

Session 1

11.00 – 12.45

Is there a moral right to conscientious exemption?

Julian Rivers

Outline of a general right to freedom of conscience

This paper identifies the outline of a general right to freedom of conscience. It does not seek to assess the extent to which such a right is already protected in English law, although inevitably it draws on historic and current examples, nor does it seek directly to justify such a general right, although of course it seeks to make the case for a general right at least plausible. I assume that a general account of a right needs to identify its rationale, i.e. the value it is supposed to serve, its scope and permissible limitations. I argue that the value of the right to freedom of conscience lies in the protection of the individual from a conflict of moral duties, one of which is the duty to obey the law. The countervailing moral duty is to be understood broadly as embracing both personal and collective duties, acts and omissions, and self-regarding as well as other-regarding duties. It is also as applicable in private legal relations as in the relationship between the individual and the state. Matters of consent are better dealt with as an aspect of limitation, not scope. The scope is set by the individual's integrity need to avoid complicity in acting adversely to some recognisably important moral interest. So a general right to freedom of conscience needs a theory of relevant moral interests and a theory of complicity. This suggests the adoption of some, but not all, of the criteria which have recently emerged from the case-law on belief-based discrimination. The existence of limitations recognises that there are circumstances under which the cost to others of allowing the conscientious objector's claim means that it must be overridden. However, the assessment of proportionality must also take account of the cost to the conscientious objector of rejecting their claim, since (if genuine) they are likely to persist in their course of action. In this way, the law comes to accommodate a reasonable diversity of moral judgment while also providing nuanced dissuasion from too radical a departure from its own ethical presuppositions.

Peter Jones

Three Issues of Conscience

One way of justifying religious exemptions is to subsume them under the more general idea of conscientious exemption. A claim for exemption from a law or rule or policy is conscientious if, in the absence of an exemption, the claimant would be (a) compelled to do what s/he believes wrong or prevented from doing what s/he believes right, or (b) burdened for refraining from doing what s/he believes wrong or burdened for doing what s/he believes right. Because of the etymological link between 'conscientious' and 'conscience', a conscientious claim is often equated with a claim of conscience. That equation can lead to the claim's being linked to a particular ethic or meta-ethic associated with the idea of conscience. In this paper, I intend no such link. I use the terms

‘conscientious’ and ‘conscience’ more generously so that they encompass any claim grounded in a claimant’s beliefs about right and wrong irrespective of the kind of morality, religious or non-religious, to which the claimant subscribes.

Justifying religious exemption by way of conscientious objection is controversial. Some commentators argue that religious claims have a special status simply as *religious* claims and that it is features special to religion that justify religious exemption; if we subsume religious claims within conscientious claims, religion will receive less than its due. Here I shall not try to settle that issue. There may be exemptions that are justified by something other than conscientious conviction, and exemptions that are justified on conscientious grounds may be justified on other grounds as well. However, if we take conscientious conviction seriously, we must take religiously-based conscientious conviction seriously and it is hard to see why anyone who is sympathetic to religious exemptions should want comprehensively to abjure the conscientious case that can be made for them.

I consider three issues that arise if, and insofar as, we treat claims for exemption as claims of conscientious conviction. These claims have a pro-tanto status, since whether they justify exemption all things considered will depend on how they weigh against other considerations that I do not take up in the paper.

First, should conscientious claims for exemption be subject to screening? Should we defer entirely to the beliefs of claimants, or should we subject their beliefs to some form of moral scrutiny and should we filter out mistaken beliefs, such as those based on erroneous understandings of what the doctrines of an established faith require?

Secondly, does the idea of conscientious conviction make especially significant whether engaging in, or abstaining from, a practice is obligatory for the claimant? Can there be a case for exemption even if the practice at issue is supererogatory?

Thirdly, moral questions are present in a vast range of laws and public policies. What justifies our marking out a limited set of issues as ‘issues of conscience’, such that claims for exemption are eligible only in relation to that set? And, if religious claims to exemption rank as conscientious claims, why are religious more common than non-religious conscientious exemptions?

In examining these questions, I consider whether their answers are governed by (a) principled thinking concerning the moral deference we owe to people’s conscientious convictions, or by (b) the practicalities of making legal provision for conscientiously-based exemption.

Cécile Laborde

Freedom of Association and Collective Religious Exemptions

Liberal egalitarian philosophers have recently argued that whatever rights religious associations have should be derived from the liberal value of freedom of association. I agree with this, but I show that freedom of association itself is an internally complex idea. I disaggregate the values it protects, so as to justify some of the collective rights claimed by religious groups. I set out two salient associational interests: what I call coherence and competence interests. I argue that while many

associations can appeal to coherence-related interests to defeat the application of some general laws, only some can, in addition, appeal to competence-related interests. Disaggregating associational interests in this way allows me to explain why religious associations (but not only they) can have some latitude in choosing their personnel.

Session 2

13.45 – 15.30

How should courts deal with claims of conscience?

Yossi Nehushtan

Tolerating Conscientious Objection: The Difference between Illegitimate Values and Misguided Values

When the liberal state decides whether to accommodate conscientious objections, it can apply one of two approaches: neutral liberalism and perfectionist liberalism. Choosing one of these approaches is necessary in order to define the limits of tolerance towards conscientious objections.

The paper offers a distinction between conscientious objections that rely on unjustly intolerant, morally repugnant and illegitimate values, and objections that rely on misguided yet legitimate values. It is argued that, all other things being equal, the state has strong reasons not to tolerate the former and weaker reasons not to tolerate the latter (thus subscribing to perfectionist liberalism).

The cases of (a) wearing religious dress/symbols in the workplace and (b) conscientious objection to performing abortions will be used as examples of conscientious objections that rely on misguided yet legitimate values. It will be argued that these objections can be tolerated under certain conditions.

The case of conscientious objection to equality laws will be used as an example of conscientious objection that relies on illegitimate values. It will be argued that this type of objection should almost never be tolerated.

Robert Wintemute

Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others

Is there a middle path between the existing case law of the European Court of Human Rights, which rarely requires accommodation of a religious individual's beliefs, and a 'general right to conscientious objection', which would exempt religious individuals from all anti-discrimination and other rules interfering with manifestations of their beliefs? The author argues that failure to accommodate is better analysed as *prima facie* indirect discrimination, to highlight the exclusionary effects of non-accommodation on religious minorities, and that the presence or absence of direct or

indirect harm to others (or cost, disruption or inconvenience to the accommodating party) could guide case-by-case assessments of whether the prima facie indirect discrimination is justified. The author then applies a harm analysis to the examples of religious clothing or symbols and religiously motivated refusals to serve others, recently considered by the European Court of Human Rights in *Eweida and Others v United Kingdom*.

Ian Leigh

Cake and Conscience

The *Ashers Bakery* case raises the question of how conscientious refusal of commercial services is to be characterised: under discrimination law or under human rights law? The Northern Ireland Court of Appeal's approach leads inexorably to rejection of the conscience claim under existing law. Where a supplier defends a discrimination action, the absence of a justification defence in relation to direct discrimination is fatal to conscience claims since the motive for less favourable treatment is legally irrelevant. Whether a duty of reasonable accommodation would produce different outcomes is debatable (Gibson 2013; Equality and Human Rights Commission 2015).

Legal protection of a right to conscientiously object would represent a more thorough-going difference of approach to the question. The paper will assess whether and, if so, why such claims would be more successful and how any such law could guard against sham claims and recognise the interests of third parties. The underlying question of the nature of indirect, secondary or 'complicity' conscience claims (NeJaime and Siegel 2015) will also be explored, alongside the logic and limitations of the alternative ways of depicting the options open to the courts.

Session 3

16.00 – 17.45

Doctrinal difficulties in the law of conscience

Frank Cranmer

Can non-natural persons have 'consciences'?

The issue as to whether non-natural persons such as commercial companies and partnerships – as opposed to their individual directors, shareholder or partners – can be regarded as having a 'conscience' and, more particularly, religious sensibilities that should be accommodated by law has been brought into focus by a series of cases on both sides of the Atlantic: most particularly, perhaps, *Hobby Lobby* in the US Supreme Court and *Ashers Baking* in the Northern Ireland Court of Appeal. My paper examines some of the recent case-law and comment, and suggests that, though the law is beginning to accommodate individual conscience for the owners and directors of small businesses, the arguments for its extension beyond SMEs are unconvincing.

Lucy Vickers

Conscientious objections in employment – is a duty of reasonable accommodation the answer?

In this paper, I will consider the question of how the law has dealt with requests for conscientious objection in the context of employment. Key cases for consideration include *Ladele* and *McFarlane*.

The paper will also consider whether a duty of accommodation, which is sometimes suggested as a way to manage religious interests in the work place, most recently by the think tank *Res Publica*,¹ would be an effective mechanism to meet the religious freedom interests of those seeking exemption from workplace. The paper will suggest that a duty of reasonable accommodation is not the best way to address conscience claims at work, and that instead an approach based on indirect discrimination and proportionality should be preferred. The factors that should shape the proportionality assessment in such cases will be discussed.

Maleiha Malik

TBC

¹ James Orr, *Beyond Belief* Defending religious liberty through the British Bill of Rights, *Res Publica*, November 2016. See also Katayoun Alidadi, 'Reasonable Accommodations for Religion and Belief,' *European Law Review* 37 (2012), 693–715; Matthew Gibson, 'The God "Dilution": Religion, Discrimination and the Case for Reasonable Accommodation,' *Cambridge Law Journal* 72 (2013), 578–616.