

Discrimination, Exemption, and Non-Religious Belief

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It is difficult to find any good reason why religious belief should be legally protected while other forms of belief should not. Significantly, the European Convention on Human Rights protects ‘thought’ and ‘conscience’ as well as ‘religion’ and current discrimination law protects ‘religion or belief’ rather than religion alone. Why then do we hear so much more about religious than non-religious belief, especially in relation to human rights law and discrimination law? Is non-religious belief receiving less than its due?

There are ‘innocent’ reasons for the greater prominence of religious belief.

- (i) As a matter of sociological fact, religion bulks larger than other forms of belief in multicultural societies like Britain and is more likely to be a ground for discrimination.
- (ii) Religions are more likely than non-religious beliefs to throw up norms of conduct that clash with prevailing socio-economic arrangements, such as holy days, religious festivals, dress codes, sacred symbols, prayer times, dietary requirements, and so on. It is difficult to imagine a non-religious system of belief generating a similar range of norms, unless it was itself quasi-religious.

So, in some measure, we can accept that religious belief enjoys its higher profile for contingent reasons rather than because it is deliberately favoured.

However, in discrimination law, religious belief did until recently wear the trousers in that it was religious belief that determined what could count as non-religious ‘belief’ for purposes of legal protection. A belief had to be analogous to religious belief – it had to be ‘religion-like’ – if it was to be recognised as ‘belief’ by discrimination law. That would have been satisfactory if the real aim was to protect religious belief alone and if reference were made to ‘belief’ more generally only to cope with the difficulty of stipulating where religious belief begins and ends. But if non-religious belief deserves protection in its own right, it is clearly unsatisfactory that protection should have been limited only to religious unbelief or to belief that mimicked religion.

As Russell Sandberg indicates in his paper, the requirement that legally recognised non-religious belief should be ‘similar’ to religious belief has now been dropped. But does the fact that belief has still to be ‘philosophical belief’ indicate that religion still wears the trousers? Why should a belief have to be part of a philosophy, part of a comprehensive web of ideas, to count? Some people may possess philosophies, such as humanism, that are analogous in range, detail and internal coherence to a religion, but those people are likely to be the exception. Why should other sorts of non-religious belief be excluded?

In fact, some of the examples Russell cites from recent legal cases indicate that courts and tribunals are willing to understand ‘philosophical’ in a very undemanding way. Belief in the sanctity of life as a reason for objecting to fox-hunting has been deemed a ‘philosophical’ belief, as has the belief that ‘public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion’. But if these count as ‘philosophical beliefs’ for purposes of discrimination law, it is hard to see why political beliefs should not also qualify; their being ‘political’ does not make them not ‘philosophical’ in the relevant sense, even when they amount only to ‘political opinions’. Pragmatically, it is understandable that legislators should not want to exclude political opinions, but epistemically it is not easy to see how the distinction between belief and opinion can survive these very relaxed understandings of what constitutes a philosophical belief.

Should we therefore extend the range of beliefs that receive legal protection? Should protected belief include, for example, political belief? I have few worries about that proposal in relation to direct discrimination. It is morally, if not always legally, wrong that a person should be deliberately deprived of an opportunity in virtue of *any* consideration that is not genuinely relevant to that opportunity. So we can deplore *any* instance in which a belief, of whatever kind or degree, adversely affects a person’s opportunities if the belief is not a consideration that is genuinely relevant to the opportunity.

I do, however, have worries about indirect discrimination. Current law seems to embody the assumption that any ‘characteristic’ that should be protected from direct discrimination should also be protected from indirect discrimination. Protecting people from indirect

discrimination imposes cost and inconvenience on employers and providers of goods and services. Those costs are limited: an employer or provider is required to accommodate the demands of a protected characteristic only up to the point at which her doing so conflicts with her use of 'proportionate means to achieve a legitimate aim'. But there will still be some costs, particularly when 'proportionate means' is interpreted ungenerously (as it was, e.g., in *Noah v Desrosiers*).

In a context of freedom of belief, it is unsatisfactory and arguably unfair that people should be able to export the costs of their beliefs to others, particularly when the beliefs at stake are subjected to such limited 'quality control'. There are counter-considerations that I cannot review here, but the default position should be that, in a society in which people enjoy freedom of belief, they should take responsibility for coping with the demands of the beliefs they embrace, rather than expect others to pick up the bill for beliefs they do not share. Of course that concern applies as much to religious as to non-religious beliefs, but it gives us reason to pause before extending the list of characteristics, including the beliefs, that are protected by discrimination law. We may think, for example, that people should be protected from direct discrimination in respect of their political beliefs, whenever those beliefs are not genuinely relevant considerations. But do we also think that employers should have a *prima facie* obligation to allow employees to sport political symbols and slogans in the workplace or to take time off to attend party conferences or other party meetings or to campaign in by-elections and national, local and European elections?

I turn now to a different but related subject: exemptions, such as the well-known exemptions enjoyed by Sikhs in relation to crash helmets, hard hats and knife-carrying in public, and those enjoyed by Jews and Muslims in relation to ritual slaughter. Whereas discrimination law governs people's relationships as members of civil society, these exemptions concern the relationship between the state and its citizens. I want to suggest that religious beliefs are easier candidates for these sorts of exemption than are non-religious beliefs.

In most liberal democratic societies, including Britain, there is widespread acceptance, albeit neither well-defined nor universal, that political decisions should not be made on religious grounds. That is a requirement of religious freedom, particularly of freedom from religion, since, if we made political decisions on religious grounds, we would be using political power

to impose the demands of a particular religion upon people who embrace other religions or no religion.

Typically a whole variety of considerations bear on public policy decisions. Whatever public decision is made, some people will disagree with it and may rightly disagree with it, but, assuming the decision has been made legitimately, they like others are obliged to comply with it. In particular, they may have non-religious beliefs about what the decision should be, but those beliefs will not justify their exemption from the decision since the content of their beliefs falls within the range of legitimate considerations for public policy. We can deem them considerations that the public decision-making process has taken into account.

By contrast, religious reasons stand outside the considerations that contribute to public decision-making. Public policy does not incorporate judgement on whether Christianity or Islam or Sikhism or any other religion is 'correct'. It is therefore easier for the authorities to acknowledge that Sikhs have reason not to wear crash helmets that is special to themselves; that Jews and Muslims have reason not to stun animals before slaughter that is special to themselves, and so on; and to recognise that those religious reasons are separate from, and additional to, the reasons that have contributed to the public policy decision. The authorities can then go on to allow that, for the religious groups at issue, their religious beliefs may tip the balance of considerations relating to the policy in the opposite direction and justify exemption.

That is not to say that religious reasons, merely as such, justify exemption. At best they will be *prima facie* rather than conclusive reasons; a public decision has still to be made on whether they justify exemption all things considered. All I have tried to explain is why, given the attempt to keep religion out of the arena of political decision-making, it is easier for the religious than for the non-religious to present themselves as special cases.

I do not claim that it is never possible for non-religious convictions to be given a similarly special status. Legal systems now often give non-religious claims of conscience a similarly privileged place in relation to matters such as war and abortion. In one way these nonreligious exceptions prove the rule concerning the logical structure of what I have argued. For example, non-religious conscientious objection to war as such – that is, non-religious pacifism – is treated as a 'private conviction' that stands outside the reasons that enter into

public decision-making concerning the prosecution of a war. That is why the conscientious objector gains an exemption from conscription, while the person who has a much more plausible, better founded and better informed, objection to the justice of a *particular* war does not. The latter's reasons may be better reasons but they have the status of 'public' reasons and, as public reasons, they find their way into and are pronounced upon in the public decision-making process. By contrast, the reasons of the non-religious pacifist are conceived as 'private convictions' that are not similarly incorporated in and subordinated to the public decision-making process. But while non-religious conscientious convictions can and do join religious beliefs in giving their holders legally recognised claims to exemption, it is much more difficult in the non-religious case to see how and why we should make the 'cut' between private convictions that give their holders claims to exemption and public reasons that give their holders none.