to ordinary church services.[16]

Religious believers are also 3.6 times more likely to engage with non-religious causes than those who are non-religious.[17] There is even evidence to suggest that the positive relationship between religious attendance and secular volunteering is higher than it is between religious attendance and religious volunteering.[18] Moreover, religious contributions to social capital tend to be more durable than secular contributions, since they are typically motivated by more than mere pragmatism or a focus on any one single social problem. In particular, religious believers appear to be less concerned with quantitative measures of instrumental success in social enterprises and much more focused on factors such as faithfulness and obedience to God.[19]

Whatever the merits of arguments in support of confining religion to the private sphere, it now seems clear that Robert Putnam was correct to observe that while 'privatized religion may be morally more compelling and psychically fulfilling … it embodies less social capital' than active participation in faith communities.[20] Although the specific forms of religious social capital do not differ from secular contributions, the evidence does suggest that the content of religious doctrines and ethical teachings can explain the greater relative contributions by religious believers.[21] Religious believers draw on their religious experiences and the distinctive moral teachings of their faith as motivation for service to the wider community.[22] These findings are line with research indicating positive correlations between levels of civic engagement and depth of religiosity. The greater the intensity of religious belief, the greater the commitment to volunteerism; and the higher the level of religious participation, the higher the likelihood and level of volunteering.[23]

This would imply that incursions on religious freedom will ultimately damage the fabric of civil society. The more that religious beliefs are subordinated to other protected characteristics, the more religious social capital will decline. One egregious instance of the damage that equalities legislation can inflict on society has been the forced closure of Catholic adoption agencies as a result of their policy of placing children with heterosexual couples. The agencies made it clear what motivated the policy was not the desire to discriminate unjustly against homosexual couples, but rather the belief that children should be protected from environments that they believed were less than optimally conducive to their flourishing. Because of the actions of the last Labour Government, all twelve Catholic adoption agencies have been forced either to close or to sever their ties with the Church.

The increasing numbers of British citizens who do not self-identify as religious may find it difficult to recognise the negative social impact of ongoing erosions of religious freedom. In the absence of clear and regular data on the contribution of religion to the common good, this is hardly unsurprising. While some steps have been taken to quantify social capital, we recommend that the Office for National Statistics incorporate a specific focus on measuring spiritual capital into its Measuring National Well-Being programme. These annual audits would form the basis for a Religious Social Capital Index (RSCI), a recognized and respected standard that would demonstrate to civil servants, policy-makers, and the wider public the variety and extent of contributions by faith communities to national prosperity and well-being.[24]

It is not enough for such a measure to be implemented at the national level alone. We therefore recommend that a European Religious Freedom Index (ERFI) be established by the Council of Europe, the aim of which would be to monitor compliance with the letter and spirit of Article 9 of the ECHR in its 47 member states.[25]

The Universities Sector

The Christian ethos has been no less central to the historical development and flourishing of Britain's universities. Yet it is not an exaggeration to suggest that British universities now lead the world in undermining academic freedom and religious freedom in particular.[26] The vast majority of incidents go unreported in the national media, but the list of those that have been reported is extensive. In 2006, the University of Edinburgh banned a course organized by its Christian Union on the basis that its promotion of chastity and traditional marriage contradicted the university's values of diversity and equality.[27] One survey found that 13 student unions have adopted so-called 'BDS' (Boycott Divestment Sanction) policies against Israel, the only state to be targeted in this way at any of the country's 115 universities.[28] At UCL, police were summoned when around 100 protesters attempted to disrupt a meeting of the 'Friends of Israel' society that had been reinstated by the university authorities after the student union voted to ban it.[29]

In April 2013, the legal group Christian Concern organized a conference on 'How to Engage Secular Culture' at Trinity College, Oxford.[30] After students protested that the group's opposition to state recognition of same-sex marriage made it 'radical' and 'intolerant,' the President of the college, Sir Ivan Roberts, not only agreed to cancel the booking, but issued

an apology for agreeing to host it in the first place. In November 2014, Oxford Students for Life, a group made up predominantly of Catholic students, organized a debate on abortion at Christ Church, Oxford, between two widely respected male journalists. An aggressive and often abusive campaign was conducted on social media that attacked the group for choosing 'cis-gendered' men. The college authorities refused to grant the group permission to hold the debate.[31]

We should not overlook the fact that the climate of hostility to free expression in universities began with incidents that overwhelmingly involved religious freedom. It was just under a decade before they began to involve less exclusively religious questions. As so often, assaults on religious freedom were a signal of more extensive assaults to come.

Many universities have now committed themselves to 'statements of values' that are plainly political. The unwitting effect of these policies has been to incentivize university authorities to *resist* reasonable accommodations of traditional religious beliefs, since resistance provides ideal opportunities to signal the strength of their preference of some minorities over others. The pattern of institutional hostility to religious groups flatly contravenes section 43(1) of the Education Act (No.2) 1986, which places an unambiguous duty on educational institutions to take reasonably practicable steps to secure freedom of speech within the law for their members, students, employees, and visiting speakers.

Similarly, section 202(2)(a) of the Education Reform Act 1988 requires university authorities to 'ensure that academic staff have freedom within the law to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges that they may have at their institutions.'

Both of these provisions are now routinely ignored by most universities and the evidence suggests that censorship in higher education has reached epidemic proportions.[32] A more concerted effort to address breaches would send a clear signal to administrators and educators that the Government is committed not only to freedom of religion, but to freedom of speech more generally. Upholding these fundamental values is vital to the future success and prestige of higher education in Britain. We recommend that the Government fulfils its duty by enforcing these items of legislation and scrutinising the culture of 'safe spaces' on university campuses.

Civic and Political Participation

The dramatic decline in levels of civic and political participation in Britain in the years after the Second World War has been well-documented. With one or two exceptions, membership of trade unions,[33] political parties,[34] and voluntary societies[35] has collapsed with startling speed in recent decades. In the view of many, the social and civic trust that these organisations historically sustained has contributed to a predictable and widespread collapse of public confidence in politicians, journalists, and business leaders.

A similar story can be told in relation to the declining participation in institutional forms of religion. Although a range of complex factors account for this phenomenon, one plausible contributory factor is the widespread loss of

the sense that religious belief and practice are oriented to public service and, conversely, a widespread rise in the belief that religion should be confined to the private sphere. These shifting conceptions of the appropriate place of religion in public reasoning are the natural consequence of a society that ignores incursions against religious freedoms.

In other words, incursions on the fundamental freedom to manifest religious beliefs in a public context *privatises* religion. Worse still, they initiate a process that leads communities to seal themselves off from wider society. Direct or indirect limitations of religion to the private lives of believers sap religion of its power to orient believers towards civic participation. If there were alternative ways restoring these deficits, this might be a consequence that some could welcome; but it is far from obvious what these might be.

If the spiritual capital that religion contributes to society is to be preserved, citizens must be encouraged to recognise that religion offers a comprehensive moral vision for the whole of society and not simply for their fellow adherents. Space for expressing commitment to this vision is essential if faith communities are to continue as distinctive social groups. This remains the best way to motivate religious citizens and communities to commit themselves to the renewal of public life as a form of religious duty.[36]

That religious commitment is oriented to public engagement is now an alien idea. In one of the leading judgments on religious freedom, the former Lord Justice of Appeal expressly rejected the view that the content of religious beliefs deserves protection in law, since 'in the eye of everyone save the believer, religious faith is necessarily subjective, *being incommunicable by any kind of proof or evidence.*'[37] These remarks typify a profoundly puzzling conception of religion that now commands almost universal assent from the nation's intellectual elites.

We have arrived at this unfortunate position through the minimalist interpretation of Article 9 that is often pressed by secularists. In the first instance, it is maintained that Article 9(1) provides an absolute right to belief. It is then suggested by the case-law that Article 9(2) ensures that if the manifestation of your belief interferes with any other right, the right to manifest that belief must be compromised. This stems from a misunderstanding of faith, which motivates religious citizens to practise what they believe. Permitting belief, but suggesting a wide-ranging right to compromise practice (especially outside places of worship) seriously undermines the freedom of religious believers to live according to their faith.

While we acknowledge that the right to manifest religious belief is not an absolute right, the true purpose of Article 9(2) is to limit the scope for qualifying the right to manifest belief, such as for reasons of public safety, the protection of public order, and where there is persecution or maltreatment of others. In our view, Article 9(2) is not, as some would believe and certain legal judgments veer towards, the right to compromise Article 9(1) whenever it conflicts with other Convention rights. The principle of reasonable accommodation, as we argue in the following chapter, provides a better means of honouring the intention of Article 9(2).

To conclude this chapter, we believe that positive steps should be taken to ensure that public bodies responsible for implementing laws pertaining to religious liberty fully understand the sort of scenarios in which the manifestation of religious freedom and other protected characteristics might collide. One practical way of achieving this would be to create a Religious Policy Review Council in central government that would cut across departments and advise on the implications of certain policies on religious communities. This should both increase religious literacy among policy-makers and reduce the conflict between religious and non-religious interests.

5. The Bill of Rights – A Way Forward for Religious Liberty

Many of the concerns regarding rights law in this country stem from the enactment of the Human Rights Act 1998, which brings into UK law the European Convention on Human Rights (ECHR). It is not commonly known that the ECHR has a British heritage. The ECHR was originally conceived after the Second World War by the Council of Europe and entered into force in 1953. Drafted by British lawyer and MP Sir David Maxwell-Fyfe, the ECHR was intended to combine civil liberties and the effective functioning of a political democracy. In March 1951, Britain became one of the first countries to ratify the ECHR.

In the 1980s and early 1990s there were increasing calls for the ECHR to be incorporated in a domestic legal regime. Although British citizens were able to take their cases to the European court, considerable costs were involved for an individual wishing to do so. In its manifesto for the 1997 General Election, the Labour Party promised to put the ECHR onto a domestic legal footing. Following Labour's victory in 1997, Prime Minister Tony Blair put forward legislation for this purpose in the form of the Human Rights Act. The Act came into force in October 2000.

According to the Act, a breach of human rights can be heard in UK courts without the need to proceed to the European Court of Human Rights in Strasbourg. The Act ensures that it is unlawful for any public body to behave in a manner that is incompatible with the ECHR. Where judges consider a statutory provision to be incompatible with the ECHR, they may issue a declaration of incompatibility.

Since coming into force, the Act has faced considerable criticism. It has, for example, been seen by some to promote the rights of terrorists and prisoners against the will of the executive and legislature. The most pressing concern is

the Act's impact on the ancient and delicate balance between parliamentary sovereignty and judicial power. These concerns have gathered renewed force in recent years. An increasingly influential body of opinion now insists that parliament and the judiciary have ceded too much de facto authority to the European Court of Human Rights in Strasbourg. As a result, the Conservative Party made a manifesto commitment in the General Election of May 2015 to "scrap the Human Rights Act and curtail the role of the European Court of Human Rights and make our own Supreme Court the ultimate arbiter of human rights matters in the UK".[38]

In its place, the Government is proposing to introduce a domestic framework for human rights in the form of a Bill of Rights. We believe that this framework offers one opportunity for Britain to lead the way once again in championing the cause of religious freedom in the developed world.[39] By far the most effective means of achieving this would be to set the principle of reasonable accommodation of religious belief on a constitutional footing.[40] This principle would require an accommodation of religious practice to be made by employers and public sector bodies. A well-known example that dates from before the enactment of the Human Rights Act is the permission granted by legislation to allow Sikhs to wear a turban as opposed to a crash-helmet whilst riding a motorcycle.

The principle has its origins in the duty to make 'reasonable adjustments' for disabled persons introduced by the Disability Discrimination Act 1995, a duty that is now included under sections 20-22 of the Equality Act 2010. The duty with respect to religious employees would comprise at least two elements. First, the duty would arise where a provision, criterion, or practice of an employer places a religious employee at a 'substantial disadvantage' in comparison with non-religious employees. Second, the duty would be discharged where the employer takes reasonable steps to mitigate the disadvantage or avoid it entirely. Assuming that Article 9 is transposed into the Bill of Rights, we suggest that an additional sub-section 3 should be included alongside the other two sub-sections:

> *'Where a constraint on the exercise of the right to freedom of thought, conscience, and religion is imposed by this section or any other section of this Bill of Rights, reasonable steps must be taken to avoid the disadvantage.'*

It is clear that in order for the principle to be effective, a great deal would turn on the criteria for establishing the appropriate threshold for reasonableness. These might include the degree to which an accommodation would be practical; the financial and/or other costs of implementing the accommodation; the availability of resources necessary to make an accommodation; and the degree of disruption that making an accommodation would entail.

The central idea of the doctrine is to ensure that an employer takes reasonable steps to make necessary and appropriate modifications or adjustments to accommodate the religious beliefs and practices of their employees, provided that such steps do not impose undue or disproportionate hardship on the employer. Examples of reasonable accommodation might include public swimming-pools reserving special hours for women whose religion prohibits mixed swimming; or a hospital offering menus without pork to accommodate the dietary practices of Jewish and Muslim patients; or an employer

making reasonable effort to rearrange work timetables to permit religious employees to observe religious holidays.

What distinguishes the doctrine from indirect discrimination is that the employee would no longer bear the burden of proof – he would not need to show that a rule or requirement puts him at a disadvantage. Instead, the employee need only make a request that his religious beliefs or practices be accommodated, and the burden of proof rests with the employer to assess whether reaching an accommodation would impose an unreasonable degree of hardship.

Enshrining the principle of reasonable accommodation in this way would provide the courts with a more coherent and equitable approach to deciding cases of religious discrimination than the unduly complex regime of direct and indirect discrimination, harassment, and victimisation set out in the Equality Act 2010.[41]

Extracting the principle would help to address one of the most serious objections to the current regime, namely that the negative duty not to discriminate generates conflicts between the very characteristics it aims to protect. In the view of several legal commentators, imposing a duty of reasonable accommodation would enhance the law in religious discrimination cases by providing fairer and more pragmatic solutions for all sides.[42]

We believe that incorporating the doctrine of reasonable accommodation in a domestic rights-based framework would confer multiple advantages, as indicated in Box 2.

Box 2: The Advantages of Incorporating Reasonable Accommodation in the New Bill of Rights

1. It would avoid the restrictiveness of the threshold requirement of 'group disadvantage' to be demonstrated in the case of indirect discrimination, a principle that was challenged in *Eweida* by both the dissenting judges and the majority

2. It would provide greater transparency to the rationale behind subordinating rights than the indirect indiscrimination model[43]

3. It would permit greater recognition of the fact that claimants in religious discrimination cases want to be treated differently rather than equally – that is, in ways that respect the distinctive character of their ethical commitments

4. It would relax the requirement to show that disadvantage would be experienced as a *group* and encourage courts to consider the impact on the claimant as an individual citizen in light of his or her contingent circumstances[44]

5. It would establish reasonable accommodation as a distinct duty in law. In indirect discrimination claims, the burden of proof is on the claimant; in claims involving the requirement to make reasonable accommodation it would rest with the defendant, which would right a significant imbalance[45]

6. It would create the legal space for a conception of religion that resists the reductionist and sceptical attitudes that currently characterise the dominant approach of the English courts towards it

7. It would increase the likelihood of employers addressing the concerns of religious employees in the workplace itself, since employees would be entitled to raise their concerns through a request for accommodation before having recourse to legal remedies. The opportunity of requesting accommodation from an employer offers a much less adversarial and costly route to resolving scenarios in which religious beliefs risk being compromised

There is, for us, a clear rationale for establishing reasonable accommodation as a distinct duty for employers and service-providers (in order to help prevent a repeat of the Catholic adoption agency scenario) to ensure that discrimination cases are anticipated and resolved as fairly as possible. The strength of this rationale outweighs arguments against providing more protection for religious believers.[46]

There is, moreover, a considerable degree of institutional and stakeholder enthusiasm for this approach. In a parliamentary report published four years ago on the religious freedom of Christians in Britain, a group of MPs recommended just this.[47] More recently, the Equality and Human Rights Commission has acknowledged that the current framework for balancing religious freedom against other protected characteristics in the equalities legislations is not fit for purpose, and that a more robust conception of the principle of reasonable accommodation represents a promising way forward.[48]

Integrating a duty of reasonable accommodation into a legislative framework for protecting freedom of thought, conscience, and religion will not be possible if it is not also practicable.[49] Specific, targeted support should be given to train employers and service-provides to anticipate and prevent disputes from becoming acrimonious. To that end, a Religious Freedom Code of Practice should be devised by the Equality and Human Rights Commission to help employers anticipate tensions between religious belief and other protected characteristics. The Code would emphasise the value of seeking practical solutions, including making appropriate accommodations in the work environment.

6. Conclusions and Recommendations

The ongoing erosion of religious liberty is a significant concern. Equality legislation has enabled the courts to exercise complete control over who is free to discriminate against whom, to adjudicate and regulate the inner moral convictions of private citizens, and thereby to undermine true equality before the law.

Assaults on the liberty and dignity of some are assaults on the liberty and dignity of us all. The evidence shows that societies which prize and protect religious freedom enjoy a wide range of other fundamental rights, in particular freedom of speech and freedom of association. Religious freedom remains one of the most effective limits on the intrusion by the state on individual and communal life.

Moreover, the relentless privatisation of religious beliefs and the exclusion of religion from public life jeopardise the vast array of social benefits and civic goods that religious believers contribute to our national life. It is for this reason that the persistent and comprehensive undermining of religious expression in public life is so worrying.

In order to prevent further incursions on religious liberty, we outline below a series of recommendations to policy-makers that we believe will serve to mitigate and even reverse the damage done to society as a result of denying this fundamental freedom.

1. Incorporate a duty of reasonable accommodation in the Bill of Rights: Employment in the public sector should no longer compel individuals to behave in ways that a member of their faith would reasonably perceive to contradict their religious beliefs, particularly when there are other employees that could fulfil these responsibilites. Furthermore, policy-makers should take steps

to mitigate the damaging effects of recent legal decisions on the freedom of those who wish to conduct businesses in accordance with their reasonably held beliefs about human sexuality and the institution of marriage. We believe that the proposed Bill of Rights provides a unique opportunity to include a positive duty on employers and regulators to demonstrate reasonable accommodation towards those who wish to express their religious convictions in the public sphere.

2. Commit to introducing a Bill of Rights in the Queen's Speech to swiftly introduce reasonable accommodation: In the backdrop of Brexit negotiations, it is easy to see how the Government's commitment to a British Bill of Rights may be sidelined and delayed indefinitely. Indeed, given the length of time that policy-makers have considered a new Bill of Rights, some parallels may be drawn to House of Lords reform, which has taken over a century to complete (and is still incomplete). For this reason, and because the reasonable accommodation or religious practice would provide such a valuable boon to society, we ask that the Government commit to introducing the Bill of Rights at the earliest possible opportunity, which would probably be the Queen's Speech in early 2017.

3. Ensure the EHRC introduces a Religious Freedom Code of Practice: Integrating a duty of reasonable accommodation into a legislative framework for protecting freedom of thought, conscience, and religion will not be possible if it is not also practicable. Specific, targeted support should be given to train employers and service-providers to anticipate and prevent disputes from becoming acrimonious. To that end, a Religious Freedom Code of Practice should be devised by the Equality and Human Rights Commission to help employers and service-providers resolve tensions between religious belief and other protected characteristics. The Code would emphasise the value of seeking practical solutions, including making appropriate accommodations in the distribution of work responsibilities and underlining the importance of making reasonable efforts to identify which employees would be prepared to execute tasks that are likely to compromise the sincerely held beliefs of other employees. It would also assist with the commissioning of public services.

4. Establish a Religious Policy Review Council in central government: Given the widespread and well-documented levels of religious illiteracy amongst policy-makers, it is hardly surprising that religious freedom is now considered to be an 'orphaned' right. Steps should be taken to ensure that public bodies responsible for implementing the Equality Act 2010 understand fully the scenarios in which the manifestation of religious freedom and other protected characteristics might collide. A practical means of achieving this would be to create a Religious Policy Review Council in central government that would cut across departments and advise on the implications of certain policies on religious communities. This should both increase religious literacy among policy-makers and reduce conflict between religion and non-religious interests.

5. Enforce existing statutory duties on universities on freedom of speech: Parliament has imposed unambiguous statutory obligations on colleges and universities to take reasonably practicable steps to secure freedom of speech within the law for their members, students, employees, and visiting speakers. They must also ensure that academic staff have the freedom within the law to question and

test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions. The various 'safe space' initiatives that operate across university campuses highlight the fact that these provisions are more honoured in the breach than in the observance. Addressing such breaches would send a signal to institutions that the Government is committed to the view that freedom of religion – and freedom of speech more generally – is vital to the future success and prestige of higher education in Britain.

6. Create a Religious Freedom Index to monitor infringements of religious liberty: There is an increasing danger that by concentrating resources on horrific abuses of religious freedom in the developing world, policy-makers overlook subtler encroachments on the rights of religious citizens in the domestic context. For this reason, the Office for National Statistics at the domestic level, and the Council of Europe at the international level, should establish indices that would measure and document failures by businesses and public-sector bodies to make reasonable accommodation for the religious beliefs of citizens and communities, both privately and publicly. This would foster working environments that uphold and protect the free expression and exercise of religious belief.

In all, ensuring that religious freedom is adequately protected in law not only benefits religious believers, but also confers substantial social, economic, and cultural benefits on Britain as a whole. This is why the Government must ensure that it introduces legislation that supports and protects religious beliefs and practices. The new British Bill of Rights offers a rare opportunity to achieve this goal. We believe that these policy recommendations will ensure that it does so successfully.

Endnotes

Endnotes

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Society Programme

The UK has one of the most centralised states in the developed world and one of the more disaffected and politically estranged populations in Europe. We hold our leaders in contempt, but despair of doing anything for ourselves or for our community. This dysfunction at every level of society stems from the collapse of our social relations and personal foundations.

We are becoming an increasingly fragmented and atomised society, and this has deep and damaging consequences for our families, our communities and our polity.

At the most basic level, the break-up of families damages everyone, but hurts the very poorest first and worst. Too many children at the bottom of our society are at a significant disadvantage, as too much is borne by lone parents who are trying to do more and more with less and less. We know that the poorer you are, the less connected with your wider society you tend to be and the more removed from the traditional resources of community and kin. Bereft of the institutions and structures that could help them, and cut-adrift from traditions and cultures that once taught skills of survival and self-advancement, too many families and communities on low household incomes are deeply unstable and are facing seemingly insurmountable problems alone, unadvised and unassisted.

We believe that power should be devolved to the lowest appropriate level. Public services and neighbourhoods should be governed and shaped from the 'bottom up', by families and communities and their associations. Neighbourhoods need to be served by a range of providers that incorporate and empower their inhabitants. Moving away from a top-down siloed approach to service delivery, which results in departmental conflicts and different goals being pursued, such activity should be driven by a holistic and integrated vision of overall local need, which is thereby able to ascertain and address the most challenging factors that prevent human flourishing. We believe that neither state bureaucracy nor privatisation of public services can achieve an integrated approach that is attentive both to whole persons and the life of communities considered in the round. Instead, we need new institutions that reflect the priority of direct and inter-personal human relationships. Not only is such a method more humane, it is also likely to be the only approach that works.

About CARE

Christian Action Research and Education is an advocacy group that seeks to uphold human dignity and to support the most vulnerable people in society, engaging with politicians in the UK Parliaments & Assemblies in its work. Supported by individuals and churches throughout the UK, CARE encourages Christians to be informed and to engage positively in public life; addressing issues relating to the sanctity of life, human exploitation, marriage and family and many other areas of advocacy.

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In a free and plural society, rights should protect difference and ensure equity between those of different dispositions. But a curious legal and philosophical inversion seems to have taken place over recent decades. This trend is particularly true with the right to religious liberty and the treatment of religious groups.

Since its enactment, equality legislation has enabled the courts to exercise complete control over who is free to discriminate against whom, and to regulate the inner moral convictions of private citizens. While this legislation has affected society in various ways, it is its effect on religious liberty that is particularly pernicious.

This is not a niche concern. Indeed, assaults on the liberty and dignity of certain groups should worry us all. Evidence demonstrates that societies that vigorously protect religious freedom enjoy a wide range of other fundamental rights as well. Moreover, the relentless privatisation of religious beliefs, and the exclusion of religion from public life, jeopardises the vast array of social benefits that religious believers contribute to our national life.

It is, therefore, vital that the Government urgently introduces legislation that protects religious beliefs and practices. The new British Bill of Rights offers a rare opportunity to achieve this goal. We believe that it should be used to introduce a principle of 'reasonable accommodation' into the law. This would better balance the deep-held religious beliefs of certain elements of society with other interest groups, and ensure that all religions and belief systems can feel respected in the eyes of the law.

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