Introduction

Is religious freedom a right?

The tug between the demands of equality and those of freedom goes to the heart of modern life. Many find deep, and growing, inequalities in modern society unjust. If all are of equal worth, is it right that some cannot afford proper health care, and could even die prematurely? Economic inequalities in society, it is alleged, lead to great disparity in standards of heath, and even normal life expectancy, in different areas of the same city. Similar complaints arise about education. Some may seem trapped in a disadvantaged area, reflected in poor local schools, while others can buy for their children the very best education. Moreover, just growing up in some homes, where education is valued, and children encouraged, can give a lifetime advantage. What can be done to create equality of opportunity so that some are not born with advantages that others can never have access to? Yet, whatever the perceived injustices, the problem is that curing them inevitably involves a growth in the power of the state, and a restriction on individual freedom. It may merely be through taxation. Some, though, want to pass coercive laws to prevent unfair advantages, perhaps banning all private education. The end of that road could be a totalitarian state, and the excesses of Communism. Individual freedom may produce, or reinforce, inequalities, but the determined attempt by a state to achieve greater equality can undermine liberty. This is the very stuff of much modern political argument. The removal of the disadvantage of some can restrict the freedom of others.

These arguments arise not just about economic matters, but in arguments about how far people’s most basic beliefs and commitments must be respected, and whether all beliefs should receive equal respect.
Should people have equal freedom to manifest their most basic commitments in their lives? Does that mean that perceived privilege be attacked, and disadvantage aided, in the name of equality? The state may have to be prepared to use the coercion of the law in the name of the common good to control beliefs that may be regarded as harmful. We then have to consider whether the beliefs that are most important to individuals should be respected and even protected, in the name of freedom. Yet, if those beliefs challenge some basic assumptions about equality, should that disqualify them from having any privileged position? This changes the question from policy issues to more fundamental philosophical questions such as what our fundamental beliefs in equality rest on. How is it that we now believe in Western democracies in the equality of all, when many in the contemporary world still do not? It may be a constituent belief of democracy, but what justifies it? Jeremy Waldron, Professor of Social and Political Theory at Oxford, distinguishes between ‘equality as a policy aim, and equality as a background commitment that underlies many different policy questions’. It is all too easy to accept that equality is a ‘good thing’ without stopping to question what supports that belief.

Why does religious freedom matter, if other freedoms, such as freedom of conscience and of assembly, are adequately protected? This may depend on how far we think religion itself matters, and how religion is to be defined. The First Amendment of the United States Constitution, in the Bill of Rights, makes the ‘free exercise of religion’ its priority, along with a prohibition on the federal establishment of religion. It is listed before rights of freedom of speech, and of the press, of free assembly, and of the right to petition the government for redress of grievances. Many believe that this order of rights is no accident. James Madison, one of the prime moving forces behind the Bill of Rights, was in no doubt, because of his experience of Anglican Establishment in Virginia, that religious freedom was pivotal for all democratic freedoms.

This is in contrast to the European Convention on Human Rights. It is only in Article 9 that we reach freedom of religion, and there, in language echoing the United Nations Declaration of Human Rights, we read: ‘Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others, and in public and private, to manifest his religion or belief, in worship, teaching,
practice and observance.’ A second clause then spells out limitations on the manifestation of beliefs, ‘such as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

The contrast between the unqualified right to hold religious beliefs and the carefully defined scope for limitations on religious practice is striking. If we compare this with the US Constitution, it is significant that ‘religion’ has been widened in an indeterminate way to include ‘religion or belief’. The reference to the need for the protection of ‘the rights and freedoms of others’ is also important, as this immediately raises the question of how different rights and freedoms can be weighed against each other. All this is important, as the European Court of Human Rights has jurisdiction, in applying the Convention, over the countries belonging to the Council of Europe, not just the European Union, and deals with cases from countries such as Russia and Turkey. Furthermore, from 1998, the people of the United Kingdom were given direct access in their own courts to the rights of the Convention. The effects of this are still being played out, and are becoming more noticeable with the establishment of the United Kingdom Supreme Court in 2009. Suddenly, a written constitutional document, as interpreted by the courts, has become important, in contrast with the practice of the common law, as it has developed over many centuries. The language of rights has become a more familiar part of jurisprudence in Britain because of these developments.

The question has to be faced of how important the right to freedom of religion is compared with other rights and freedoms. The age-old tug between freedom and equality reappears in a new guise. Liberal philosophers are fond of talking of people being ‘free and equal’, or referring to ‘equal liberty’. Both are crucial for the idea of democracy. Any democratic state must treat its citizens equally, so that it cannot deem some more important than others, more worthy of respect, or having greater dignity. The law can have no favourites, and must be impartially administered. In a democracy, the rule of law is paramount, and the justice it conveys embodies the idea of equal treatment.

We may fully believe that everyone is of equal worth, but for that reason see the possibility of treating different people differently according to circumstance. Even in the administration of justice in the courts, genuine justice might consist not in automatically handing out identical
sentences for similar offences but in being guided by the facts of a case. Acknowledgment of equality need not imply uniform treatment. How far should the courts, or even perhaps the legislature (parliament, congress or whatever), be willing to make allowances when confronted with religious conviction? Should there be a deliberate attempt to accommodate such beliefs? The idea of reasonable accommodation—for instance, for the needs of disabled people—is often accepted in some areas of British law. Things become much more controversial when it appears that religious beliefs, or religious people, are obtaining privileges.

The clash with equality

In recent years, considerations of equality have come into conflict with religious beliefs of various kinds. Once we allow different treatment of different groups, that seems to mean discriminating between the groups. Yet, in a democracy, if all are equal, how can some be given more attention than others? In moral arguments, the mere accusation of ‘discrimination’ is well calculated to bring the argument to a halt. Discrimination in favour of religious views will seem as unacceptable as discriminating against some other group. Yet, although ‘discrimination’ has become a powerful label for unacceptable behaviour, it is worth remembering that every rational judgement, and indeed every moral judgement, involves discriminating between relevant and irrelevant factors.

The drive to equality has at times led people to believe that any judgement on the part of the state must never imply that some views are preferable to others. All beliefs must be viewed equally. Any other position involves unfair discrimination. Citizens, it seems, are not being treated equally if their views are not being affirmed by the state, or if some are singled out for special attention. They are not being treated with respect. Their intrinsic human dignity is being questioned. Their human rights are being undermined.

Yet, although equality can seem to mandate the neutrality of the state, the fact of state neutrality is an impossibility. In the context of religious freedom, no state can abdicate all responsibility to the extent of refusing to make judgements about the character of any religious belief. As the European Convention on Human Rights itself makes clear, a state has to decide when such freedom has to be restrained. Just because human sacrifice is religiously motivated does not make it socially acceptable.
Even the idea of neutrality towards religion is unclear, as it is bound to be infected by the general fuzziness of the concept of religion. When, for instance, is a moral position also a religious one? A judgement in favour of equality appears to be a quintessentially moral position, but may itself be based on religious belief.

The demand for state neutrality can lead to the view that there is no place for religion of any kind in the public sphere. The state can then be even-handed precisely because it ignores them all equally. This is, in the minds of some, what a secular state should by definition do. Yet secularity, and neutrality can come in many guises. The secularism of la laïcité in France is different from the secularism of Muslim Turkey, and both are different from the separation of church and state much vaunted in the United States, but significantly not mentioned explicitly in the Constitution. Secularism is never neutral, but always takes a view about the proper place of religion.

To revert to the European Convention on Human Rights, part of the absolute right granted by the first clause about religious freedom is precisely to have freedom to manifest religion ‘either alone or in community with others and in public or private’. This echoes the words of Article 18 of the UN Declaration. Human rights documents themselves, therefore, do not support the idea of religion as something that from a governmental point of view should be out of sight and out of mind. Human rights are in the public sphere. The issue of religious freedom is too, and so must religion itself be.

Particular issues concerning the clash between freedom and equality come over issues of equality between the sexes, and equality between people of different sexual orientation. In both areas, contemporary attitudes arising in liberal, democratic societies are liable to clash with more traditional views, often linked closely with religious views. They may often have a wider rationale than the religious. Issues concerning the treatment of women can be linked with deep cultural attitudes, which are not essential for religion. An obvious example concerns female dress. Some Muslims demand a full-face veil for women, and others different forms of covering, including a simple headscarf. Yet others do not see the need for special dress at all. To a lesser degree, similar customs can be observed in some parts of Christianity, with some sects demanding head coverings for women.

The ensuing battles can easily be portrayed as a battle between human rights and religion, with rights being on the side of a perceived
emancipation of women. Yet, at times, this may appear simply as an unwarranted intrusion into others’ ways of life, and it may be seen by non-Westerners as imperialist. The clash between individual rights and those of a community can appear stark. Indeed, the ideology of rights can find it hard to find its way through the demands of equal rights for both sexes, and the right of cultures, perhaps especially minority cultures, to follow their own traditions. Even liberal thinkers can find this difficult to resolve.

A similar problem occurs for religion. The rhetoric of individual rights, and equality between individuals, can sit uncomfortably with a wish on the part of religions to abide by the traditions of a community. Should a Western state be prepared to challenge religious doctrine, so that women have to be admitted into the Roman Catholic priesthood? What about female bishops in the Church of England, about whom there has been prolonged controversy? Current practice is to recognize that religious institutions like the Catholic Church have a right to order their own affairs according to their own collective beliefs. However, there has also been an issue within churches, as to how far objectors should be able to continue within a church, without signing up to the changes. Could room be found within the Church of England for those who still cannot accept a woman bishop? This question is a microcosm of a much wider question. Can dissent be still allowed and contained within a wider community holding different standards? When states introduce new legislation, whether about women, homosexuals, or whoever, and some object to this, can they allow exceptions on religious grounds to the operation of the law? This is a question that can be applied about both religious institutions and individuals, and the law courts in many countries are getting caught up in litigation on precisely these points. At the same time, many may query why a religious conscience should be given priority over other forms of conscientious objection.

Some feel that, when questions of basic human dignity are at stake, there can be no room for exceptions or special accommodation. If it is collectively felt in a democratic country that women ought to be treated equally in all respects with men, some will see it as unprincipled to compromise with those who want to treat them in some way as second-class citizens. The law, it will be said, is the law, and must apply to all impartially. There cannot be one law for one group and another for another. We would not allow racial discrimination, the
argument goes, so why should we tolerate other forms of discrimination? The shadow of Islamic *sharia* law falls on the discussion. If the law quite properly decrees equality between the sexes, how can religious groups claim exemptions so as to treat women, particularly in family matters such as divorce, in what is regarded as a flagrantly unjust way? The law should not make accommodation for injustice, it will be said. Further, the very idea that society can be split up into different groups abiding by different legal standards challenges the unity and cohesion of a country. So the arguments will go, and they can be very persuasive.

**Democracy and dissent**

Must individuals, and groups, always be coerced to act against their consciences, if that is the democratic decision of a country? Put like this, it becomes apparent that the very ideal of personal freedom must at times be at stake. Democracy is itself built on the free judgements of its members and would not be necessary if everyone always agreed. It is a system not just for making decisions, but for containing, and even respecting, disagreement. Without the possibility, and the fact of disagreement, there can be no political freedom. There can be no choice between alternative views. Democracy needs the free expression of the conscience of all its members, even when they pose an uncomfortable challenge.

The idea of democracy includes both the reality of dissent, and the need for equal respect of all its citizens. What happens when the imperative to respect one group appears to preclude respecting another? A prohibition of discrimination on grounds of sexual orientation often collides with deeply held moral views about homosexual practices, which can be grounded in religion. Many Christians, Muslims, and others cannot accept that homosexual relationships are morally on a par with heterosexual ones. These arguments are often portrayed as being between religion and a conception of human rights, although it is possible to have a rational discussion about the morality of homosexuality without depending on any religious assumptions. Whatever the status of people’s objections, however, the question remains. Should they be accommodated in some way, so as not to be forced to act against their conscience?
These questions come up in many contexts. The basic argument for not accommodating those who object to homosexuality comes from basic ideas of human dignity and equality. When religion is pitted against rights, religion is often sidelined. The argument is well summed up by one Canadian professor of law, who says: ‘If gay or lesbian sexual orientation is...felt by the individual to be part of his or her personal identity, so that failure to affirm its equal worth (in relation to heterosexuality) is experienced as denial of respect, or exclusion from full community membership, then affirmation is a matter of justice.’\(^6\)

The writer applies this in the context of education within state schools, advocating ‘affirmation’ of homosexuality in that context. This brings him to the conclusion that, ‘if an individual manifests religious views that are contrary to the values of the civic curriculum, then she or he may be excluded from teaching...because she or he is unable to affirm, in good faith, the values of the curriculum’.\(^7\) Thus teachers may be expelled from their profession because of beliefs conscientiously held.

What is noticeable is that, when two apparent rights are pitted against each other in this way, there seems little appetite from the standpoint of law for any reasonable accommodation. The views of the state have to be applied regardless of any conscientious dissent. Yet the issue of freedom of conscience, and freedom of religion, arises in its most acute form when unpopular, or unfashionable, minority positions are in question. Freedom is safeguarded only when the majority allows beliefs to be manifested of which it disapproves.

Rights, in this instance those of homosexuals, often appear to trump any claim to a right of religious freedom. When such rights clash, it seems, the solution is for one to win, and not for any attempt to be made to satisfy both sides. It sometimes becomes very difficult to abstract the issue of religious freedom from the particular arguments of one impassioned debate. Yet the morality or otherwise of, in this instance, homosexuality is irrelevant to the dispute. Similar problems can arise when the argument is transposed to many other contexts, say in medical ethics. It is easy to imagine situations when the law allows a procedure (even euthanasia, or assisted suicide) that many doctors would want to avoid on conscientious, and perhaps specifically religious, grounds. Yet it might be justified on the rounds of the equal right of everyone over their own lives. Is doctors’ only choice then to obey the law or to give up practising medicine? Once again the issue
is what happens when religious freedom is balanced against other apparent rights.

It is easy to champion the freedom of those who wish to act as we do. The problem comes when we fervently disagree with the stand being taken. It may still be important for the future of democracy, and the cherishing of human freedom, that we defend their right to disagree with us. Apart from anything else, we might one day find ourselves in a minority position, and find our rights challenged in a similar way. The question must be asked whether laws themselves should be drafted so as take account of conscientious objection. Further, should courts be more ready to find room for accommodation? If we really value religious freedom, including the right to deny all religion, we should be concerned if its claims are simply overridden.

Talk of exemptions, or accommodation, is never going to appeal to governments, unless they grasp the importance of the principles at stake. Simplicity in the law, and in its administration, will always be preferred, and a consistent application of a law will be assumed to be fairer. Yet, without exceptions, an unreasonable burden can be placed on religious believers unable to practise their faith. The example of the sensible law in the United Kingdom requiring motor cyclists to wear crash helmets is a stock example. It is a neutral law, not targeted at any group, and to be fair it should apply to everyone equally. Yet for Sikhs, with their requirement to wear a turban, it is unduly burdensome, and the law has granted an exception to them.

Much depends on how highly we rate individual freedom, and the freedom of institutions, particularly religious ones. When the issue of equality is to the fore, bringing in its trail appeals to human dignity, and human rights, it may be tempting always to override such considerations. Whether, and how far, that is justified is the subject of this book.