

Equality v Conscience? Ethics and the Provision of Public Services

Annabelle Lever

annabelle@alever.net

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Should Catholic adoption agencies be required to serve gay couples because they are willing to serve non-Catholics? Should Catholic hospitals be required to provide contraceptives to those who want them? Such questions lie at the heart of contemporary controversy, in Britain and the USA, over the appropriate scope for conscientious exemptions from antidiscrimination law, and over the implications of allowing voluntary associations a role in the provision of public goods and services. Freedom of conscience requires that faith-based institutions be free to serve their members' needs in accordance with their religious teachings. But what should happen when faith-based institutions serve the general public, often with public funds?

There are two logically coherent but opposed answers to these questions: 'conscience trumps all' and 'equality trumps all'. Cardinal Timothy Dolan, Roman Catholic Archbishop of New York and President of the US Conference of Catholic Bishops, represents the first position, and the British Humanist Society represents the second. Both illuminate the complexities of the issues and their limitations highlight the scope for political choice in morally acceptable responses to such questions.

According to Cardinal Dolan, conscience is as much implicated in the way Catholic-affiliated hospitals treat non-Catholic employees and patients as it is in the way that the Catholic Church handles purely internal matters, such as the selection of priests, or ministry to parishioners. Consequently, he claims, religious exemptions from non-discrimination laws that apply to the Church's treatment of the faithful must apply to its provision of services to the general public as well. Hence, he insists, if it is wrong to force the Catholic Church to make contraceptive and abortion care accessible to the faithful, it would be wrong to force it to provide insurance covering such care to non-Catholics working in Catholic schools and hospitals. Similarly, Dolan maintains, if adoption services

are precluded from serving gay couples when they minister only to the faithful, they must be allowed to discriminate against gay couples when they serve the general public.

By contrast, the British Humanist Society maintains that equality and non-discriminatory public services require religious agencies either to abide by the same antidiscrimination norms as the State, or stick to serving their co-religionists. Hence the Society's report, 'Quality and Equality: Human Rights, Public Services and Religious Organisations', concludes that 'all organisations involved in the provision of statutory public services should be secular ones, but if religious ones are to be given contracts, they must operate in an inclusive, secular manner'.

The difficulty with this view is that religious communities have an expressive interest in providing charitable services in accordance with their faith. Soup kitchens are not restaurants, and religion-affiliated hospitals and public services have an expressive and charitable rationale which their for-profit equivalents lack. Thus, even if voluntary associations must abide by norms applicable to the state when they are acting '*in loco statu*, (just as they must abide by norms applicable to parents when they act '*in loco parentis*'), it does not follow that states are never *permitted* to grant conscientious exemptions to charities which serve the public.

Still, the limits of the idea that 'equality trumps all' do not mean that 'conscience trumps all'. No one has a conscientious obligation to provide goods and services to the general public, whatever our duties to the poor and needy. Respect for conscience, therefore cannot *require* states to compromise the equality of their citizens, or their access to public services. In short, it is one thing to say that religious beliefs should determine religious care of the faithful, and quite another to say that they should determine the provision of non-profit goods and services for the general public, whether or not the state is subsidising those services.

There is therefore more scope for political choice in determining the extent of religious exemptions than is sometimes thought. Everyone has duties of charity, and these may lead us to serve those who do not share our ideals and convictions. But it is no violation of conscience when we are unable to provide those services because of state laws which protect people's freedom and equality. On the other hand, there appear to be a range of

cases in which states may, but need not, encourage the voluntary provision of public services, and where they may, but need not, grant conscientious exemptions from generally applicable laws. For example, states may wish to promote Jewish-Muslim cooperation in the provision of non-profit goods and services, and therefore to subsidise such things as genetic counselling and advice on domestic violence even if this means accommodating the religious beliefs of their more traditional members. However, states are obliged to ensure fair access to goods and services for citizens, and to protect their dignity. This means that states are entitled, and sometimes obliged, to seek alternatives to existing voluntary associations, and to favour those which will abide by non-discrimination norms over those which cannot.

Imagine two scenarios. In the first, a catholic adoption agency refuses to place children with same-sex couples in a city where there are many other adoption services, including gay-friendly ones. In the second, the same agency exercises a virtual monopoly over adoption services. In the former, accommodating the expressive interests of Catholics is compatible with protecting the self-respect and care of those ineligible for Catholic adoptions. This is not the case on the second scenario. Hence, in such circumstances, the state would be entitled to remove any subsidies that it was providing to the Catholic agency, and to seek out and subsidise non-discriminatory adoption services by others, or to provide them itself. Given the importance of adoption services to prospective parents, to the children involved, and to their birth parents, the state would have a duty to diminish the importance of any voluntary provider who was unable to abide by antidiscrimination norms, in order to meet its *own* obligations of non-discriminatory care to its citizens.

No state has a duty to support the charitable activities of religious groups in preference to other groups, and no state has a duty to support the charitable activities of groups-religious or not – who behave in a discriminatory fashion. That is the fundamental difficulty with the ‘conscience trumps all’ approach to the rights of non-profit public service providers. Indeed, the state has no duty to support existing voluntary associations in preference to alternatives. Those who are currently best placed to provide non-profit public services did not gain their position purely on merit. The relative capacity of different religious groups, different charitable groups and different providers of public

services is still shaped by the legacy of undemocratic powers and privileges, inherited from the past. So while I have argued against forcing small religious associations to abide by antidiscrimination laws that violate their beliefs, states have duties to ensure that the powerful serve the public fairly, and duties to redress unjust forms of power and privilege. States are therefore entitled to promote non-profit associations which will abide by antidiscrimination norms, and may remove subsidies from existing associations in order to do so. This is not because equality is more important than freedom of conscience. Rather, it is because a conscientious commitment to equality is a fragile achievement and deserving of state support.

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