

# Conscientious Exemptions: The Fallacy of Neutral Liberalism and Neutral Pluralism

Review of: John Adenitire *A General Right to Conscientious Exemption: Beyond Religious Privilege* (Cambridge University Press, 2020)

Yossi Nehushtan\*

## I. Introduction

John Adenitire's book presents a powerful argument, from a powerful thinker, in defence of neutral liberalism and neutral pluralism within the context of conscientious exemptions. Neutral liberalism is used both as a way of describing the nature of the practice of granting conscientious exemptions, and as a justification for granting exemptions in the right cases.

The book offers comprehensive, complex and insightful arguments; first – for having a general right to be granted conscientious exemptions; and second – about the typical cases where this right trumps other rights and interests. The book makes a mostly implied yet important attempt to remedy the fallacy of 'pure' neutral liberalism as a theory that aims to explain the practice of granting conscientious exemptions – and justify it. In short, Adenitire rejects 'pure' liberal neutrality, as far as it entails being 'value-neutral', or not making an adverse judgment about ways of life or perceptions of the 'good' of others - or not acting on that judgment. Instead, Adenitire offers an approach that still prohibits state officials, especially judges, from making such adverse judgment and acting on it, but only as long as a competing way of life or perception of the good does not meaningfully and directly contradict core liberal values such as equality, dignity, and autonomy. Staying away from 'pure' neutrality and being willing to offer some protection to core liberal values does remedy some of the shortcomings of neutral liberalism. Adenitire, however, is not a perfectionist-liberal, not quite yet. His core arguments are more committed to neutrality and pluralism than to equality, dignity, and autonomy. Therefore, the version of neutral liberalism or neutral pluralism that Adenitire offers as a theoretical framework that explains and justifies the practice of granting conscientious exemptions, and his either implicit or explicit rejection of perfectionist liberalism and the principle of toleration as alternative theoretical framework for these purposes, is vulnerable to similar criticism that has been aimed towards the orthodox view of 'pure' neutral liberalism.

Elsewhere I argued that granting conscientious exemptions is almost always the outcome of toleration and that the principle of toleration best explains the practice of granting conscientious exemptions and the attitude of those who grant the

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\*Professor of Law and Philosophy, Keele University. A slightly different version of this review was published in 84(4) *The Modern Law Review* (2022) 1097-1102.

exemptions.<sup>1</sup> In short, the argument is that typically, granting conscientious exemptions from a legal rule which is not morally neutral, presupposes that the state does not share the conscientious objector's values or her way of balancing between values, or believes it would be unbearable and indeed intolerable if everyone shared the objector's kind of conscience and reasoning. Otherwise, the exemption would have been the general rule rather than the exception to it. When the state does grant conscientious exemptions, the state makes an adverse judgment about the conscientious objector's values, yet does not act on that judgment (for whatever reason). The state, therefore, is being tolerant toward the objector.

In his book, Adenitire reiterates his criticism on this view, and argues that instead of seeing conscientious exemptions as an expression of toleration, we should make recourse to a cluster of moral principles which explain and guide that practice. The cluster that he suggests contains various principles, including autonomy, freedom of conscience, well-being, and respect for state neutrality.

## II. Granting conscientious exemptions – and neutrality

Neutrality is an elusive concept. Neutral liberalism requires the state to pay equal respect to either all or as many as possible competing moral claims and ways of life. It requires that the state should not endorse, promote, or restrict any value or way of life, despite the fact that the state's authorities may believe that some values and ways of life are worth pursuing whereas others are not. According to almost all perceptions of neutral liberalism, when the state decides whether to restrict people's freedom it should ignore the moral content of the values on which the claim for 'freedom' is based, and only take into account content-neutral considerations.

Adenitire uses this perception of neutrality, and at times adds to that the concept of pluralism, to justify having a non-absolute right to be granted conscientious exemptions. He argues, for example, that "in imposing a particular rule which creates a barrier to the pursuit of a particular way of life, the state may be portrayed as violating its duty of neutral pluralism: the state makes certain ways of life less accessible and thereby incentivizes individuals to choose other conceptions of a good life (i.e. the more accessible ones). If the state is to remain neutral among competing ways of life it should therefore grant an exemption to alleviate the barrier it has created" (12).

Whether the state *should* be generally neutral is a question which is beyond the scope of this note. The focus of the following discussion will be on two other issues, with an emphasis on the latter. The first is the impossibility of general state neutrality. The second is the impossibility of state neutrality within the context of granting conscientious exemptions.

## III. Can there be a neutral state?

When the state enacts laws, especially laws that are likely to be objected to on conscientious grounds, the state must make value judgments about conflicting conceptions of the good and about many aspects of its citizens' lives. Many of these judgments reflect moral choices and preferences of one set of values over another. Such is the case, for example, regarding legal decisions about the mere existence of income tax and its rate; the existence of national health insurance and its extent;

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<sup>1</sup> Yossi Nehushtan, 'What Are Conscientious Exemptions Really About?' (2013) 2 Oxford Journal of Law and Religion 393-416; Yossi Nehushtan, *Intolerant Religion in a Tolerant-Liberal State* (Hart Publishing, Oxford, 2015).

privatization; abortions; euthanasia; criminalising hate speech; polygamy; anti-discrimination laws; privacy laws; sexual harassment laws; same-sex marriage laws; subsidizing primary and higher education; subsidizing cultural institutions and so on. Almost any legal or political decision regarding these issues is in fact a moral decision, at least in part. In order to make these decisions, the state has to embrace some values and reject others, or to accord greater weight to some values and less weight to others. Almost any meaningful political or legal decision distributes rights, duties, benefits, responsibilities, and goods. Therefore, all states must make moral decisions about how to apply a chosen version of distributive justice – and justify that chosen version. Whatever the state decides may be objected to by some, on the ground of conscientious reasons, among others. Even Adenitire, who generally subscribes to neutral-liberalism, admits that “the state cannot permit all expressions of every lifestyle. Some will collide with fundamental public interests and/or the rights of others” (13). However, the mere existence of ‘fundamental’ public interests—and even more so: rights, their meaning, and the weight that should be accorded to them—cannot be decided by applying purely neutral criteria, and without making any moral judgment regarding competing lifestyles.

Adenitire’s neutral-pluralism attempts to allow cohabitation of as many possible different conceptions of the good. It is not an attempt to be value-neutral. Adenitire will therefore not deny that a liberal state is not and cannot be value-neutral when it legislates. He will also not deny that if the liberal state’s laws do not reflect and protect liberal values such as equality, autonomy, dignity, privacy etc., then it cannot be perceived as a liberal state in any meaningful way. Lastly, if Adenitire agrees that a liberal state must and does prioritise liberal values and reject non-liberal ones when it legislates, then he should also agree that when the liberal state does that, it makes adverse judgments about non-liberal values and act on those judgments.

Despite this, Adenitire argues that a liberal state cannot be a tolerant one; that toleration does not describe the nature of the practice of granting conscientious exemptions; and that judges are prohibited from making (almost) any value-based judgment about the beliefs of conscientious objectors. And here lies the core problem with Adenitire’s main thesis. If no state can be purely neutral, if all states must and do make moral judgments every time they enact laws that reflect or enforce moral values, and if every modern state does enact laws that reflect or enforce moral values, then it will be incoherent to argue that courts must be neutral when they decide whether to grant conscientious exemptions from non-neutral laws. This argument leads us to the next section, where it is argued that within the context of granting conscientious exemptions, state neutrality is not only undesirable but also impossible, as it can never be coherent.

#### **IV. Can the state be neutral when it grants conscientious exemptions?**

Our concern here is conscientious objection to laws that reflect or protect moral values, rather than to laws that are morally neutral. Within this context, Adenitire offers his neutral-liberal model for granting conscientious exemptions. One of its fundamental propositions is that “the liberal state should generally refrain from passing moral judgement on the content of the beliefs which give rise to a claim for conscientious exemption” (242-243). This view coincides with Adenitire’s previous writing where he

stated that “the state has no place in expressing negative (or positive) moral judgments about the content of conscientious objectors’ beliefs, ie it has a duty of neutrality”.<sup>2</sup>

However, within the context of granting conscientious exemptions, an approach of state neutrality is impossible, simply because it can never be coherent. Here, Adenitire’s argument is that by enacting laws that reflect and enforce certain moral values, the state is violating its duty of neutrality. In order to remedy said violation, the state should (sometimes) grant exemptions from such laws to those who conscientiously object to them. A coherent argument for state neutrality would be that the state should never enact laws that reflect or enforce certain moral values to begin with. But Adenitire does not make that argument. His argument is that the state is allowed to enact such laws, but must then quickly remedy their non-neutral nature by granting exemptions to those who object to these laws because of conscientious reasons. Thus, the general non-neutral legal norm should be upheld, while exemptions should be granted from it, while applying content-neutral considerations, thus without acting on any moral judgment about the content of the objector’s conscience – even though such judgment has been made when the general legal norm was enacted (or, perhaps, precisely because of that). Adenitire, much like all others who subscribe to neutral-liberalism or neutral-pluralism, does not explain why general legal norms are allowed to reflect or enforce certain moral values (and in fact – must do so) whereas decisions as to whether to exempt conscientious objectors from the application of such norms must not reflect moral values and be content-neutral instead.

Using the case of anti-discrimination laws will help in explaining the incoherence of this approach. Anti-discrimination laws are not and cannot be neutral.<sup>3</sup> They take a moral stand that clashes with many lifestyles and ideologies, both religious and secular. Denying the right to act upon certain moral positions is the exact purpose and nature of such laws. When such laws include protected characteristics, such as sexual orientation, they take a moral view on this issue, which almost always contradicts other moral views that some people hold. The prohibition on discriminating against others on the ground of their sexual orientation is not aimed at enlightened people who would never consider discriminating against lesbian, gay, bisexual and transgender (LGBT) people, nor is it mainly aimed at those who discriminate against LGBTs because of mere preferences or interests. It is aimed mostly at homophobes and those who have moral reasons for discriminating against LGBTs. From the liberal state’s point of view, it makes no sense to exempt from equality laws the same people who are the reason for enacting such laws. Put simply, granting exemptions from laws that reflect and enforce moral values to those who conscientiously object to these moral values may make these laws—and therefore core liberal values—redundant. The argument from neutrality can be coherent (yet utterly non-persuasive) if it is aimed against anti-discrimination laws as such. It cannot be coherent if it justifies anti-discrimination laws and at the same time argues for exemptions from such laws to those who really, truly, strongly, and conscientiously wish to discriminate against others.

Adenitire makes two further arguments for state neutrality within the context of granting conscientious exemptions. He argues that:

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<sup>2</sup> John Adenitire, ‘Conscientious Exemptions: From Toleration to Neutrality; From Neutrality to Respect’ (2017) 6(2) *Oxford Journal of Law and Religion* 268, 281.

<sup>3</sup> For more details, see: Yossi Nehushtan, ‘Conscientious Objection and Equality Laws: Why the Content of the Conscience Matters’ (2019) 38(3) *Law and Philosophy* 227.

“it is futile for the state to express a view on the merits of the content of the beliefs of the objector for two reasons. First, such moral judgment is unlikely to lead the objector to change his beliefs. Second, the moral judgment is totally unnecessary for the more important task of safeguarding the public interest or the rights of others which the acts of the objector may undermine” (250).

The first argument about the futility of making an adverse judgment about the content of the objector’s conscience is misguided for two reasons. First, Adenitire makes a normative argument according to which the state should not make such moral judgment, i.e., that the state should not be tolerant but rather neutral or pluralistic. However, the argument that toleration better explains the practice of granting conscientious exemptions, and that therefore the state does make such moral judgment when it decides whether to grant an exemption, is not a normative argument but rather a descriptive one. It does not focus on what the state should do but rather on what it inevitably does. Jones accurately depicted the nature of this argument when he said that “toleration is a feature of the exemptions themselves”.<sup>4</sup> Put differently, and as argued above, creating a general norm that reflects certain moral values that the creator of the norm wishes to protect or enforce, and then exempting those who conscientiously object to such values, must reflect, almost as a matter of logic, an attitude of toleration.

Second, if the argument about futility indeed focuses on whether the state *should* make such moral judgment, then the argument is attacking a scarecrow. We may agree, for the sake of argument, with Adenitire’s view that the state does not have to make an adverse moral judgment about the content of the objector’s conscience when it decides whether to grant conscientious exemptions, and that it is a matter of policy, i.e. it is for the state to decide whether to make such moral judgment. However, if the state now chooses to make such moral judgment in some cases, the purpose of making such judgment would not be to make the objector change her belief or conscience. These are not likely to change just because an adverse moral judgment has been made about them, or indeed at all. The reason for making such moral judgment, in cases where that reason exists, is rather to allow the liberal state to fulfil its duty to promote and defend liberal values and to condemn anti-liberal, unjustly intolerant ones. The purpose is to allow the tolerant-liberal state to properly and proportionally refuse to tolerate unjustified intolerance – when condemnation, sometimes alongside granting an exemption, is indeed a proportionate response.

Adenitire finds it troubling that the tolerant-liberal state expresses, through its agents, a negative view on the merits of the objector’s conscience when it grants an exemption from the law. This, he argues, violates the state’s duty to be neutral. Adenitire, however, is wrong to assume that the tolerant-liberal state must or will always openly express the negative view that it makes on the merits of the conscientious objector’s conscience. When the state does grant conscientious exemptions, the state’s attitude is indeed that of toleration. The state, however, does not have to publicly and openly express the adverse judgment that it makes about the content of the objector’s conscience. The state, for various good reasons, may decide to be silent about it. Its attitude will still be that of toleration, but not every person who is being tolerated must know that they are being tolerated rather than ‘respected’, ‘accepted’, and so on.

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<sup>4</sup> Peter Jones, ‘Toleration, Religion and Accommodation’ (2012) 23(3) *European Journal of Philosophy* 542, 551.

Toleration can and sometimes should be exercised unnoticeably, either as a matter of civility, or because of pragmatic-utilitarian reasons.

Adenitire's second argument was that there is no need for the state to make an adverse moral judgment about the content of the conscientious objector's conscience, because making that adverse moral judgment is not needed to properly protect core liberal values and safeguard the public interest or the rights of others which the acts of the objector may undermine. The neutral-liberal state can provide said protection and safeguarding, without making moral judgment about the content of the conscientious objector's conscience, presumably through its courts, by applying mostly 'content-neutral balancing tests'. This argument gives rise to a few questions: does neutral liberalism properly protect core liberal values? Can it? Do courts apply 'content-neutral balancing tests' when they decide whether to grant conscientious exemptions? Should they? Are 'content-neutral balancing tests' being used by courts to disguise decisions that are actually based on core liberal (or non-liberal) values? For lack of space, none of these questions will be answered here. Adenitire's answers to some of these questions will also not be discussed here. These questions deserve a separate discussion.

Adenitire's book is a most powerful and insightful defence of neutral liberalism and neutral pluralism within the context of conscientious exemptions. The book deserves a more detailed reply from those who think that it aims to defend the indefensible, i.e., neutral liberalism or neutral pluralism.