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# The Courts and Conscience Claims

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## I. INTRODUCTION

In a memorable scene in Richard Attenborough's 1982 film *Gandhi*, Mahatma Gandhi appears before a colonial judge charged with an act of civil disobedience based on his conscientious violation of legislation enforcing the tax on a basic commodity—salt. Given the opportunity to ask for mitigation Gandhi, in a bid for martyrdom, argues that the judge's duty, faced with such deliberate and symbolic disobedience towards the colonial authority, is to impose the maximum permitted sentence. This is an account, exaggerated no doubt for dramatic effect, of events surrounding the Salt March of 1930. Nonetheless, the episode neatly illustrates the dilemma facing the courts when dealing with individuals motivated by conscience, or by what they claim is a higher duty. Should they ignore the motivation or should they treat it as somehow better (or worse) than that of others who have done the same acts for more prosaic reasons?

The whole question becomes much more complicated of course in legal systems in which human rights or constitutional protections apply. The conscience claim frequently takes the form of a challenge to the constitutionality or rights-compatibility of the law. If the courts recognise the claim they are not strictly exempting the conscience question so much as finding that the law in question is overbroad. Moreover, even aside from these broader ways in which conscience questions become constitutionalised there are other routes to legal recognition that figure in the contemporary treatment of conscience questions and which add further complexities. Parliament may have provided exceptions to statutory provisions to reflect conscience concerns or exemptions for the benefit of certain groups that hold these views. In such cases questions about the scope of the defences or protections may arise. Although this is a conventional question of statutory interpretation naturally there is an

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In places I have drawn on the following: I Leigh and A Hambler, 'Religious Symbols, Conscience and the Rights of Others' (2014) 3 *Oxford Journal of Law and Religion* 1, 2-24; I Leigh, 'Reversibility, Proportionality and Conflicting Rights: Fernández Martínez v. Spain' in S Smet and E Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford, OUP, 2017), pp 218-241; I Leigh, 'Conceiving Religious Freedom in Terms of Obedience to Conscience' in I Benson and B Bussey (eds), *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto, Ontario, LexisNexis, 2017); I Leigh, 'The Legal Recognition of Freedom of Conscience as Conscientious Objection: Familiar Problems and New Lessons' in R Ahdar (ed) *Research Handbook on Law Religion* (London, Edward Elgar, 2018).

interplay with constitutional or human rights considerations affecting both the conscience claimant and, in some instances, the human rights of others.

Owing to recent clashes of rights in equality law (especially over sexual orientation and religion) much contemporary discussion has focussed on role of the courts in balancing these rights. One of the aims of this chapter, however, is to contextualise and broaden discussion of the role of courts in handling conscience claims. In doing so the objective is to identify the range of judicial tasks and approaches that apply to handling these claims and, in the process, to correct an over-emphasis on balancing. I shall discuss two basic positions that the courts can take to treat conscience as legally irrelevant or as relevant, arguing that in appropriate circumstances the latter is not merely desirable but obligatory in human rights law. Three specific questions that arise from recognition are then tackled: the weight to be attributed to legislative silence or non-recognition, the limiting role of judicial supervision in setting the boundaries of conscience claims and, finally, problems of reconciling these claims with other societal interest and the rights and freedoms of others. It will be argued that where conscience claims are concerned (as distinct from freedom of religion and belief) there are difficulties in limiting such claims through the conventional means of proportionality balancing and that greater attention needs to be given to alternative judicial techniques.

First, however, it is helpful to set out the positive case for recognising freedom of conscience by way of addressing two commonly voiced objections.

## II. RESPONDING TO PRELIMINARY OBJECTIONS

A common objection to the recognition of conscience claims in the form of exceptions to more general legal duties is that to do so would violate the rule of law and/or amount to unequal treatment of individuals or undue preference based on their beliefs. There is, however, a straightforward response to this position: a sound understanding of equality recognises that the criteria identifying which individuals or actions qualify for like treatment can easily take account of distinctions based on conscience. The formal conception of justice is to treat like cases alike *and* to treat different cases differently in proportion to their differences.<sup>1</sup> Once it is recognised that conscience imposes different burdens on some individuals in complying with legal rules there is no difficulty in recognising that justice requires them to be treated differently from other people who do not carry those burdens.

Although it is not the purpose of this chapter to engage in a comprehensive defence of this position, since the focus is on judicial treatment, it is nonetheless worth outlining two steps in the argument a little more fully. These are to elaborate on the nature of the rule of law and of conscience claims, respectively.

Firstly, it is a misunderstanding of the rule of law to equate it with identical treatment of all persons. The underlying question is whether it follows from acceptance of the universalist principle that law applies to all that it must therefore apply to all *in the same way*. For AV Dicey, whose work is forever associated with the rule of law, the second meaning of the concept involves the 'equal subjection' of all to one law administered by the ordinary courts. What Dicey had in mind was that there should be no distinct system of administrative law, rather than the uniform application of the law to all individuals.<sup>2</sup> In a modern state the law differentiates in myriad ways between different individuals and groups, not only

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<sup>1</sup> Aristotle, *Nicomachean Ethics*, trans. by R. Crisp (New York: Cambridge University Press, 2000).

<sup>2</sup> J Jowell, 'The Rule of Law and its Underlying Values' in J Jowell and D Oliver, *The Changing Constitution* (Oxford, OUP, 2011) 13-15.

according to role but also on occasion according to characteristics such as age and sex. The core issue is not identical treatment of all but rather treating different cases differently proportionately. The limited legal recognition that differences in treatment based on religion can be appropriate on occasion gives effect to this principle. For example, in discrimination law through concepts of Genuine Occupational Requirements and justification in relation to indirect discrimination; even differential treatment based upon a person's religion may in some contexts be permissible.<sup>3</sup> As explained more fully below, the European Court of Human Rights has also recognised that a failure to treat religiously-motivated law-breakers differently to other people committing the same offence is itself discriminatory.<sup>4</sup> It is doubtful therefore if a requirement of identical treatment for all to the exclusion of difference based on conscience is a necessary implication of the rule of law.

A second objection is to characterise conscientious objection or refusal as privilege-seeking. This is arguably a mischaracterisation based on a failure to appreciate the nature of conscience claims and the historical basis of recognition. It arises, understandably, from a modern tendency to focus on personal autonomy as the basis for freedom of religion and to view freedom of conscience as a subsidiary or derivative aspect. In an historical analysis of conscientious objection, however, Jose de Sousa e Brito points out that freedom of conscience (rather than freedom of religion) was recognised in the constitutions of several American colonies, culminating in the adoption of the First Amendment to the US Constitution.<sup>5</sup>

It is important to understand that in historical perspective freedom of conscience was seen to be worthy of recognition because of the obligatory moral nature of conscience upon the individual and the consequent dilemma that non-recognition creates. James Madison, for example, regarded conscience as 'an imperious sovereign; its demands [were] experienced as imperatives, as "dictates"'.<sup>6</sup> In *Memorial and Remonstrance* Madison argues:

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.<sup>7</sup>

Likewise, another writer summarises Roger Williams' position as:

the freedom to be captive to the Divine will, the freedom to be subject to a power other than Caesar's. Liberty of conscience protected the individual from the dilemma of having to choose between sovereigns, under temporal

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<sup>3</sup> Equality Act 2010, sch 9, paras 2 and 3, discussed below.

<sup>4</sup> *Thlimmenos v Greece* (2000) 31 EHRR 411 (violation of Art 14 ECHR in the case of a convicted conscientious objector to military service who was thereby prevented from becoming an accountant).

<sup>5</sup> Jose de Sousa e Brito, 'Conscientious Objection' in T Lindholm, W Cole Durham Jr, B Tahzib-Lie, *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden, Brill | Nijhoff, 2004) 275.

<sup>6</sup> W Cole Durham Jr, 'Religious Liberty and the Call of Conscience' (1992) 42 *De Paul L Rev* 71, 85.

<sup>7</sup> *Memorial and Remonstrance against Religious Assessments* (1785) in A Adams and C Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (Philadelphia, University of Pennsylvania Press, 1990) 104.

penalties for failure to heed one, but suffering eternal consequences for failure to obey the other.<sup>8</sup>

Robert George cites Newman's pithy summary: conscience has rights because it has duties. George distinguishes this understanding of conscience from a modern tendency to sometimes regard conscience as an outworking of autonomy (what he calls 'conscience as self-will'). He elaborates:

The right to follow one's conscience and the obligation to respect conscience – especially in matters of faith, where the right of conscience takes the form of religious liberty of individuals and communities of faith – obtain not because people as autonomous agents should be free to do as they please; they obtain, and are stringent and are sometimes overriding because people have duties and the obligation to fulfil them. The duty to follow one's conscience is a duty to do things or refrain from doing things not because one wants to follow one's duty but even if one strongly does *not* want to follow it. The right of conscience is right to do what one judges oneself to be under an obligation to do, whether one welcomes the obligation or must overcome an aversion to fulfil it.<sup>9</sup>

People who assert that their consciences forbid them from complying with general legal rules are, then, making a claim firmly within this long historical tradition. An appeal to conscience is a claim by an individual to be bound by a higher authority that transcends and trumps legal obligation. In seeking relief from legal obligation, the person making the appeal is seeking to avert the moral harm that would follow from being compelled to act against their conscience.

This is especially important to understand in the face of criticism suggesting that these are somehow novel, spurious, or contrived objections that go beyond the acceptable and agreed recognition given to religious freedom in a liberal state. As Javier Martínez-Torrón points out, however, this is not open season for

any and every intellectual opinion inspired by personal views but the ensemble of supreme personal rules of conduct, rooted in religious or non-religious beliefs, which leave for the individual a compelling force higher than any other normative reference.<sup>10</sup>

State recognition allows the individual following their conscience to integrate their beliefs and their actions, so avoiding the need to partition the two.

### III. THE DANGERS OF JUDICIAL CONSCIENCE-BLINDNESS

As noted above, faced with claims of this kind in relation to general or neutral laws, one approach is for the court to disregard the conscience-based motivation of the actor. Treating conscience as legally irrelevant may seem an attractive option: in line with the understanding of the rule of law, criticised above, it has a veneer of equal treatment. Moreover, it corresponds with the dominant positivist model of law, which separates questions of legal validity from morality. In a criminal case, for example, a court may in its discretion consider

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<sup>8</sup> T Hall, 'Roger Williams and the Foundation of Religious Liberty' (1991) 71 Boston UL Rev 455, 514.

<sup>9</sup> R George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (Wilmington, ISI Books, 2013) 112.

<sup>10</sup> J Martínez-Torrón, 'Protecting Freedom of Conscience Beyond Prejudice' in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Oxford, Routledge, 2015) 192.

the conscientious motivation of the party in mitigation or (in a civil case) when deciding upon remedies, but not to absolve her of legal responsibility in the first place. Such an approach also puts the onus firmly on the conscience-stricken person to choose whether to bear the cost of their beliefs, rather than requiring the state or some third party to accommodate them. In the history of civil disobedience, in particular, willingness to suffer has been taken as a mark of sincerity: either as a political lever in its own right or as an acknowledgement of the social contract.

Nonetheless, when the law disregards conscientious reasons for non-compliance, it reinforces a societal view of the conduct in question which squeezes the individual's perception into the category of 'private' beliefs or, depending on one's view, marginalises or trivialises them. At worst, disregarding conscience sets up a dissonance between permitted conduct and beliefs that means the individual must either in their own eyes deny their beliefs by acting contrary to them or face penalties in effect for following them.

Sometimes in a contemporary context, judges attempt to defend failure to legally recognise conscience by suggesting that it has been adequately accommodated because dissenters from the prevailing view are free simply to hold countercultural opinions or to teach them within their religious communities. Such judicial comments are no doubt meant to be consolatory—to avoid the appearance of wholesale winner and losers in the 'Culture Wars'—but they also embody a telling contradiction and reinforce the privatisation of conscience: finding that the beliefs in question are important enough to be acknowledged but not so important that they can be allowed to be acted upon. Whereas for the conscience-stricken individual the crisis they face is precisely over integrating their conduct and beliefs.

At other times the process is subtler and is a consequence of the hegemonic effect of legal categorisation of commonplace situations and transactions. For example, when discrimination law characterises behaviour as nothing more than the supply of goods and services it appears to follow unquestionably that *suppliers* should simply 'do their job' (provide a cake with a message of the customer's choice, for example) and disregard any other consideration, such as their personal beliefs.<sup>11</sup> Failure to provide services is accordingly constructed as discrimination against people of same-sex orientation.

Reductionism of this kind has been the dominant approach of UK courts and tribunals to recent direct religious discrimination claims involving matters of conscience. Thus, employees refusing for conscientious reasons to perform certain duties have been found to be no less favourably treated than any other employee who (for any other reason) fails to perform their contractual duties. The courts have on several occasions found that penalties an employee attributed to discrimination on grounds of their faith did not constitute direct discrimination, because the employer would have treated any employee who failed to perform their duties (for whatever reason) in the same way.<sup>12</sup> '[I]t cannot constitute direct discrimination to treat all employees in precisely the same way.'<sup>13</sup> Moreover, in direct

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<sup>11</sup> Even on this basis a marriage registrar might be treated differently since their performative speech or signature literally creates the marriage or civil partnership.

<sup>12</sup> For example: *Macfarlane v Relate Avon Ltd* [2010] EWCA Civ 880, where a Christian relationships counsellor who was dismissed for refusing to give some forms of sexual counselling to same-sex couples was found not to have been treated less favourably on grounds of religion, but rather because of his unwillingness to provide counselling; *Azmi v Kirklees MBC* [2007] ICR 1154 in which a bilingual support worker at a school who was dismissed for insisting on wearing the niqab veil had not suffered directly discrimination on grounds of religion or belief, since she had failed to show that she had suffered less favourable treatment than others in circumstances which were materially the same. In both instances an indirect discrimination claim also failed.

<sup>13</sup> *London Borough of Islington v Ladele* [2009] IRLR 154, para 53.

discrimination cases where *defendants* claim that the apparently less favourable treatment they have given to a claimant is based on conscience, judges have applied an outcome-driven ‘but-for’ approach that treats motive or the defendant’s own explanation of their conduct as beside the point.<sup>14</sup>

Reductionist approaches rest, however, on unarticulated assumptions about the nature of employment, the running of a business, or the conduct of a profession. By treating them as a mechanistic performance of functions or supply of services they adopt a particular perspective, calculated to exclude from consideration the ethical or moral perception of the employee or proprietor.<sup>15</sup> From a different perspective, however, employment cannot be reduced to mere performance of functions—what in an employment context Alvin Esau characterizes as an ‘instrumental’ approach to work<sup>16</sup>—and is not a sphere sanitised from spiritual or moral concerns. Secularists are not required to accept such viewpoints, of course, but in good faith they could acknowledge that there are alternative ways of seeing familiar activities and that the decision to reduce them to specific legal categories is a choice of perspective and is not self-evident, value-free or even-handed.

The thrust of this section of the argument has been to criticise judicial exclusion of questions of conscience and to argue against conscience-blindness. Finally, it can be noted that there is human rights provenance for such an approach. In the next section the duty that arises under human rights law on occasions to make exceptions from general legal rules for conscience will be addressed. It can also be noted in relation to other Article 9 claims that *Eweida et al v UK*<sup>17</sup> confirms that the domestic courts’ earlier approach of simply disregarding conscientious motivation in discrimination law cannot stand. It does not follow that conscience arguments are automatically conclusive but UK courts will certainly be obliged in future to consider them, irrespective of the statutory wording.

The next section develops the argument that conscience questions are legally relevant. This is naturally the case when legislation provides for explicit recognition of conscience, as it does in limited cases. It can though be seen more clearly perhaps when legislation is silent on the recognition of conscience. In these circumstances it is clear that courts not only may but on occasion should take account of relevant questions of conscience.

#### IV. WHEN LEGISLATION IS SILENT

What weight should be attributed by the courts to the failure of the legislature to recognise a conscience claim? On occasion it is clear that the omission of conscience protection was a deliberate legislative choice, for instance where the possibility of exemption *was* directly considered by way of unsuccessful legislative amendments.<sup>18</sup> For example, following the introduction of civil partnerships for same-sex couples in the UK, an unsuccessful attempt was made in the House of Lords by Lady O’Cathain to include conscience provisions for marriage

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<sup>14</sup> *Hall and another v Bull and another* [2013] UKSC 73. See also *R(E) v Governing Body of JFS* [2009] UKSC 15.

<sup>15</sup> As an example of this approach see R Wintemute, ‘Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others’ (2014) 77 MLR 223–253.

<sup>16</sup> A Esau, ‘“Islands of Exclusivity”: Religious Organizations and Employment Discrimination’ (2000) 33 UBC L Rev 719.

<sup>17</sup> *Eweida and Ors v United Kingdom* (2013) 57 EHRR 8.

<sup>18</sup> For detailed discussion of debates about the inclusion of such clauses in relation to same-sex marriage legislation in several countries see R Ahdar, ‘Solemnisation of same-sex marriage and religious freedom’ (2014) Ecc LJ 283; B MacDougall, E Bonthuys, K Mck.Norrie and M van der Brink, ‘Conscientious Objection to Creating Same-Sex Unions: An International Analysis’ (2012) 1 Canadian Journal of Human Rights 127.

registrars.<sup>19</sup> Equally, part of the background to the so-called ‘Gay cake’ appeal recently argued before the UK Supreme Court is the failure to provide exemptions from Northern Ireland sexual orientation discrimination regulations for religious ethos small businesses despite responses to the consultation on the regulations that urged ministers to do so.<sup>20</sup>

Where the legislature has considered and rejected such options, should this leave any room for a later appeal to conscience to the courts? The reason for the legislature not granting an exemption may be *because* recourse lies to the courts in any event to protect conscience and to balance it against other rights. But in any event, and without delving too deeply into the extensive literature about the contestable nature of rights, few commentators are prepared to give legislators exclusive or conclusive right to determine their meaning and scope in constitutional democracies. There appears to be no more reason to treat Parliament’s refusal to recognise the right as binding the courts in this than in any other context. The short but compelling answer is that if there is no reason why unsuccessful political campaigners for changes such as assisted suicide or opposite sex civil partnership, to take two recent examples,<sup>21</sup> should be barred from the courts following rebuff by the legislature, then why should conscience claimants?

A (slightly) longer short answer is that even when change follows a period of consultation, societal reflection and consensus-seeking contentious moral conflicts that have sometimes extended over decades cannot be settled in a democracy by stroke of the legislator’s pen. Legislation does not oblige those with serious objections of conscience who are on the losing side of a parliamentary debate to henceforth regard themselves as estopped from claiming judicial protection from being bound to act contrary to their beliefs. Otherwise individual conscience would be subordinate to majority opinion.<sup>22</sup> Conversely, though, in the context of balancing between different rights by a domestic court or to the application of the margin of appreciation by the European Court of Human Rights then a degree of judicial deference may be due to the balance the legislator has struck between competing rights. Unsurprisingly, then, in the recent Northern Ireland cake appeal counsel for Mr Lee and the Equality Commission, Robin Allen QC argued that because of the considered decision not to provide a conscientious exemption to suppliers of goods and services, the Supreme Court should be reluctant to find any limitations to the appellants’ Convention rights to be disproportionate.<sup>23</sup>

Protection of freedom of conscience may on occasion require the courts to craft an exception even if the legislature or policy-makers have failed to provide one. This can be seen both from Convention jurisprudence and in its implementation by the domestic courts. In *Thlimennos v Greece* the applicant was prevented from becoming a chartered accountant because of a serious conviction, arising from his refusal to wear a military uniform during conscription to the armed services. The Greek government argued that this was a neutral and general provision and that the domestic authorities could not be expected to go behind the reasons for the conviction; in his case the refusal was based on his beliefs as a Jehovah’s

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<sup>19</sup> HL Deb 13 July 2005, vol 684, col 1147.

<sup>20</sup> *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants)* (Northern Ireland) UKSC2017/0020 (hearing 1st and 2nd May 2018), discussed further below (text at n 78 ff).

<sup>21</sup> See respectively, *R (on the application of Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431; *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32.

<sup>22</sup> Here I disagree with the view of Richard Moon in his contribution to this volume but lack of space prevents full discussion. For an eloquent refutation see H Thoreau, *Walden and On the Duty to Civil Disobedience* (New York, Signet Classic, 1962) 242–3.

<sup>23</sup> N 20 above.

Witness. The European Court of Human Rights held, however, that the refusal to make an exception discriminated against the applicant on grounds of religion and belief contrary to Article 14:

The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.<sup>24</sup>

The Court found that the rule barring persons with a serious conviction from the accountancy profession could have a legitimate aim (preventing dishonesty or moral turpitude). However, this was not applicable in the case and, in any event, bearing in mind that the applicant had already served a prison sentence for the offence, the effect was disproportionate so that the criteria of objective and reasonable justification were not fulfilled.

A second clear instance at Convention level comes from *Bayatyan v Armenia*,<sup>25</sup> in which the European Court of Human Rights found that conscientious objections to military service falls within Article 9. The Armenian government had argued that, in the context of an active conflict with its neighbour Azerbaijan in which there was a national policy of compulsory male conscription, to provide for alternative service for conscientious objectors like the applicant (a Jehovah's Witness) would be to treat them in an unfairly favourable way. The Grand Chamber held, however, that the failure to provide for alternative military service interfered with the applicant's rights and was not necessary in a democratic society. In response to the government's argument it contended:

a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position [citing *Leyla Şahin*, § 108]. Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.<sup>26</sup>

The same approach can be seen at a domestic level in *Adath Yisroel Burial Society*<sup>27</sup> where a coroner's 'cab rank' policy of dealing with deaths in strict chronological order and without reference to religious considerations was found to be unlawful. In the context of an average delay of 15 days from the date of death until release of the body, the coroner had formulated her policy so as to treat all families fairly, regardless of religion, and so to avoid having to defer some inquests because others had been prioritised for religious reasons. By choosing to disregard the needs of Orthodox Jewish and Muslim families that their relative's body be buried as soon as possible after death, however, the coroner had, the court found, acted unlawfully. She had fettered her discretion, acted irrationally, breached Articles 9 and

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<sup>24</sup> *Thlimennos v Greece* (2001) 31 EHRR 15, at para 44. It is noteworthy that Greek law provided a procedure for conscientious objection (within 3 months of call-up) which the applicant had *not* used but the Court found this did not debar his claim arising from the conviction.

<sup>25</sup> *Bayatyan v Armenia* (2012) 54 EHRR 15.

<sup>26</sup> *ibid* para 126.

<sup>27</sup> *R (on the application of Adath Yisroel Burial Society) v Senior Coroner for Inner North London* [2018] EWHC 969 (Admin).



14 of the European Convention on Human Rights, and had discriminated indirectly contrary to the Equality Act 2010.<sup>28</sup>

It is the Divisional Court's treatment of Articles 9 and 14 that is of particular interest here. In relation to Article 9, Singh J pointed out that:

what Article 9 requires is not that there should be any favouritism, whether in favour of religious belief in general or in favour of any particular religious faith, but that there should be a fair balance struck between the rights and interests of different people in society. The fundamental flaw in the present policy adopted by the Defendant is that it fails to strike any balance at all, let alone a fair balance.<sup>29</sup>

There could be a need to differentiate between cases according to individual circumstances based on religion:

What on its face looks like a general policy which applies to everyone equally may in fact have an unequal impact on a minority. In other words, to treat everyone in the same way is not necessarily to treat them equally. Uniformity is not the same thing as equality.<sup>30</sup>

Under Article 14 equality required not only that like cases to be treated alike, but also that different cases be treated differently.<sup>31</sup>

It is also clear from the human rights jurisprudence that the mere existence of a limited conscience clause does not bar claims that fall outside their scope on which the legislation is silent. The clearest instance is perhaps the early Convention decision of *Young, James and Webster v United Kingdom* in which the Strasbourg court found that the then UK closed shop legislation (the Trade Unions and Labour Relations Act 1974, as amended) was contrary to the negative right of freedom of association, under Article 11, not to be compelled to join an association against one's will.<sup>32</sup> The impugned legislation contained a right of conscientious objection for those with genuine religious objections to joining a trade union. A further proviso for those with 'any reasonable grounds'<sup>33</sup> to being a member of a particular trade union contained in the 1974 Act was repealed by amendments in 1975, giving rise to the dilemma faced by the applicants since their employer, British Rail, had a closed shop agreement. Two of the applicants (Young and Webster) who objected on grounds of conscience to joining a trade union fell outside the scope of the revised provision since their objection was non-religious in character.<sup>34</sup> This did not prevent the Court from finding in their case that:

The protection of personal opinion afforded by Articles 9 and 10 in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11. Accordingly, it strikes at the very substance of this Article to exert pressure, of the

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<sup>28</sup> An argument that the coroner was in breach of the public sector equality duty under s 149 of the Equality Act was rejected.

<sup>29</sup> *Adath Yisroel Burial Society* (n 27 above) para 107.

<sup>30</sup> *ibid* para 111. Citing *Jakóbski v Poland* (2012) 55 EHRR 8 in which the ECtHR found a violation of Article 9 because of the failure by the Polish prison authorities to take account of the applicant's religious dietary needs in providing food in prison.

<sup>31</sup> *Adath Yisroel Burial Society* (n 27 above) para 117.

<sup>32</sup> See also *Thlimennos v Greece* (n 24 above): the Greek law provided a procedure for conscientious objection (within 3 months of call-up) which the applicant had *not* used but the Court found this did not debar his claim arising from the conviction.

<sup>33</sup> ie not limited to conscience grounds of any kind.

<sup>34</sup> Mr James' objection was not based on conscience.

kind applied to the applicants, in order to compel someone to join an association contrary to his convictions.<sup>35</sup>

## V. JUDICIAL SUPERVISION

In view of the case made so far for judicial recognition of conscience claims, this section seeks to argue that recognition need not lead to an anarchical situation in which conscience claimants can opt-out of legal duties at will in the way critics sometimes claim. This is because the courts supervise these claims both by individuals and groups, and keep them within boundaries.

The point can first be demonstrated from the judicial treatment of the conscience provision against being required to ‘participate’ in an abortion (Abortion Act 1967, s 4(1)). At first sight, this appears to grant extremely broad protection from statutory or contractual compulsion subject only to the formality that the burden of proof lies on the claimant to establish their conscientious objection.<sup>36</sup> However, the courts have limited its application by interpretation of what ‘participate’ means. Thus, in *ex p Janaway*<sup>37</sup> it was held that a secretary asked to type a letter referring a patient for an abortion did not have the right to invoke the provision since she was not participating in the treatment. In *Greater Glasgow Health Board v Doogan and another* the UK Supreme Court faced a similar question in relation to whether two Roman Catholic midwives, who worked as labour-ward coordinators in the Glasgow Southern General Hospital and whose duties included supervising staff participating in abortions, could claim the protection of s 4.<sup>38</sup> The Supreme Court found in a preliminary ruling that ‘participate’ meant ‘taking part in a hands-on capacity: actually performing the tasks involved in the course of treatment, rather than the ancillary, administrative, and managerial tasks which the appellants, as supervisors, were obliged to carry out’.<sup>39</sup>

With regard to groups, although the provisions in the Equality Act 2010 designed to protect the autonomy of religious groups are often described as exemptions, this is misleading since they do not take the form of a straightforward exclusion. Only certain activities, bounded by qualifying tests, are excepted under the provisions. They are applicable to ‘employment for purposes of an organised religion’ and allow an employer to apply a requirement related to sex, marriage and sexual orientation in two circumstances.<sup>40</sup> These are to comply with the doctrines of the religion,<sup>41</sup> or to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers.<sup>42</sup>

The wording may appear wide, but the responsible minister was at pains to argue in Parliament that ‘organised religion’ was substantially narrower than a religious organisation and that the exception was intended to apply to a very small number of posts on a ‘case by

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<sup>35</sup> *Young, James and Webster v UK* (1982) 4 EHRR 38, para 57. Having found a violation of Art 11, the ECtHR found that, at para 66, it was not necessary to determine if Art 9 was violated.

<sup>36</sup> Abortion Act 1967, s. 4(2).

<sup>37</sup> *R v Salford Health Authority, ex p Janaway* [1988] 2 WLR 442.

<sup>38</sup> *Greater Glasgow Health Board v Doogan & Anor* [2014] UKSC 68. The question of whether arrangements made by the Board in relation to respondents were compatible with Art 9 ECHR was referred to the tribunal hearing the case.

<sup>39</sup> *ibid* para 38.

<sup>40</sup> See now Equality Act 2010, Sch 9, para 2. Like religion, sexual orientation is a ‘protected characteristic’ under the Equality Act 2010 and hence discrimination in matters of employment on this ground is generally unlawful.

<sup>41</sup> Equality Act 2010, Sch 9, para 2 (5).

<sup>42</sup> Equality Act 2010, Sch 9, para 2 (6).

case' basis.<sup>43</sup> The courts have approached it in this light.<sup>44</sup>

This exception was considered in *Reaney*<sup>45</sup> in which an Employment Tribunal found that the refusal to employ a homosexual church youth worker notwithstanding his undertaking at interview to remain celibate constituted direct discrimination on grounds of sexual orientation. The Diocese's claim to invoke the organised religion exception failed because, in the Tribunal's view, bearing in mind his undertaking, Reaney satisfied the conditions and the bishop was not acting reasonably in doubting Reaney's undertaking to remain celibate. The Tribunal found that the exception applied to a youth worker post<sup>46</sup> and that the Church of England's doctrinal stance on homosexual celibacy was within its scope.<sup>47</sup> It held, however, that the final requirement of the exception was not met (that the person to whom that requirement is applied does not meet it or the employer is not satisfied in all the circumstances and it is reasonable for him not to be satisfied if that person meets it).<sup>48</sup>

Subsequent decisions have shown that the courts probe whether the objection is clearly based on doctrine, as the recent decision on whether denial by an Anglican bishop of an Extra-Parochial Ministry Licence to a clergyman who had married his same-sex partner amounted to discrimination on grounds of sexual orientation demonstrates.<sup>49</sup> Without the licence the plaintiff was unable to work as a hospital chaplain, where the duties included conducting services of worship. The Court of Appeal found that the employment tribunal had not erred in concluding that the Church of England's doctrinal position was to be found in a statement of Pastoral Guidance from the House of Bishops in conjunction with the Church's canonical view of marriage.<sup>50</sup> While judges would be acting beyond their competence in assessing the soundness of such doctrinal positions by adjudicating between rival claims, the *Pemberton* decision illustrates how they can nonetheless ensure that those exceptions do not become de facto exemptions by assuring themselves that there is a basis for doctrinal claims.

Indeed, a recent decision from the European Court of Justice affirms that judicial supervision of this kind is required in areas to which EU equality law applies.<sup>51</sup> In a preliminary ruling on a reference from a German Federal Labour Court concerning the correct approach to the exception in Article 4(2) of the Equality Framework directive for churches and religious ethos organisations,<sup>52</sup> the CJEU held that the principle of effective judicial review must

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<sup>43</sup> Lord Sainsbury of Turville: 'we had in mind a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including those who exist to promote and represent religion', HL Debs, col 779, 17 June 2003.

<sup>44</sup> *R (on the application of Amicus et al) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin), paras 114-127, per Richards J, holding that the equivalent earlier provision was consistent with the Equality Framework Directive and was not invalid.

<sup>45</sup> *Reaney v. Herford Diocesan Board of Finance* (2007) ET Case No 1602844/2006 (17 July 2007).

<sup>46</sup> 'The Claimant would be in one of the small number of jobs which would be closely associated with the promotion of the Church. The Claimant would have been promoting religion in the way in which it has been suggested the regulations are meant to encompass'. (ibid. para 102).

<sup>47</sup> ibid paras 103-104.

<sup>48</sup> ibid paras 105-107.

<sup>49</sup> *Pemberton v Inwood* [2018] EWCA Civ 564.

<sup>50</sup> ibid paras 62-63.

<sup>51</sup> Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* EU:C:2018:257 (Grand Chamber, 17 April 2018).

<sup>52</sup> Art 4(2) states:

Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based

apply.<sup>53</sup> While courts should not assess the legitimacy of the ethos of the organisation, they were expected to determine ‘whether the occupational requirement imposed by the church or organisation ... is genuine, legitimate and justified, having regard to that ethos’.<sup>54</sup> Consequently there had to be an ‘objectively verifiable’ ‘direct link between the occupational requirement imposed by the employer and the activity concerned.’<sup>55</sup> Furthermore, the occupational activity had to be sufficiently important for the manifestation of that ethos or the exercise by the church or organisation of its right of autonomy.<sup>56</sup> Moreover, the organisation was obliged to show in the particular case that ‘the supposed risk of causing harm to its ethos or to its right of autonomy is probable and substantial’.<sup>57</sup> Accordingly, it was not open to member states to provide in their law that the need for the exception was to be determined by the religious organisation itself and any such national provision had to be interpreted in the light of the principle of effective judicial supervision and, if this was not possible, to be disapplied.

The CJEU’s approach is in line with that adopted by the European Court of Human Rights in balancing religious autonomy with other rights in which the Strasbourg court has in effect taken on the role of verifying that the domestic courts have undertaken the proportionality analysis with sufficient rigour and without undue deference to religious group interests.<sup>58</sup> The appropriateness of such balancing is considered next.

## VI. WEIGHING CONSCIENCE CLAIMS AGAINST OTHER INTERESTS

If it is accepted that conscience claims should be judicially recognised in the ways outlined so far, what, if any, are the limits to recognition? In recent decades proportional balancing has emerged as the dominant method of human rights adjudication—a move reflected in the belated adoption by the European Court of Human Rights in *Eweida* of it as the preferred method for reconciling religion and belief and other interests, at least in an employment context.<sup>59</sup> On the whole this move is to be applauded in the case of religion and belief as reflecting a generous approach to when the right is engaged and offering the potential (not always actualised to date) of allowing for more systematic and structured consideration of

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on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos. This difference of treatment shall be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

<sup>53</sup> *Egenberger* (n 51 above) paras 55 and 59.

<sup>54</sup> *ibid* para 61.

<sup>55</sup> *ibid* para 63. Pursuit of ‘an aim that has no connection with that ethos or with the exercise by the church or organisation of its right of autonomy’ would not be legitimate’ (at [66]).

<sup>56</sup> *ibid* para 65.

<sup>57</sup> *ibid* para 67.

<sup>58</sup> *Obst v Germany* App no 425/03 (ECtHR, 23 September 2010); *Schüth v Germany* (2011) 52 EHRR 32. *Siebenhaar v Germany* App no 18136/02 (3 February 2011); *Fernandez Martinez v Spain* (2015) 60 EHRR 3.

<sup>59</sup> *Eweida* (n 17 above) para 83:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

See also: *Obst v Germany* (n 58 above); *Schüth v Germany* (n 58 above); *Siebenhaar v Germany* (n 58 above).

the relevant interest, in which the onus is on the state to justify limitation of the right. This section will adopt a generally more sceptical approach, however, of its applicability to freedom of conscience claims.

In theory, when it comes to the weighing of conscience against other social interests and other people's rights under human rights law the difference between conscience and religion and belief is of some importance. This is because the text of Article 9 ECHR and Article 18 ICCPR refer to a right to *manifest* one's religion or belief (subject to limitations) but only a right to freedom of conscience. From this most writers conclude that there is no right to manifest one's freedom of conscience.<sup>60</sup> While this conclusion appears faithful to the drafting of these instruments it also creates a series of difficulties. Nor does it seem to have proved much of an obstacle in practice to courts proceeding on the basis that individuals have a right to express their conscience, which can be limited according to other factors.

The difficulty with distinguishing religion and belief on the one hand and conscience on the other is neatly expressed by Carolyn Evans: 'Many people come to their beliefs by following their conscience and their conscience is, in turn, shaped by the nature of those beliefs'.<sup>61</sup> Moreover, if a juridical distinction has to be drawn it would seem to follow that the religiously-informed conscience should be better protected (through a limited right to be manifested) than the non-religious conscience. This does not comport well with the invariably cited statement that freedom of thought, conscience and religious is a precious right for non-believers. That apparent inconsistency may, however, be cancelled out by the right to manifest one's *beliefs*—assuming this to be sufficiently broad to include non-religious questions of conscience.

In fact, the practice of the European Court of Human Rights suggests that it does not pay undue attention to these distinctions. That may be because in the past the Court frequently applied a restrictive approach to when Article 9(1) was engaged under the well-known dictum from the *Arrowsmith* case that not every action motivated or inspired by a belief is a practice that manifests it.<sup>62</sup> So, in the case of conscience claims by pharmacists, in its brief admissibility decision in *Pichon and Sajous v France*, the European Court of Human Rights found that the conviction for refusal to sell contraceptives that had been medically prescribed did not interfere with the pharmacists' Article 9 rights. The Court said:

as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.<sup>63</sup>

That decision pre-dates the change of approach of the European Court of Human Rights in *Eweida* and it is likely that were it to be decided again today it would be on the basis that there was a justified limitation under Article 9(2), because of the rights and freedoms of others. Indeed, even before *Eweida*, a markedly more nuanced position was adopted by the Court in *RR v Poland*, where it stated:

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<sup>60</sup> C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, OUP, 2000), 52.

<sup>61</sup> *ibid*, 52-53.

<sup>62</sup> *Arrowsmith v UK* (1981) 3 EHRR 218. The majority of the Commission found that the applicant's distribution of leaflets calling on soldiers not to serve in Northern Ireland were not a protected manifestation of her pacifist beliefs because the leaflets in question reflected political arguments rather than pacifism as such.

<sup>63</sup> *Pichon and Sajous v France* App n 49853/99 (Commission Decision, 2 October 2001).

States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.<sup>64</sup>

This appears to impliedly acknowledge that Article 9 is in play<sup>65</sup> and avoids some of the obvious questions begged by the *Pichon and Sajous* decision about 'imposition' of the pharmacists' views and whether freedom to manifest views in other contexts is a reason to deny the right to do so in one's employment.

So far there is no evidence that the Court applies its post-*Eweida* approach to Article 9 only to manifestation of *religious* beliefs. Clearly, one option would be to retrace the steps to *Arrowsmith* and to develop instead a more robust distinction between conscience, belief and religion. The developing right of conscientious military service would perhaps be the most obvious field in which such a distinction could emerge, but to date there is no sign of the Court treating non-religious pacifists differently to religious ones. Moreover, to do so would seem anomalous and discriminatory.

Paradoxically the only attempt to develop a more systematic distinction between religion and belief and conscience comes in a partially dissenting judgment by Judges Vucinic and De Gaetano in one of the *Eweida* group of cases, *Ladele v UK*, and it turns the conventional analysis referred to above on its head. The judges noted that conscience is protected under Article 9(1) but is 'conspicuously absent' from the limitations available to Member States in Article 9(2).<sup>66</sup> From this they concluded that conscience, once a certain threshold is reached, is an absolute right (similar to the *forum internum*) which cannot be qualified (*inter alia*, with respect to the rights of others) in the way that religious manifestation more generally might be. Following this logic they found that Ms Ladele had a right to follow her conscience on a moral matter and that, since this was an absolute right, there was consequently no requirement to engage in any kind of balancing exercise in consideration of sexual orientation rights. Her fundamental human right to exercise moral conscience could not be trumped by an 'abstract' right. Predictably the latter choice of terms has drawn criticism, although, paying careful attention to the Convention jurisprudence on sexual orientation equality, it is not indefensible.<sup>67</sup> However, it is the argument about the fundamental nature of conscience which is the focus here.

Interestingly the history of the development of the right of conscientious objection before the UN Human Rights Committee shows the Committee having progressively moved to the same approach. In *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*<sup>68</sup> the Committee decided, for the first time, that lack of alternative civilian service to military conscription breached Art 18 of the Covenant. Bearing in mind that a large number of states had introduced schemes of alternative service to accommodate conscientious objectors to compulsory military service, it found that Korea had not adequately demonstrated why this was impossible in its case without compromising national security. Accordingly, it could not

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<sup>64</sup> *RR v Poland App* no 27617/04 (ECtHR, 26 May 2011).

<sup>65</sup> Admittedly, however, Art 9 was not directly considered by the Court (which found breach of Arts 3 and 8 in the case of a woman suffering repeated delay in accessing prenatal screening).

<sup>66</sup> *Eweida* (n 17 above) Partially Dissenting Opinion of Judges Vucinic and De Gaetano, para 2.

<sup>67</sup> I Leigh and A Hambler, 'Religious Symbols, Conscience and the Rights of Others', (2014) 3 *Oxford Journal of Law and Religion* 2-24.

<sup>68</sup> *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, CCPR/C/88/D/1321-1322/2004, UN Human Rights Committee, 23 January 2007.

rely on Art 18(3) to limit the right.<sup>69</sup> This reasoning could not easily account for the application of Art 18 to non-religious conscientious objectors,<sup>70</sup> whose right to manifest their beliefs was not explicit in the text. The approach of treating conscientious objection as a manifestation of the right of religion and belief also left open the possibility that a state might in future be able to justify its refusal to accommodate conscientious objectors under Art 18 (3). As one member of the HRC (Sir Nigel Rodley) later pointed out, however, since claims of conscientious objection were most likely to arise against the background of existential threats to the state this possibility had ‘a certain lack of reality’. He argued instead that because of the value of sanctity of life the ‘right to refuse to kill must be accepted completely’ and therefore Arts 18(1) and 18(2) were a more appropriate basis for the right of conscientious objection.<sup>71</sup> Subsequently in *Jeong et al v Republic of Korea* the HRC accepted the force of these points and found by a majority that the complainants’ conviction and sentence for refusing to be drafted amounted to an infringement of their freedom of conscience, in breach of article 18 (1), rather than by way of unjustified restriction on external manifestation.<sup>72</sup> In the later decision of *Young-kwan Kim and others v Republic of Korea*, the Committee acknowledged that the implication of its approach was to treat some forms of conscientious objection as absolute and others<sup>73</sup> as only entitled to qualified protection.<sup>74</sup>

The concept of overlapping protection, in which some conscientious positions receive full protection and others only a qualified protection that is defeasible by other interests, gains some support from the way different types of conscience claim are often treated in practice. There is broad consensus that some acts against one’s conscience are so serious that the individual’s protection against them should be absolute. Being compelled to kill another person contrary to one’s beliefs about the sanctity of human life falls into this category (whether the beliefs are religiously derived or not). This helps to explain the protection in many legal systems and under human rights law for conscientious objection to military service. On the other hand, conscience-based beliefs about marriage or sexual conduct have tended to be treated by courts as subject to qualified protection, where, among other considerations, the rights and freedoms of others need to be proportionally balanced.<sup>75</sup>

This is not to say that such balancing is unproblematic either. There has also been a regrettable tendency on the part of the Strasbourg court to refer to the ‘rights and freedoms

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<sup>69</sup> ‘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.’

<sup>70</sup> See *Eu-min Jung, Tae-Yang Oh, Chang-Geun Yeom, Dong-hyuk Nah, Ho-Gun Yu, Chi-yun Lim, Choi Jin Taehoon Lim, Sung-hwan Lim, Jae-sung Lim and Dong-ju Goh v Republic of Korea*, Comm Nos 1593 to 1603/2007 (adopted 23 March 2010), UN Doc CCPR/C/98/D/1593-1603/2007, finding violations of Art 18 where a number of the complainants had no specific religious basis for their conscientious objection.

<sup>71</sup> *Atasoy and Sarkut v Turkey*, Comm Nos 1853/2008 and 1854/2008, UN Doc CCPR/C/104/D/1853-1854/2008 (2012).

<sup>72</sup> *Jeong et al v Republic of Korea* Communications no 1642-1741/2007 (Human Rights Committee, 27 April 2011).

<sup>73</sup> Such as objections to compulsory schooling and payment of taxes.

<sup>74</sup> *Young-kwan Kim and others v Republic of Korea* (Comm no 2179/2012 (14 January 2015), CCPR/C/112/D/2179/2012).

<sup>75</sup> See, eg *Eweida* (n 17 above) [106], dealing with the claim brought by Ms Ladele; *In the Matter of Marriage Commissioners Appointed under The Marriage Act, 1995*, 2011 SKCA 3 (January 10, 2011); *Dichmont v Newfoundland and Labrador (Government Services and Lands)* 2015 NLTD (G) 14.

of others' in a loose and generalised way.<sup>76</sup> This can be seen in the existing Convention jurisprudence in which conscience has come into conflict with the interests of others. The text of the Convention itself is unhelpful since it does not specify what is to count as a 'right' or 'freedom' in the various limitation clauses (especially Arts 8(2), 9(2), and 10(2)). In fuller discussions elsewhere I have argued in favour of a reversibility test which would require the Court to ask whether another identifiable victim would have an admissible Convention claim if the state were to 'reverse' the outcome by giving priority to the less favoured right. If such a victim cannot be identified then the test suggests that no legitimate aim for a restriction exists. It follows that there is no need to consider questions to do with the legal quality or proportionality of the restriction. This is not the place for a full recapitulation of the argument but, in summary, the reversibility test helps to prevent the undisciplined growth of limitations to rights, helps promote consistent and symmetrical interpretation of Convention rights, and maintains the priority of Convention rights over other legal interests. Some prominent examples of 'balancing' by the European Court of Human Rights of freedom of thought, conscience and belief and other rights are shown to be spurious by careful application of this test.<sup>77</sup>

The relevance of the reversibility test can be briefly demonstrated by illustrating its potential applicability to the *Ashers Bakery* ('Gay Cake') case recently decided by the UK Supreme Court.<sup>78</sup> The interest here is on the Convention rights arguments, rather than on the applicability of discrimination law to the appeal.

In the Supreme Court the bakery argued that even if discrimination law applied to its refusal to supply the cake with the message 'Support Gay Marriage', the legislation should be interpreted compatibly with their rights under Arts 9 and 10 ECHR or, if such an interpretation was not possible, be treated as ultra vires. Conversely, the Equality Commission argued that the legislation had already struck a balance between the competing rights that the courts should defer to and that the appellants' Article 9 and 10 claims were limited by the rights and freedoms of others. In that context it is important to clearly identify what the competing rights are. The bakers contended that to treat their refusal to supply the cake with the message supporting same-sex marriage as unlawful discrimination was a form of compelled speech, contrary to Articles 9 and 10 of the Convention.

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<sup>76</sup> Cf. J Bomhoff, 'The Rights and Freedoms of Others: The ECHR and its Peculiar Category of Conflicts between Fundamental Rights' in Eva Brems (ed) *Conflicts Between Fundamental Rights* (Antwerp- Oxford, Intersentia, 2008).

<sup>77</sup> I Leigh, 'Reversibility, Proportionality and Conflicting Rights: Fernández Martínez v. Spain' in S Smet and E Brems (eds.), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford, OUP, 2017), pp 218-241; I Leigh and A Hambler, 'Religious Symbols, Conscience and the Rights of Others' (2014) 3 *Oxford Journal of Law and Religion* 2-24; I Leigh, 'Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 (1) *Res Publica* 55-73.

<sup>78</sup> The County Court found that a bakery had breached equality legislation by its refusal, in accordance with the proprietors' Christian beliefs, to supply a cake for a campaign event with slogan in favour of same-sex-marriage: *Lee v Ashers Baking Co. Ltd.*, County Court in Northern Ireland, May 19, 2015. For discussion see R Wintemute, 'Message-Printing Businesses, Non-Discrimination and Free Expression: Northern Ireland's "Support Gay Marriage" Cake Case' (2015) 26 *King's Law Journal* 348. The Northern Ireland Court of Appeal rejected an appeal, holding that the bakery had directly discriminated on grounds of sexual orientation and political opinion: *Lee v McArthur & Ors*, [2016] NICA 29. The Supreme Court held that there was no sexual-orientation discrimination. It also found that to the extent that there was any discrimination on the basis of political belief, enforcing the anti-discrimination legislation against the bakery would breach the religious freedom (Art 9) and negative freedom of expression (Art 10) of the owners of the bakery: *Lee v Ashers Baking Company Ltd & Ors* (Northern Ireland) [2018] UKSC 49.



How should the claim that to do so would offend the bakers' conscience be treated? On the one hand, the bakers argued that they were asked to positively endorse something they found to be immoral. This perhaps put them in a stronger position than a business that refused service to a same-sex couple on grounds of conscience.<sup>79</sup> On the other hand, the endorsement point is open to the objection that bakers are not normally understood to identify with the message they ice, whether the message contains birthday or anniversary greetings or support for a football club.<sup>80</sup> This is partly a question of whose viewpoint the law should adopt—that of an onlooker<sup>81</sup> or of the person concerned. Normally, however, courts are reluctant for good reason to go behind the beliefs of a religious claimant if satisfied that they reach a minimal threshold of cogency, seriousness, coherence and importance. The recent Convention jurisprudence shows the Court tending to take such statements at face value where the actions are 'directly motivated' by the applicant's religious beliefs<sup>82</sup> and, consequently, treating Article 9 as engaged, but (as noted above) this is coupled with a preparedness to apply the limitations under Article 9(2) in a loose or generous way for the state's benefit. It is not surprising, then, that the Supreme Court accepted that it was the baker's own view that to supply the cake with the message in support of Gay marriage would be contrary to their conscience that was determinative.<sup>83</sup>

If it is accepted that fulfilling the cake order involved the bakery or its directors identifying with the message, then being required to do so in the case of a message that they disagreed with would undoubtedly constitute an interference with their freedom of expression. Equally, approached from the direction of the directors' conscience<sup>84</sup> the same applies—this is the basis, after all, for the earliest conscience provisions, allowing a person to affirm rather swear a religious oath in court or as a condition of public office. The European Court of Human Rights has repeatedly found that a requirement to swear a religious oath violates Article 9.<sup>85</sup>

Could it be argued, though, even accepting that freedom of speech or freedom of thought, conscience and religion was engaged, that it should be limited in the interests of the rights and freedoms of others under Article 9(2) or 10(2)? It is here that the reversibility test is potentially helpful in clarifying what rights or interests are at stake. It would be a mistake to start from the premise that what is involved is a clash between freedom of conscience and equality rights. This is an inaccurately wide formulation which is likely to lead to an unsound conclusion. There is no general Convention right to be protected against discrimination by private persons in the provision of goods and services. Article 14 of the ECHR applies only to discrimination by *states* in relation to *the enjoyment of Convention rights*. Protocol 12 (which the UK has not signed in any event) is wider but still stops short of requiring states to prohibit

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<sup>79</sup> Such refusals are likely to be dismissed as a straightforward claim for exemption from legal obligations because of disagreement with the law: cf Baroness Hale in *Bull v Hall* (n 14 above) para 37.

<sup>80</sup> *Lee v McArthur & Ors*, [2016] NICA 29, para 67.

<sup>81</sup> Wintemute (n 78 above) pp 353-355 argues in favour of the viewpoint of a reasonable onlooker.

<sup>82</sup> See, for example, *Eweida* (n 17 above) para 103 (refusal of marriage registrar to conduct civil partnership ceremonies) and para 108 (refusal to provide sex counselling to same-sex couples).

<sup>83</sup> *Lee v Ashers Baking Company Ltd & Ors* (n. 78 above), para. 54.

<sup>84</sup> The European Court of Human Rights has been reluctant to recognise that commercial organisations as such have rights under Article 9: JC Norton, *Freedom of Religious Organisations* (Oxford, OUP, 2016), 179-180. In *Asher's Baking* the Supreme Court held that to hold the company liable on this basis would 'effectively negate' the appellants' Convention rights: *Lee v Ashers Baking Company Ltd & Ors* (n. 78 above), para. 57.

<sup>85</sup> *Buscarini v San Marino* (2000) 30 EHRR 208; *Alexandridis v Greece*, App no 19516/06 (ECtHR, 21 February 2008); *Dimitras v Greece*, App nos 42837/06, 3269/07, 35793/07 and 6099/08 (ECtHR, 3 June 2010).

discrimination by private parties.<sup>86</sup> Some Council of Europe states have legislated on discrimination in the provision of goods or services by private suppliers, but many have not. Those that have not could not be said to be in breach of the Convention. Equally, EU law does not require states to prohibit discrimination in the provision of goods and services on grounds of age, disability, religion or belief, or sexual orientation.<sup>87</sup> It is clear then that if there were no equality legislation applicable in Northern Ireland to goods and services Mr Lee would have not have a Convention rights claim arising from the refusal of the cake order.

The distinction between rights under national legislation and Convention rights *stricto sensu* ought to be highly pertinent when considering ostensible conflicts of rights in cases such as this. The effectiveness of protection under the Convention would be undermined if rights under national legislation were able to prevail over those rights chosen for special protection under the ECHR. It is a regrettable feature of both the Strasbourg and domestic jurisprudence, however, that too often in the past courts have failed to be alert to this distinction.<sup>88</sup>

The Supreme Court in *Ashers Baking* found that there had been no sexual orientation discrimination by refusing to bake a cake with the slogan 'Support Gay Marriage' so the Court did not have the opportunity to resolve an ostensible conflict of rights. Even if it had found that there had been sexual orientation discrimination, it is nonetheless worth emphasising the political nature of the event for which the cake was intended. The legislation on same-sex marriage does not apply to Northern Ireland and there can be little doubt that to oppose its introduction is squarely within the range of political discourse, highly protected under Article 10.<sup>89</sup> From this point of view the respondent was free to promote his message for a change in the law but the appellants, just like anyone else, could not be compelled to assist him. Adopting a reversibility analysis, there is no Convention right to be supplied with a cake with a message, still less a political message with which the supplier disagrees.

This argument is consistent with the Supreme Court's treatment of political belief discrimination in *Ashers Baking*.<sup>90</sup> It found that prima facie the message in support of Gay

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<sup>86</sup> *Explanatory Report to the Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Council of Europe, 2000), para 25.

<sup>87</sup> A longstanding proposal to extend it in this way in the 'Horizontal Directive' has not been implemented: European Commission, 'Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons irrespective of Religion or Belief, Disability, Age or Sexual Orientation' COM (2008) 0426 final.

<sup>88</sup> For example in *Bull v Hall* (n 14 above) deciding that the Christian guesthouse owners' rights (with regard to manifesting their belief in the immorality of sex outside heterosexual marriage) were limited by the rights and freedoms of others under Article 9(2). The Supreme Court did not engage in any systematic analysis of what the overriding rights were from a Convention point of view. At paragraph 5 of her judgment Baroness Hale refers in general to the applicability of appellants' rights under Articles 8 and 14, but in the later section dealing with the applicability of the Human Rights Act 1998 bases the discussion on their rights under the ordinary law instead (ibid para 44). See also Lord Toulson and Lord Neuberger at para 72 and para 85 respectively, concurring.

<sup>89</sup> *Castells v Spain* (1992) 14 EHRR 445.

<sup>90</sup> Discrimination on grounds of political belief is an under-explored aspect of the Article 14 jurisprudence. In *Redfearn v United Kingdom* [2013] IRLR 51 (ECtHR) the European Court of Human Rights found that the absence of a remedy for employment discrimination on the basis of political opinions or membership infringed Art 11, in the case of dismissal of an employee who had been elected as a British National Party councillor. His Art 14 claim was admissible but was not determined in the light of the Court's finding on Art.11.

Assuming, however, that political belief discrimination falls within the scope of Article 14, the reversibility argument made above about sexual-orientation would, apply in the same way: a state is not required by the Convention to make such discrimination unlawful in the case of the private supply of goods and services and so 'the rights and freedoms of others' do not arise under Art. 9(2) or 10(2). The legislative prohibition in Northern Ireland is certainly unusual, if not unique, in the Council of Europe.

marriage was indissociable from Mr Lee's political beliefs and so raised the question of whether he had been directly discriminated against on grounds of those beliefs. Baroness Hale found, however, that while the bakery could not refuse service because of the customer's sexual orientation or support of Gay marriage:

But that important fact does not amount to a justification for something completely different - obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake. ... The fact that this particular message had to do with sexual orientation is irrelevant. ...<sup>91</sup>

If, as I have argued, the courts were to be substantially more cautious in reaching for balancing as a way of defeating potentially undesirable claims, there could be a prospect that the floodgates would open to unmeritorious applicants and 'conscience creep' would lead to an anarchical situation. There are several responses that can be made to this understandable concern. Firstly, proportional balancing may indeed be appropriate for a narrower category of cases. Conscientious objection claims by medical professionals spring to mind as a field in which this type of contextual, fact-sensitive approach would be suitable. Where countries at the one pole entirely deny conscientious objection so that a pro-life midwife in Sweden is unable to find work<sup>92</sup> or, at the other pole, allow it so freely that women are impeded from their legal entitlement to access abortion, as in Italy and Poland,<sup>93</sup> it seems entirely correct to balance the two rights in a context-sensitive way.

Secondly, if there is an increase in resort to conscience claims it may be partly in response to the perception that existing religious freedoms claims are being too lightly treated by the courts in a way that invariably results in defeat whenever an obstacle is encountered such as a conflicting societal interest or the claim that the state is acting to protect the rights of others.<sup>94</sup> Religious affiliation is frequently characterised as a matter of individual choice—with the implication that it is less worthy of protection than other rights. Arguably, claimants have been forced to respond to religious illiteracy on the part of society and the courts by enunciating more clearly the nature and consequences of their beliefs and to find new legal ways of presenting their arguments. A more rigorous judicial approach to conflicting rights in religion cases might incidentally disincentivise some conscience claimants.

Thirdly, proportionality is not the only way to limit overbroad conscience claims in any event. There are other tools available. It is open to a court to apply the existing requirements that beliefs must attain a certain level of cogency, seriousness, cohesion and importance<sup>95</sup> and that there must be a sufficiently close and direct nexus between the act and the belief<sup>96</sup> to fall within Article 9 more stringently to debar tenuous conscience claims. Although, as noted above, the European Court of Human Rights uses these tests sparingly, one can see how such reasoning could potentially deal with some instances where the claim is that the person's conscience would be violated if they were made to some degree complicit in the

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<sup>91</sup> *Lee v Ashers Baking Company Ltd & Ors* (Northern Ireland) (n. 78 above), para. 55.

<sup>92</sup> As in the case of Ellinor Grimmark. BBC, 'Swedish Anti-Abortion Midwife Loses Court Case' (BBC News, 13 April 2017).

<sup>93</sup> Parliamentary Assembly of the Council of Europe, Resolution 1763 (2010). See Explanatory Memorandum, 'Women's Access to Lawful Medical Care: the Problem of Unregulated Use of Conscientious Objection', Doc 11757 (Rapporteur C McCafferty).

<sup>94</sup> For example, *SAS v France* [2014] ECHR 695.

<sup>95</sup> *Bayatyan* (n 25 above) [110].

<sup>96</sup> *Eweida* (n 17 above) [82].

actions of other people that it would be immoral for they themselves to undertake. There is also the possibility in cases of contrived conscience claims of defeating them by (sparing) use of a sincerity test.<sup>97</sup>

## VII. CONCLUSION

The question of how courts approach conscience claims is assuming greater significance and is likely to continue to do so due to a variety of factors. These include the increasing pluralism of Western societies which make it less likely than in the past that legislation can be framed to accommodate the variety of beliefs and practices existing in these societies. At the same time, against the combined background of the Culture Wars and of 9/11 and its aftermath, religion has become toxic for many liberal legislators. As a consequence they seem less inclined than in previous decades to provide conscience clauses when enacting reforming legislation.<sup>98</sup> The side-effect is that claimants look to the courts for protection instead. Conscience claims are no longer the preserve of conscripted soldiers. They are increasingly made by public officials, healthcare professionals, and even bakers. Judicial activism may itself be part of the cause. Where the courts engage in progressive or innovative constitutional interpretation of rights, for example to assisted suicide or same-sex marriage, one effect may be to create new crises of conscience for existing professionals.<sup>99</sup>

In this chapter it has been argued that the courts should embrace conscience claims both for normative and doctrinal reasons. At the normative level the frequently-voiced objections to conscience claims—that they involve special treatment of certain groups that somehow violates the rule of law or that claimants are privilege-seekers—have been shown to rest on misunderstandings. Equal treatment does not require uniformity. The reverse is the case in fact, once it is accepted that conscience burdens some individuals in a way that it would be unjust not to recognise. Legal doctrine reflects this position and there is a clear duty on courts in human rights law when the right of freedom of conscience is engaged to make appropriate provision where the legislature has failed to do so.

On the other hand, the fear that by doing so the courts would open the floodgates to anarchy underestimates the extent to which courts currently supervise the boundaries of conscience claims both by individuals and groups under exceptions and exemptions. As noted above, conscience claims are increasingly made in response to newly introduced rights and services under progressive law reform, whether by the legislature or the judiciary. Here the question of how to reconcile conscience with other societal interests and the rights and freedoms of others arises. It should not be assumed that proportional balancing is the correct or best way to resolve all such potential conflicts. Indeed, in some situations on careful analysis it is unlikely to be applicable and the right of freedom of conscience will be

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<sup>97</sup> A Hambler, 'Establishing Sincerity in Religion and Belief Claims: a Question of Consistency', (2011) 13 Ecc L J 146-56.

<sup>98</sup> Note, for example, the refusal to grant more than temporary exemption for Catholic adoption agencies from the Equality Act 2010.

<sup>99</sup> As with physician assisted suicide in Canada (*Carter v Canada (Attorney General)* [2015] SCC 5) or same-sex marriage in the US in *Obergefell et al v Hodges, Director of Ohio Department of Health et al*, Supreme Court of the United States, 576 US, 26 June 2015 and South Africa in *Minister of Home Affairs and Another v Fourie*, Case CCT 60/04, 1 December 2005 [2005] ZACC 19 (although the judgment in *Fourie* also seems to have been the catalyst for inclusion in the subsequent legislation of a right of conscientious objection: Civil Union Act 2006, s 6; *Fourie* [159]).

unqualified. Even where conscience rights are qualified there may be more appropriate alternatives, involving more careful examination of whether either freedom of conscience or the ostensibly conflicting right is properly engaged. However, there is likely to remain a smaller group of conscience claims—including those by healthcare professionals—where proportional balancing is unavoidable and appropriate.