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SUBMISSION BY THE IONA INSTITUTE ON FREEDOM OF CONSCIENCE AND RELIGION

Introduction

The Iona Institute would like to draw attention to certain disturbing trends that have developed in Ireland in recent years concerning the rights of both individuals and organisations to freely practice and manifest their religion.

We believe that to an increasing extent the Irish State is not properly protecting freedom of conscience and religion and that this is problematic from the point of view of international law.

This failure to protect is manifesting itself in two ways. One is that the State is permitting certain statutory professional organisations to disregard the conscience rights of their members. The second is that the State itself is sometimes disregarding those conscience rights.

As Professor Roger Trigg of Oxford University argues in the attached article (see appendix), no real effort is being made to find a reasonable accommodation between the moral convictions of religious believers concerning matters of controversy, and rival moral convictions based on certain views of human rights. The State is increasingly finding against those who have religiously informed moral convictions, and even against religious organisations themselves. Arguably, this violates Church/State separation with the State being the guilty party on this occasion.

Writing in The Times of London (February 3, 2010): the Chief Rabbi of Great Britain, Jonathan Sacks, said: "When Christians, Jews and others feel that the ideology of human rights is threatening their freedoms of association and religious practice, a tension is set in motion that is not healthy for society, freedom or Britain."

We strongly believe this same tension now exists in Ireland and is expressing itself in ways that are increasingly detrimental to religious freedom. We urge the UN Human Rights Council to address itself to this issue by adopting an attitude that is favourably disposed towards religious freedom.

We will now provide a number of concrete examples of how freedom of conscience and religion increasingly finds itself under pressure in Ireland.

Example one

The first example involves Dr Phil Boyle, a Galway-based physician who runs a private practice offering fertility treatment to couples having difficulty conceiving.

Dr Boyle is a practising Catholic and accordingly he runs his clinic in accordance with his beliefs. Among the other consequences of this is that he will treat only married couples.

Last year, Dr Boyle was investigated by the Fitness to Practice Committee of the Irish Medical Council (a statutory body) following a complaint by a couple who were not married but were nonetheless seeking to avail of his services.

When told of his policy, the couple made a formal complaint. In the event, Dr Boyle was acquitted, but it appears only on a technicality.

The implications of this are clear; Catholic doctors who run their practices in accordance with their consciences face possible sanction in particular circumstances for the first time.

It is worth noting that Dr Boyle could just as easily have been a member of another religion that also places a very high value on marriage.

It should also be noted that the specific type of fertility treatment offered by Dr Boyle is called 'Napro technology' and it is a treatment fully compatible with Catholic teaching.

As such, it is the only fertility treatment in Ireland that can make this claim. If those who offer this service were driven out of business, it would mean that there no longer existed in Ireland a form of fertility treatment for Catholic couples fully compatible with the teachings of their Church.

Furthermore, as reported in The Irish Times (April 15, 2010) Dr Boyle could be in contravention of the Equal Status Act 2000 which forbids 'discrimination' in the provisions of good and services on grounds of marital status. No provision is made in the Act for conscientious objection.

However, The Irish Times also pointed out in this same article that because it lacks a conscience clause the Equal Status Act could be in breach of Article 44 of the Irish Constitution which protects freedom of religion and conscience.

Section B (10) of the Medical Council's Guide to Professional Conduct and Ethics does allow for conscientious objection. However, given the fact that the complaint against Dr Boyle was entertained it is clear this needs to be strengthened.

Example two

Last year Ireland passed Civil Partnership legislation which is aimed chiefly at same-sex couples. However, the law made no provision for conscientious objection and included no provisions to protect the rights of religious organisations.

For example, under the Civil Partnership Act 2010, a Civil Registrar can go to prison for up to six months if they will not perform a Civil Partnership ceremony even if there is another Civil Registrar on hand who will perform it instead.

We believe this is particularly draconian and even in those other jurisdictions which do not provide for conscientious objection in this regard, the maximum penalty is normally dismissal from employment.

In addition, under the Civil Partnership Act, church halls available for public use would not be allowed to refuse their use to same-sex couples who wished to hire them for their reception following a Civil Partnership ceremony.

The Government rejected pleas to respect the ethos and beliefs of religious organisations despite the fact that such allowance has been made in other jurisdictions, including Britain. Its Equality Act 2010, while it forbids discrimination in the provision of goods and services, nonetheless does not require religious organisations to make their premises available for purposes contrary to their ethos. (See Schedule 23, Section 2(3)).

By contrast the Irish Government refused to even consider the possibility of tightly worded and highly limited opt-outs and exemptions for certain exceptional circumstances where the autonomy and freedom of religious believers and organizations might be infringed by the new legislation.

Both this example and that of Dr Phil Boyle illustrate that belief in traditional sexual morality is increasingly being seen as a form of unjustified discrimination to be punished by law under certain circumstances with little or no allowance made for conscientious objection or religious freedom.

It is noteworthy that greater provision for religious belief was made in the Employment Equality Act 1998 than in the Equal Status Act or the Civil Partnership Act.

Section 37 of The Employment Equality Act permits religious organisations such as schools to employ staff in accordance with their ethos.

The constitutionality of Section 37 was upheld by the Supreme Court in 1997. The Attorney General of the then Government, comprising of Labour and Fine Gael, argued that the Act had to contain Section 37 for it to be constitutional.

It is odd therefore that the Equal Status Act does not contain a similar provision so as to achieve a proper balance of rights.

Example three

The Pharmaceutical Society of Ireland is the governing body of Irish pharmacists. Like the Irish Medical Council it is a statutory body.

While the Medical Council's Guide to Professional Conduct and Ethics makes limited provision for conscientious objection, there is none at all in the Code of Conduct of the PSI. This is a glaring oversight in our view.

One consequence of this is that a pharmacist would be required to stock emergency birth control (also called the 'Morning-After-Pill') or refer a customer to another pharmacist despite any ethical objections they may have.

FREEDOM OF CONSCIENCE AND RELIGION IN INTERNATIONAL LAW

Freedom of thought, conscience and religion is a "vital human right" and is protected in the domestic law of liberal democratic societies as well as in international law.

Article 18 of the Universal Declaration of Human Rights 1948 states that: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

This right was later declared in Article 1 of the UN's Declaration on the "Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief." The preamble to the Declaration noted that infringements of this right, in particular, "have brought, directly or indirectly, wars and great suffering to mankind". Furthermore, protecting the freedom of thought, conscience and religion will "contribute to the attainment of the goals of world peace, social justice and friendship among peoples..."

In a later Resolution on the "Elimination of all forms of religious intolerance", adopted by the General Assembly in 1993, the UN reaffirmed, "that freedom of thought, conscience, religion and belief is a human right derived from the inherent dignity of the human person and guaranteed to all without discrimination".³ Furthermore, the resolution urged States "to ensure that their constitutional and legal systems provide full guarantees of freedom of thought, conscience, religion and belief..."⁴

¹ Murdoch, Jim, "Freedom of thought, conscience and religion", Council of Europe, 2007, p. 58

² Proclaimed by General Assembly resolution 36/55 of 25 November 1981

³A/RES/48/128, 20 December 1993, para 1

⁴ *Id.*, at para 2

Article 18(1) of the International Protocol on Civil and Political Rights, ratified by Ireland on 8 December 1989 along with the Optional First Protocol, likewise states that: "Everyone shall have the right to freedom of thought, conscience and religion", which includes the right to manifest one's religion or belief in "observance [and] practice." The Human Rights Committee has commented on the "far-reaching and profound" nature of this right, as well as its "fundamental character", reflected in the fact that "this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant."

Article 18(3) does place limitations on Article 18(1) and states that: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." However, the Committee has noted that these restrictions are to be "strictly interpreted" and limitations "may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner."

Recognizing the importance of protecting conscience (in the form of conscientious objection from military service), the Committee has stated that whilst "the Covenant does not explicitly refer to a right to conscientious objection...such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."

Freedom of thought, conscience and religion is also enshrined in the European Convention on Human Rights, with Article 9(1) stating that: "Everyone has the right to freedom of thought, conscience and religion", which includes the right to manifest one's religion or belief in "practice and observance."

Once again, the right to manifest one's religion or belief is qualified, but the limitations are narrow in scope. Indeed, it has been noted that when the Convention was being drafted, "the final draft of Article 9(2) was the narrowest of the proposed articles..." Article 9(2) states that: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others."

The European Court of Human Rights declared in *Kokkinakis v Greece* that: "As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention" and "[t]he pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it." Furthermore, the Court considered that without the freedom to manifest one's beliefs, "Article 9, would be likely to remain a dead letter." 9

⁵ General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/1993 at para 1.

⁶ *Id.*. at para 8.

⁷ *Id.*, at para 11. See, for example, *Frédéric Foin v France*, Communication No. 666/1995, 9 November 1999, at para 10.3, where the Committee held that, "the author was discriminated against on the basis of his conviction of conscience."

⁸ Evans, Carolyn, *Freedom of Religion Under the European Convention on Human Rights*, Oxford, Oxford University Press, 2001, p. 137.

⁹ Kokkinakis v. Greece, judgment of 25 May 1993, Series A no. 260-A, at para 31.

Recommendations

- 1. We believe that professional Codes of Conduct of statutory bodies should be amended so as to make proper provision for the right of conscientious objection and that the State should actively facilitate this process and that UN Human Rights Council should urge it to do so in accordance with international human rights law.
- 2. We also believe that the UN Human Rights Council should urge the State to give greater protection in its legislation to freedom of conscience and religion and to take immediate steps to ensure that the rights of religious believers and organizations are taken fully into account in existing laws and are not needlessly infringed by the denial of reasonable and carefully worded exemption clauses. In the case of the Equal Status Act 2000, for example, this would mean inserting a similar provision to Section 37 of the Employment Equality Act 1998.

The Iona Institute

The Iona Institute promotes the place of marriage and religion in society. We defend the continued existence of publicly-funded denominational schools. We also promote freedom of conscience and religion.

We are a member of the Fundamental Rights Platform of the European Union.

Appendix

Freedom of Religion? The growing clash between religious freedom and certain interpretations of human rights

By Professor Roger Trigg

(Delivered at a seminar on freedom of conscience and religion hosted by The Iona Institute on 24/9/10)

Why Be Tolerant?

A right to freedom of religion has never gone uncontested. The problem has always been that those who are sure that they are right, and know the truth, have been reluctant to allow what they see as error flourish. 'Error has no rights' has sometimes been a rallying cry. Certainly we do not imagine that teachers can decide what they will teach as 'physics' without any reference to experts in the field or the scientific knowledge which has been built up painstakingly over the centuries. Why should not similar principles be invoked in public life, so that everyone conforms to expert knowledge, entrenched authority, and the experience of centuries? At times, through history, the Christian Church has certainly been tempted on such a course, and used a position of power to impose its will. This has often been done with the best of motives. If you think you know what is best for everyone, particularly if their eternal destiny is at stake, surely one even has a duty to try and procure it for them, with or without their consent? Yet that is the path of totalitarianism. It is certainly the view expressed and practised by Marxist-Leninism in the twentieth century, with disastrous results.

From a Christian point of view, the objection to forcing people to act in accordance with particular religious beliefs, on the grounds that it is for their own good, fails to take seriously the basic fact that we have all been created with a free will which enables us to see and chose what is true and good. Yet it also opens the possibility that our decisions may be wildly mistaken, and that is the price of freedom. Unless we can make up our own minds about what we should believe and what we should do, we are not acting as responsible, rational adults. We are not using the freedom with which we have been endowed. A forced response to God is not an exercise of freedom, and if we have been entrusted with freedom, it is the responsibility of each of us to make a voluntary commitment to God. Anything else must surely be worthless in His eyes.

This was basically the argument put forward by John Locke in the seventeenth century in advocating religious toleration. For him, such toleration was based on a theological vision of how we had all been endowed by God with a freedom we could not escape. The Glorious Revolution of 1688 in England, in which Locke was a moving force, began a process which allowed greater nonconformity in religion, and greater democratic freedoms. This was all part of the general stress on reason, and individual autonomy, which came with the European Enlightenment. Yet Locke was part of an earlier strand of Enlightenment thinking which saw freedom and reason as the gifts of God. Reason was 'the candle of the Lord', to use the slogan of the Cambridge Platonists, philosophers and theologians who were influential at the origins of modern science, and who influenced Locke.

This was very different from the hard-edged atheism and materialism which emerged particularly in France in the eighteenth century. It produced an aggressive anti-clericalism, and secularism, which saw

all religion as an enemy, as the voice of arbitrary authority against that of unfettered reason. It is an attitude that all too clearly lives on in parts of Europe, particularly in France with its policy of *la laicite*, which keeps religion, and its manifestations, firmly out of the public square. Sometimes it attempts to do this literally, as the current crackdown on the public wearing of an Islamic veil in France demonstrates. The result is to place ultimate authority in the hands of the State, which can graciously allow its citizens to have the freedom it chooses to grant them. That is very different from a view which sees the State as subject to a higher authority, namely that of God. Locke in his 'Letter Concerning Toleration', saw it as unanswerable that God had not given the care of souls to 'the civil magistrate.' God had not given authority to anyone 'to compel another to his religion'. Compelled, and insincere, faith is unacceptable to God.

Aggressive Secularism

What have these divergent strands in the European Enlightenment to do with us today? They offer two different models for the way religion is to be viewed. The early English Enlightenment saw Christianity as essentially grounding reason, demonstrating human freedom, and showing the equality of all in the sight of God. The later French Enlightenment thought itself able to champion freedom, equality and brotherhood, (*liberte, egalite et fraternite*), without the theological underpinning that had undoubtedly produced those ideals. 'Brotherhood', for example is a nonsensical notion without the idea of a common (heavenly) Father. Yet these ideals, torn from their Christian heritage, have gone on to spur the secularism that dominates much of contemporary Europe, and to stimulate the belief in human rights, which at times seems to be put forward as an alternative creed to traditional Christian notions.

The earlier Enlightenment, typified by Locke, and his belief in natural rights granted by our Creator, was influential a century later in inspiring those, like Thomas Jefferson, who founded the United States. He thought Locke was one of the three greatest men who had ever lived (along with Bacon and Newton). The result was that although religious freedom was of paramount importance in the new nation, it was a freedom that was built on an idea of rights granted to us by our Creator, rather than of rights which in some mysterious way were hostile to religion. We hold rights because we are God's creatures, rather than as weapons to be use against all religion.

The aggressive secularism that sees religion as an enemy of reason, of the exercise of our freedom, and of the acknowledgment of human equality, instead of the guarantee and grounding of all three, is spreading throughout Europe. In 2007, the Parliamentary Assembly of the Council of Europe, representing the Parliaments of 47 states stressed 'the supremacy of human rights, democracy and the rule of law over any religious tenet.' It even wished to 'require' that religious leaders 'take an unambiguous stand in favour of the precedence of human rights, as set forth in the *European Convention of Human Rights*, over any religious principle.' Yet this is to assume that human rights have nothing to do with religious principles, and are in conflict with them.

What is clear is that religion is not being valued for its own sake, but seen as a source of threat, danger and division. It is to be controlled, rather than nourished. In the United Kingdom recent charity law has changed religion from a justifiable charitable object, by definition, to having to prove 'public benefit'. The risk is that what is seen as beneficial will depend on the shifting sands of public opinion. Religious freedom is seen as a possible source of trouble, as religion cannot be allowed a free rein. While the *European Convention of Human Rights* allows an absolute right of freedom of belief, it holds that

manifestations of religion must be governed by the need to respect the rights and freedoms of others, 'and of meeting the just requirements of morality, public order and the general welfare in a democratic society'. The result can be that, while we have a right to think and believe what we like, (as long as we keep it to ourselves), rights of manifestation can become progressively limited. For some courts, freedom of religion need not mean much more than a right to worship freely in public. Once religious beliefs begin to impinge on behaviour, and influence morality, they can become severely circumscribed.

As European societies become more secular, and change laws which had previously rested on tradition Christian insights, Christian believers find themselves in ever more difficult situations. In April 2010, BBC Television broadcast had a documentary entitled 'Are Christians Being Persecuted?' The title was significant, as it represented a feeling amongst many Christians in Britain that they are increasingly at odds with the wider society, and even the law, because of their Christian faith. 'Persecution' may be too strong a term, as Europe does not yet usually witness the coercion that Christians find in many countries of the world. One cannot, for example, in some countries obtain a job if one is a Christian. We seem to be getting near that at times in Europe.

The 'First Freedom'

Freedom of religion is one of the most basic of human rights. In the United States it is regarded often as the 'first freedom', not just because of its position in the First Amendment to the United States Constitution, but because it is regarded as central to the operation of any democracy. If, as citizens, we cannot all equally live according to our deepest and most important beliefs about what is right and good, how can we properly contribute to the welfare of any democratic society? All too often religious freedom is not given any priority at all in Europe. In the case of employment law, the European Court of Human Rights imagines that people are guaranteed enough freedom if they have a freedom of contract. They can give up their job if they find they are being required to act against their conscience. Yet the freedom to be unemployed is not much of a freedom.

This scenario plays out, for example, in cases about Sunday working. Employers can change to seven day working, and require an employee to work on Sunday. The employee may think that this goes against his or her conscience. The rights of the employer however, are made to trump any claim to be free to act according to religious conviction. The employee has to work on Sunday or resign. More recent cases have arisen because of a repugnance many Christians feel in being required to appear to support or encourage civil partnerships. In Britain, it has been made clear that a civil registrar must give up her job unless she is willing to register them. No attempt is made at any reasonable accommodation, even in places, such as the London Borough of Islington, where other registrars could easily register civil partnerships and a civil registrar who objects can be moved to other duties. It was felt by the Borough, and upheld in English courts, that it was important to demonstrate that no form of discrimination on grounds of sexual orientation was to be tolerated, and that this far outweighed any religious scruples. Rights to equal treatment, and non-discrimination, were thought of far greater importance than any right to religious freedom.

Homosexuality may be the 'hot button' issue of the moment, but it is important to see that the controversy about which rights are prior is absolutely different from any argument about the morality of homosexual practices. Both, no doubt, involve complicated issues, but the issue of religious freedom is independent of any judgment one makes about who is right in a particular controversy. Indeed, even, if

one thinks the civil registrar wrong for refusing to register civil partnerships, the question is whether she should have the right to make that decision. Perhaps in a society that claims to be free, it is particularly important that we allow those with whom we disagree to put their beliefs into practice. In other words, just how important is conscience, and in particular a religious one? Should it be respected for its own sake, and how easily can it be overridden? Conscientious objectors in time of war have been tolerated, and even respected. Cannot other consciences also be accommodated on matters which believers see as of fundamental importance?

The same issue can be transferred to other contexts in which conscience can part company with changing social expectations. Pharmacists, doctors and other health workers can be regularly faced with difficult ethical choices. This can be seen at its extreme in societies which could legalise assisted suicide or even euthanasia. If the law, for example, were to allow voluntary euthanasia as an option, would doctors employed by a national health service come under pressure to provide the 'service'? In other words, might doctors who entered their profession to save and preserve life find that they had to kill, whatever their conscience aid, or give up their profession?

Similar controversies have erupted in Ireland, where the recent debate about civil partnerships have exposed an unwillingness on the part of government to allow any legal exceptions to cater for freedom of conscience or any manifestation of religious belief. The Minister for Justice, Dermot Ahern, said in the *Dail:* 'What would the consequences be if we were to allow officials to choose the parts of their job they would not do on the basis of their religious beliefs?'. Similarly those with conscientious objections to civil partnerships were simply dismissed by the Minister for the Environment, John Gormley, as having 'old and discredited prejudices'. The same Minister, speaking on RTE News, warned the Catholic church to not to intrude in temporal or State matters. Thus, not only are religious consciences ignored, but religion is pushed out of public life, even when concerned with what might be seen as basic moral issues.

The same attitudes are gaining ground in Britain, where recent court cases have shown that other religions besides Christianity are under threat. For example in the one of the first cases to be heard by United Kingdom Supreme Court in 2009, the Court in effect accused Jews of racial discrimination because of their traditional method of determining who is a Jew through matrilineal descent. This is a view long embedded in Jewish theology, but in the case of admissions to a Jewish school, it had the effect of apparently cutting across the provisions of the United Kingdom 1976 Race Relations Act. Just as discrimination against homosexuals will always, it seems, trump claims to a religious conscience, so 'racial discrimination' is absolutely prohibited, no matter what the theological background. Religion always appears to take second place in contemporary Europe to the demands for equality and the removal of 'discrimination', even if, as in the Jewish school case, there appear to be extenuating circumstances.

Are Human Rights and Religion Opposed?

It is a fundamental democratic principle that we allow freedom for beliefs and practices which we do not share, and which may go against the views of the majority. The fact that there have to be limits to any freedom does not mean that fundamental beliefs cannot often be accommodated. There is such a thing as 'reasonable accommodation.' Europe seems to be drifting away from the views of the early Enlightenment which saw religion as an indispensable support for our beliefs in such principles as freedom and equality, and human dignity. It is simply assumed that these can be torn from their Christian

roots and continue to flourish. Whether that is so is doubtful, but the views of the later Enlightenment introduce prejudice against religion in all its forms.

One of the problems with removing religion from public life is that it leaves nothing between the individual and the authority of the State. Without intermediate institutions, the State becomes ever more dominant in the lives of individuals. Although the rhetoric of human rights appears to give a great deal of attention to the individual, it undermines the role of institutions such as Churches. Religion cannot survive as a phenomenon of individual belief. It needs institutions to enable it to flourish and be passed on to future generations. Religious freedom itself presupposes a freedom for religious institutions. The more they are constrained, the more religion itself is undermined.

The idea has steadily gained ground that the exercise of a religious conscience, and the importance of religious freedom, is somehow at odds with human rights. This must be nonsense. Religious freedom, and freedom of conscience, is always given a prominent place in any charter of human rights. It is one of the most basic rights, and cannot simply be trumped by other rights. Justice can never be done by simply ignoring one set of rights in favour of another. One right cannot simply override another. In the case of Ireland, a refusal to take seriously deliverances of a religiously inspired conscience does not just exhibit a prejudice against religion, unbecoming in a democratic society. It is to ignore the right to manifest one's religion, as laid down in article 9 of the *European Convention of Human Rights*, and, significantly, also fails to take seriously the import of Article 44 of the *Constitution of Ireland* which claims that 'freedom of conscience and the free profession and practice of religion, are, subject to public order and morality, guaranteed to every citizen'.

Perhaps it all comes back to how important we think religion is. In a democracy, it is not for one group of citizens, let alone the Government of the day, to decide what is and not important, regardless of the views of others. Unless we live in a totalitarian state, a Government has to respect views of those with whom it may disagree. It cannot itself decide what is and is not a fit topic for public discussion, and what is and is not a discredited prejudice. This is especially so when what is at stake is the place of religion, and its influence over the consciences of many citizens. Contemporary scientific research into human cognition has shown the ubiquity, and deep-rooted nature, of those elements of our understanding which go to build up religion. Religion has always been a central feature of human societies. When suppressed, it soon reappears, as the experience of countries demonstrates after the removal of Communism. Ignoring religion is to turn our backs on one of the deepest springs of human nature, and one of the most powerful influences on human behaviour.

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