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### A divided conscience

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## A DIVIDED CONSCIENCE: THE LOST CONVICTIONS OF HUMAN RIGHTS?

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### **Abstract**

*The category of conscience has played a key role in the history of human rights. However, since a high point in the decades after the Second World War, much of the human rights movement appears to have become less interested in the issue. Instead, claims of conscience have often become the domain of the religious right. This article asks how this has happened, and whether human rights – widely accused of a retreat into technicalities at the expense of intense conviction – has lost anything along the way? In doing so, the article treats conscience as a historically embedded and contested category, exploring the types of subject claims of conscience conjure up, the forms of difference they can reproduce, and the conflicts they both create and mediate. The central argument of the paper is that the protection of conscience has often been discriminatory in terms of the types of person and forms of conviction that it seeks to promote.*

In January 2015 Amnesty International rejected a proposal to introduce a “conscience clause” into Northern Irish law.\* The clause followed legal action against Ashers Baking Company – popularly known as the “gay cake case” - for refusing to make confectionary celebrating International Day Against Homophobia and Transphobia. The bakers were being prosecuted for a breach of the *Equality Act*. In response, Paul Givan, an elected member of the ruling Democratic Unionist Party, proposed an amendment, arguing that it was necessary to “stop the civil persecution of people of faith... (and)... uphold the Universal Declaration of Human Rights.”<sup>1</sup> The amendment would have created a reservation for people who objected to providing services they felt endorsed “behavior or beliefs which conflict with the strongly held religious convictions”.<sup>2</sup>

The Northern Ireland “conscience clause” fitted into a wider trend of attempted legislation and litigation, particularly in the US, claiming to protect people’s deeply held beliefs and convictions. Unsurprisingly, such legal moves have met with considerable protest, not least from human rights groups, who have accused proponents of trying to create a two-tier system of justice. Although Givan was claiming to speak in the name of human rights, Amnesty International condemned the amendment as a “recipe for a significant reduction in rights protection”.<sup>3</sup> At a protest in Belfast, Patrick Corrigan, Amnesty UK’s program director for Northern Ireland declared, “this is not a conscience clause, it is a discrimination clause... I say to those behind this law: if the code by which you live your life tells you that it is OK to treat

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some people as inferior, then you need to take a good, hard look at yourself. Your moral compass is broken".<sup>4</sup>

Conscience has played a central role in the history of modern human rights. The 1948 Universal Declaration of Human Rights put issues of conscience up front and center, mentioning the word no less than three times, including in the Preamble and very first article. The significance of conscience was also hardwired into Amnesty International's original mission, as it rose to prominence as an organization devoted to protecting *Prisoners of Conscience*. For much of the mid-twentieth century international human rights movement, conscience was both the driving motivation of human rights work, and the thing they sought to protect, sometimes even being seen as the foundational human right (Jellinek 2009; Moyn 2015). Yet, over the following sixty years, much of the movement appears to have become significantly less interested in the issue. Instead, conscience has often become the specific domain of the religious right, amongst others. Part of the reason for the relative loss of focus might be that conscience has simply been crowded out, as social and economic rights in particular, have been given an increasing prominence. The question remains though, given its foundational status, how has conscience been so easily put to one side? And what has been lost, if anything, along the way?

The aim of this article is to show how the protection of conscience went from being at the center of the international human rights project, to holding a relatively marginal position. The article treats conscience as a historically embedded and contested category, rather than a transcendent principle or experience. The objective is to examine the shifting political and cultural work that the use of the category has done, rather than come up with a definition. This is not to say that there is no such thing as conscience. Instead, it is to examine the changing tensions involved in particular politically and culturally situated claims. Doing so enables us to ask what types of action, and by whom, has a focus on conscience made possible? This means exploring the types of subject claims of conscience conjure up, the forms of difference they can reproduce, and the conflicts they both create and mediate.

Within human rights work, the category of conscience has implicitly served as a cross-cultural category marking the universal human capacity to make moral judgments. In this sense it is both used descriptively and prescriptively, stating what humans are already and what they should be. Speaking more broadly, in popular culture, philosophy and law, conscience is the faculty - however troubled - that is supposed to help us stand up to domination, make decisions of life and death, and motivate people to do good in the world (Clark 2001; Mandelstam 1999; McEwan 2014; Press 2014). Liberal philosophy, in particular, has seen conscience as a deep and inclusive principle, speaking directly to what it means to be human (Dworkin 1995; Rawls 1993, Walzer 1970). Conscience, from this perspective, is central to the constitution of the 'modern subject' (Taylor 1989). For its critics though, a valorization of conscience presents a particularly narrow vision, rooted in specific Christian traditions (Laborde 2012). As with human right more generally, it has been argued that a focus on conscience has its roots in Christian thought and practice (Evans 2015; Hopgood 2013, Moyn 2015; Perry 1998). Protecting conscience therefore allows distinctly Christian forms of conviction to trump all other concerns. Far from being the basis on a universal form of human freedom, conscience is a narrow and discriminatory form of personhood that effectively marginalizes other political and religious projects (Fernando 2010). As such, the virtue of conscience is

far from self-evident. If conscience is central to the ‘modern subject’ this is a subject that is divided and exclusionary.

From the perspective of twentieth century human rights, conscience is an issue of conviction. These are convictions that may, or may not be religious or secular, but they are seen as deeply held and going to the heart of the ways in which individuals are understood to give meaning to their worlds. However, as Alberto Toscano has argued, there is a central uncertainty running through much liberal politics – in which we can include much human rights - over how to deal with conviction (2010; Critchley 2007). Should it be seen as a fanatical form of commitment, or an antidote to anemic civil apathy? We might similarly ask, is conscience about the exercise of moral autonomy, or the blind commitments of a zealot? What forms of conscience should we therefore listen to and what types should we ignore? Any attempt to protect conscience is therefore an attempt to define the forms of conviction that are seen as having a legitimate place in public life (Connelly 1999; Mahmood 2006). The ways in which different forms of conviction have been legitimized and regulated has shaped the concerns of human rights practitioners and their approaches to conscience.

Human rights have been criticized by failing to provide a positive vision of humanity by promoting a hollow “most we can hope for” humanism, that focuses on suffering rather than potential human flourishing (Brown 2004; Hopgood 2013; Moyn 2015). There have also been widespread claims that twenty-first century human rights have lost their moral energy in a retreat into technical managerialism (Douzinas 2000, Hopgood 2013). As Samuel Moyn has argued, for example, human rights has been guilty of “prizing moderation against extremes over liberation of human capacity” and therefore might look to religion, amongst other places, to reclaim inspiration (2015). More broadly, Simon Critchley has pointed to what he calls “a motivation deficit at the heart of secular liberal democracy” (2007, 7). In this context, examining conscience can help provide an alternative perspective on the international human rights movement - one that emphasizes convictions about the human potential for doing good in the world.

The central argument of this paper is that the attempts by the international human rights movement to protect conscience have always been deeply ambiguous and discriminatory. Much of this human rights work has been marked by an understanding of conscience shaped as a particular response to the totalitarian regimes of the mid-twentieth century, which sits awkwardly in relation to the struggles over anti-colonialism, race and gender that marked the latter part of the century. As such, it is not simply that protecting conscience can free people to act in discriminatory ways – although it can do that too – but rather that the protection of conscience is itself discriminatory in terms of the types of person and forms of conviction that it singles out. We could tell the story of the rise and fall of conscience within international human rights as a story of the relative position of particular Christian networks and organizations within the human rights field (see, for example Duranti 2016; Lindqvist 2013; Moyn 2015). This is obviously part of the story. But the tensions between the nominally religious and secular is of potentially less significance than their common hierarchical assumption about what it means to be human. Tather than lament the relative decline of enthusiasm for claims of conscience as a loss of liberal nerve or a failure of conviction, conscience should itself be seen as a right that is always liable to be captured by existing forms of inequality. It is not that the Christian right has subverted the human right to freedom of conscience, but rather that they are working in a much longer exclusionary

tradition that has been central to the conscience of human rights practice.

The following pages provide an account of the rise and fall of claims of conscience in the international human rights movement. The paper begins though with a broader discussion of the role of conscience in attempts to regulate legitimate and appropriate forms of conviction. It next moves on to focus on the 1948 Universal Declaration of Human Rights, examining the tensions between conscience as the motivating force of human rights work, and conscience as the object to be protected, between conscience as a form of obligation, and conscience as a form of freedom. The bulk of the paper then focuses on how these tensions played out in the history Amnesty International and its arguments over the relationship between conscience, nonviolence and sexuality. Amnesty should not be taken as representing the international human rights movement its entirety, but rather, as an organization that exemplifies many of they tensions in the category of conscience from the perspective of human rights.

### **What Is This Thing Called Conscience?**

Debates over freedom of conscience have a history that is longer and wider than human rights, and liberalism, for that matter. Even within these histories though, it is important to note that there is nothing self-evident about the importance placed on conscience, or the forms it is thought to take. Historically, conscience has been understood variously as an innate quality of all humans, a gift from God reserved for a privileged few, the product of self-deception, or simply morally insignificant; it can be seen as a feeling, a thought, or an intuition, amongst other things (Andrew 2001; Baylor 1977). The Protestant Reformation saw a partial challenge to a tradition that saw conscience as obligation with an objective basis in the word of God and teachings of the Church (Andrew 2001). This saw a view of conscience as an internal form of moral reflection focused on a self-centered agent. Conscience in this form - often associated in its most extreme manifestations with Quakerism - was potentially revolutionary in that it recognized no external authority or particular content other than the sincere convictions of the believer (Walzer 1982). It was therefore not only individual but profoundly subjective and free. The tension between conscience as conservative or radical, as a matter of obligation or an issue of freedom, would continue to run through the human rights struggles of the twentieth century.

If the claim that we have a conscience and the forms that it said to take is embedded in specific histories, so too are the issues upon which conscience is thought to focus. For eighteenth century protestant dissenters, for example, the taking of oaths was a key issue (Andrew 2001). In nineteenth century Britain, conscience was widely associated with opposition to compulsory vaccination (Durbach 2001). For twentieth century pacifists, conscience was primarily about war and killing. The modern human rights movement saw conscience as linked to political prisoners. And for twenty first century conservative Christians, sexuality was the main concern. Whatever its focus, one of the key things that a claim of conscience does, in liberal regimes in particular, is try to address political questions by referring to internal convictions (Brown 2015; khanna 2016). Debates about the distribution of rights and obligations are answered through reference to the interior state of individuals (Muehlebach 2012). By treating politics as an issue to be dealt with at the level of personal interiority, hard to solve questions are placed into the black box called "conscience".

But a focus on conscience as an issue of internal and individual scruple, also creates its own problems. One of the key implications of an individual, interior and

radically free understanding of conscience is that we have little or no criteria to choose between different claims. Moral autonomy can also imply the autonomy to be amoral, immoral, and even mistaken. Even those who have historically prioritized conscience have worried about it being misleading (see, for example, Locke 1689: 60; 1695: 254). A radically free and individualistic conscience can take us in problematic directions.

But, it is not just that conscience can lead us to both virtues and vices, but equally importantly, that it can be hard to know what conscience looks like when we come across it. Nihilism, self-interest, and apathy can appear indistinguishable from sincere conviction. As Hannah Arendt argued, for conscience to be socially persuasive, it must be taken out of the internal life of an individual and brought into the world of public representations and debate (1972). There is therefore a double move: political conflicts are made into matters of individual internal conflict, and then they must be made social again in order to be recognized.

Two things are important to note here. The first is that the often repeated distinction between conscience as a matter of internal individual belief, on the one hand, and the public manifestation of religion, on the other, becomes more complex (see for example, Asad 1993; Evans 1997; Fernando 2010). An individual conscience has no social significance unless somehow is found to make it manifest to others. Conscience, like language, is never entirely private.

And second, the distinction between a radically free subjective conscience and a more conservative doctrinal conscience focused on obligations, also begins to break down. This is because in the process of public recognition – as claims of conscience are acknowledged as legitimate - conscience becomes regulated. As commentators have remarked in relation to freedom of religion, attempts to protect religious freedom are never neutral (Sullivan 2006). For Winifred Sullivan, for example, the legal protection of religious freedom is impossible, as it constantly tries to draw a line around what counts as religion and therefore restricts what can be free (2006). As Sullivan argues, “to define is to exclude, and to exclude is to discriminate” (2006, 101). Something similar can be said about freedom of conscience. The acknowledgement of freedom of conscience puts in place limits on what and whom can be protected. Freedom of conscience has therefore historically been tightly circumscribed (Feldman 2002; Sandel 1989). Protecting conscience can become a form of prejudicial intolerance, as only some forms of conscience are seen as having a legitimate place in public life.

This paper will now turn to how these processes have played out in the field of international human rights, first in the drafting of the Universal Declaration of Human Rights (UDHR) and then at Amnesty International.

### **The Conscience of Human Rights**

Conscience runs through the 1948 Universal Declaration of Human Rights. In the Preamble, the Declaration states that “contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.” And again, in its very first article, the UDHR claims that all human beings are “endowed with reason and conscience.” To be human in this vision is to have a conscience. To make matters doubly sure, the Declaration goes on to claim in article 18 that “everyone has the right to freedom of thought, conscience and religion.” The Declaration can be seen as an attempt to make conscience a category resonating on a global and universal scale. In ways familiar from other attempts to codify human rights concerns, the meaning of conscience had to be seemingly lifted out of specific traditions and made to speak in

more abstract and general terms. In doing so though, the drafters were also necessarily speaking from a very particular historical perspective.

For the committee members who wrote the Universal Declaration, reference to conscience can be seen to serve two overlapping functions. The first was to index the moral failures leading to the atrocities of the Second World War. For the French jurist and Nobel prize winner Rene Cassin, during the Second World War the “fundamental principles of mankind had been forgotten.”<sup>5</sup> Geoffrey Wilson, the British delegate and Quaker, who would later become chair of Oxfam, similarly argued “the basic idea was to explain in an International instrument that the conscience of mankind had been shocked by inhuman acts in Nazi Germany.”<sup>6</sup> If more people had acted according to their consciences, so the logic seemed to go, the Holocaust would not have happened. Auschwitz was seen as a unique failure of conscience, and the UDHR was a wake up call. We might note that viewing the horrors of the Second World War as the first failure of European humanism might seem as a parochial perspective, when viewed from the Congo, South West Africa, or Australasia, for example. As Wole Soyinka put it the ‘failure of European conscience can be placed centuries earlier, and that would be at the very inception of the Atlantic slave trade’ (1998, 38). Either way, from the perspective of the UDHR, to act according to conscience is to do good in the world in the wake of the destruction of the previous decade.

The references to conscience in the Declaration were doing more than that marking a historical rupture. Some of the drafters were also deliberately indexing a very particular type of conscience - a Christian conscience. As Nehal Bhuta has argued, for prominent figures behind the Declaration, the text was an attempt to harness Christian faith as a “bulwark against anti-democratic, materialist, and totalitarian propensities” (2014, 11). Similarly, Sam Moyn has claimed that Charles Malik - the Lebanese Greek Orthodox Christian who served on the drafting committee - was implicitly invoking the Thomist formula of “reason and conscience” (2015; see also Lindqvist 2013, 436). For Malik and Cassin, conscience as part of the spiritual dimension of humanity, which would be essential in defeating totalitarianism. Such approaches to conscience did not go unchallenged though. The Brazilian delegation worried that history showed not all people had a conscience, and therefore it was an unstable foundation on which to base a claim of universal rights.<sup>7</sup> We might also add that many fascists presumably thought that they were following their consciences too- however warped (Koonz 2003). Either way, this was an early indication within the human rights movement that conscience did not always sit easily alongside a universal and inclusive sense of human moral virtue.

The final version of Article 18 of the UDHR read, “everyone has the right to freedom of thought, conscience and religion.” There was some ambiguity though as to whether conscience was distinct from religion, or qualified the type of religion that was protected. Pen Chun Chang, the Chinese delegate – a Confucian philosopher and former student of John Dewey - thought that religion was a specific example of conscience and thought. Whilst the Chilean delegate argued “even political beliefs could be included.”<sup>8</sup> However, an early UK draft stated that, “everyone shall be free to hold any religious or other belief dictated by his conscience and to change his belief”.<sup>9</sup> The implication was that conscience was foundational for religion, and more significantly, distinguished the form of religion that was to be protected.<sup>10</sup> Article 18 of the UDHR also has to be seen against the broader context of a move away from on the collective rights of religious minorities, towards one that emphasized the rights of individual believers (Asad 1993; Evans 1997; Mahmood 2015). Whether seen as

“religious” or otherwise, a central part of the vision of conscience promoted by the UDHR was one of individual belief and conviction.

Crucially though, the UDHR’s implicit promotion of an internal conscience raises more questions than it answers. On the one hand conscience, it was implied, was free, and therefore “conscience” is “conscience”, whatever form its convictions take, democratic or authoritarian, religious or secular. It is this very openness and freedom that needs to be protected. This is the type of conscience that we might read as being promoted in Article 18 of the Universal Declaration. The promotion of such a relatively free form of conscience might explain why Article 18 also stated that people had the right to change their religion. At the same time, this emphasis on freedom also means that people with problematic convictions can make claims of conscience. And this goes against the spirit of conscience in the Preamble and Article 1 of the Declaration, where conscience is about the obligation to “do the right thing”. Furthermore, the provision that people have the right to change religion also simultaneously points to the relatively lack of freedom of conscience. It is implicitly assumed that conscience takes religious form, and that religion is of a form that prioritizes choice and belief. Not all claims conscience are therefore seen as being equal in the UDHR. None of this is a problem so long as the people who make claims of conscience are the “correct” sort of people. The human rights movement did not have to face the tension between conscience as freedom and conscience as obligation, between expansive and exclusionary approaches to conscience, so long as people making claims of conscience chimed with the spirit of their own. This would not always be the case.

### **The Conscience of Amnesty International**

In the decades after the Universal Declaration, Amnesty International was the organization that directly took on the human rights concern with conscience. And, in its campaign to free Prisoners of Conscience, which started in 1961, Amnesty would try and give conscience a positive form.

Eric Baker, a British Quaker, pacifist and Secretary General of the National Peace Council, was the person who was probably most influential in shaping the ways in which Amnesty understood conscience in its early years. In doing so he drew on his own experience as a conscientious objector during the Second World War. Initially, Baker had been directed to carry out agricultural work, but won his appeal on the grounds that his conscience meant he would not take any compulsion.<sup>11</sup> His experience was fairly typical for many British Quakers (Kelly 2015). Of all the people claiming exemption from military service, white, male middle class protestant dissenters had the relatively easiest time in persuading the tribunal that their conscience was sincere and appropriate. Quaker conscience was individual and subjective, but it was also loyal and patriotic (Kelly 2015). This was the form of conscience most readily acknowledged by the British state - as opposed to the claims of anarchists, socialists, and Jehovah Witnesses, for example. It was also a version of conscience that would dominate the early years of Amnesty.

In its first decade there was a strong Christian emphasis at Amnesty (Hopgood 2006). Alongside the Quaker Eric Baker, Peter Benenson, the man widely seen as the founder of Amnesty, was a deeply committed Catholic convert. Both of them saw religion as central to Amnesty’s mission. Amnesty’s first five annual reports, for example, had the subtitle: “an international movement for freedom of opinion and religion.”<sup>12</sup> And of the eight original members of the board of trustees, three were reverends.<sup>13</sup> Many of the early individual letters sent out by Baker and

Benenson also went out to churches, and included a suggested “prayer for human rights day.”<sup>14</sup> Importantly, Benenson in particular, saw the Amnesty campaign as an attempt at spiritual transformation (Buchanan 2002). Conscience here was not just something that needed protecting, but was also part of the motivation for human rights work - speaking directly to the ways in which conscience was understood by Malik and Cassin in the drafting of the UDHR.

Baker would draw on particular Quaker notions of conscience in shaping the ways in which Amnesty approached their work. Again this was an individual and free conscience that walked within tight lines, particularly in relation to the use of violence. Benenson had originally wanted to focus on “political prisoners”. It was Baker who suggested framing the issue in terms of conscience.<sup>15</sup> The 1961 article in the Observer newspaper that launched Amnesty defined Prisoners of Conscience as “Any person who is physically restrained (by imprisonment or otherwise) from expressing (in any form of words or symbols) any opinion which he honestly holds and which does not advocate or condone personal violence.”<sup>16</sup>

The question remained as to what or whom counted as a Prisoner of Conscience? One of Amnesty’s earliest publications contains a series of short essays telling the story of people who have “suffered” for their “ideals” (Amnesty 1961, 9). These included Ashton Jones, a white clergyman and civil rights activists arrested for eating in a “colored restaurant” in the southern United States; and Patrick Duncan, a South African disabled, white, anti-apartheid activist; and Constantin Noica, an Eastern Orthodox Christian and philosopher, detained in Communist Romania. Of the nine people, eight were men, and their numbers included clergy, academics, lawyers, and writers. These were forms of conscience where would have been very familiar to liberal and devout figures such as Baker and Benenson.

Formally, Amnesty’s stress was on “non-conformist” opinion or religion, and on the fact of imprisonment for a belief, rather than a particular belief. This was a deliberate attempt to “depoliticize” the appeal. By dealing with detention as a matter of the suppression of individual conviction on a case-by-case basis, the structural conditions of imprisonment were self-consciously left to one side. Amnesty would also develop what was called the “rule of three”, whereby it would adopt prisoners from the Communist block, the West and non-aligned countries in equal measure. Amnesty was therefore part of the tradition that tried to promote freedom of conscience as neutral and value free.<sup>17</sup> But in practice it also, initially at least, restricted the forms of conscience that it tried to protect. The conscience of a relatively narrow type of person seemed easiest to recognize.

Nonviolence was central to the ways in which Quaker pacifists such as Baker understood conscience. However, we should not treat the link between conscience and pacifism within human rights as self-evident. The Universal Declaration is decidedly not a pacifist document, and throughout the twentieth century, human rights would often be used to justify violence (see Perugini and Gordon 2015). There was also always internal skepticism on the moral virtue of nonviolence within Amnesty. As the publisher and early supporter Victor Gollancz wrote in a letter “though a complete pacifist... I deprecate your “Exclusion of those who condone or advocate... violence”. Do you really believe that those miserable prisoners in Spandau should continue to smolder there?”<sup>18</sup> Alongside the pacifist wing, there was also a tradition of political realism within Amnesty, perhaps best represented by the figure of Sean McBride, former Chief of Staff of the IRA, Irish Minister for Foreign Affairs, and Chair of AI throughout the 1960s and early 1970s.

The nonviolence stipulation was under pressure throughout the 1960s, particularly in relation to anti-colonial struggles. Nelson Mandela was famously rejected as a Prisoner of Conscience by Amnesty after he advocated the use of limited force in the fight against apartheid. Amnesty's decision was unsurprisingly controversial. This was particularly the case as some of the senior members of Amnesty were also active in the Anti-Apartheid Movement.<sup>19</sup> Critics argued that it was deeply problematic to disown people fighting for liberation from a discriminatory and violent system. However, a 1965 report from Amnesty on South Africa, the year after Mandela was imprisoned, noted "Amnesty ... is not composed of philosophical anarchists who advance the view that society is obliged to tolerate any form of dissenting behaviour."<sup>20</sup> After polling all national sections, it was decided to restrict Amnesty's work for Mandela to issues of prison conditions and fair trial.<sup>21</sup> Benenson would later see this as a key turning point, as it was the first time that Amnesty had agreed to take up wider prison conditions, rather than focus solely on the release of Prisoners of Conscience.<sup>22</sup> Although Amnesty would continue to campaign for people who had been "imprisoned for their conscientious opposition to apartheid, rather than about those who might be termed victims of apartheid", a restricted conscience was beginning to creak around the edges.<sup>23</sup>

The nonviolence clause was also facing pressures from other directions. There was a controversy over whether Communists could be Prisoners of Conscience, as "all Communist wanted the overthrow of the capitalist state by violence".<sup>24</sup> Benenson was particularly hostile to Communists, once writing to the British Foreign Office, for example, that Amnesty supported the attempt to limit their influence in Southern Africa.<sup>25</sup> More generally, it was argued that retaining the nonviolence clause should not be seen as necessary support for pacifism, but rather as a way of marking out a politically neutral space (Thompson 2008, 328).<sup>26</sup> A leaflet explained: "membership could not agree" in which situations the use of violence could be justified.<sup>27</sup>

But, even if the nonviolence clause was retained, it was still never a simple matter in deciding whether specific individuals were Prisoners of Conscience (Kaufman 1991). A Borderline Committee was therefore established to look at troublesome cases. British anti-Nuclear protestors who damaged property were rejected, as were peace activists who sprayed the slogan "hit back, protect yourself".<sup>28</sup> A Neo-Nazi imprisoned in the Federal Republic of Germany was also rejected on the grounds that he was inciting "discrimination and hostility", and to be a Nazi was by definition to advocate violence.<sup>29</sup>

A crucially important expansion of the definition of Prisoners of Conscience came in 1968, when the first attempt was made to produce a formal constitution for Amnesty.<sup>30</sup> At the Stockholm meeting of the International Council, Prisoners of Conscience were newly defined as persons who are imprisoned due to their "political, religious and other conscientiously held beliefs or because of their *ethnic origin, colour or language*" [emphasis added].<sup>31</sup> The change took place despite an objection from some country sections that Amnesty should not campaign for victims of racial discrimination.<sup>32</sup> The addition of ethnic origin and color should be seen in the context of the concerns about South Africa and anticolonial struggles more generally raised in the debate over Mandela. These changes would have long-term implications. Over the following decade the definition of *Prisoners of Conscience* would be further extended to include other attributes, such as sex and economic status, for example. One way of interpreting this shift is as a move away from a concern with Prisoners of Conscience because of restraints on their convictions, to a concern resulting from

discrimination. The anti-authoritarian, individualist and nonviolent conscience of Amnesty's first decades found it difficult to respond to the collective struggles of the second half of the twentieth century. As we shall see below though, it was sexuality that would provide perhaps the biggest challenges.

### **Sexuality and Conscience**

In 1979 Amnesty recognized that the persecution of a person for their homosexuality is a violation of their fundamental rights.<sup>33</sup> However, the acknowledgment of sexuality as a specific issue of conscience was a slower process. It was only in 1991, after 15 years of lobbying from some members, that Amnesty agreed to include lesbians and gay men as Prisoners of Conscience (Hagland 1997). There had long been widespread opposition to directly broadening the Mandate - the official declaration of Amnesty's aims and objectives. The main arguments were that advocating for homosexuals was an "unpopular" issue, that it would inhibit the develop of Amnesty International, and that it might lead to pressures to support "unacceptable sexual behavior."<sup>34</sup> In contrast, some sections had been arguing since the late 1970s that sexuality was similar to religion, race or ethnic origin and that sexuality was as "much a part of their nature as the colour of their skin."<sup>35</sup> In part this can be seen as an attempt to see conscience as a form of obligation rather than freedom. Sexuality was understood here as biologically determined and therefore not an issue of free will. In this line of argument, people were seen as having no choice over their sexuality.

The question of the relationship between Prisoners of Conscience and sexuality was eventually referred to the Mandate Committee.<sup>36</sup> Prior to 1991 Prisoners of Conscience could be adopted if they were imprisoned for advocating homosexual equality, or falsely accused for political reasons of being gay, but not if they were imprisoned for actually being gay. In the end a compromise was reached, whereby the Mandate was not changed, but it was agreed that the existing Mandate could be interpreted to allow Amnesty International to work for people "imprisoned solely because of their homosexuality, including the practice of homosexual acts between consenting adults."<sup>37</sup> This was justified by arguing that, in a creative stretching of everyday usage, the prior expansion to include people imprisoned on grounds of their sex could also cover those imprisoned for their sexuality.<sup>38</sup> In supporting the decision, explicit mention was made of anti-discrimination articles in the UDHR and the International Covenant on Civil and Political Rights.<sup>39</sup> This was part of a gradual and still incomplete move towards equality rather than freedom being a key human rights issue.

The first ever mission to investigate imprisoned homosexuals took place in the Isle of Man in February 1991. Unsurprisingly though, deciding which cases to take on was never straightforward. A British case of men jailed for masochist activities was rejected, for example, on the grounds that they were not imprisoned solely because of their sexuality, but also due to their use of violence.<sup>40</sup>

Amnesty's change of perspective on sexuality and conscience should be seen as part of a broader mainstreaming of sexuality issues across international human rights NGOs in the 1990s (Mertus 2007; Waites 2009). Prior to this period there were remarkably few direct mentions of sexuality in human rights documents. Northern Ireland though would play a crucial role in this history. In the early 1970s the Belfast gay rights activist Jeff Dudgeon had won a case before the European Court of Human Rights over the banning of homosexuality.<sup>41</sup> Interestingly in its argument against

decriminalizing sodomy, the UK government argued that the people of Northern Ireland held “strong conscientious” opinions on sexuality.<sup>42</sup> The court ruled though that the criminalization of homosexual acts between consenting adults was a violation of the right to a private and family life. The case was one of the first times an international body had recognized the connection between gay rights and universal human rights, and has since been used in litigation around the world (khanna 2016; Curtis 2014, 198). It was only in 2006 though that the Yogyakarta Principles would define sexual orientation as “integral to a person’s dignity and humanity” (O’Flaherty and Fisher 2008). The Principles represented a partial shift away from the language of civil and political rights that had marked movements such as Stonewall and the Gay Liberation Front, towards a focus on sexuality as an issue of social and economic rights. The phrase “sexual orientation” was included in the Principles after lobbying from some groups in the Global South, as a way of pushing against a narrower framing Eurocentric framing of LGBT rights.<sup>43</sup> Sexuality, like conscience, was now recognized by the international human rights movement as an essential part of a person’s humanity (khanna 2016). And equally importantly, it was something that was said to be found deep within a person, much like the convictions of conscience.

Amnesty’s expansion of the definition of Prisoners of Conscience should also be seen as part of the wider struggle to expand the Mandate. It became clear to many in the movement that focusing on specific prisoners, but not to protest the death penalty, disappearances, or torture, for example, seemed somewhat arbitrary (Hopgood 2006, Clark 2001). By 1991, the Mandate Review Committee was arguing that “freedom of conscience/expression has to be understood in the wide sense of the freedoms required to act in public.”<sup>44</sup>

At the same 1991 meeting where sexuality was newly included in the working definition of Prisoners of Conscience, economic and social rights were also discussed seriously for the first time. According to Stephen Hopgood, the debate over conscience and sexuality became the trigger for a much larger discussion on the focus of movement (2006, 120). In 1995 Amnesty started working for political prisoners who were not prisoners of conscience.<sup>45</sup> In 1997 Amnesty took a decision to “reaffirm” that it was determined to promote all human rights. In particular, it decided to “further intensify its work on social, economic and cultural rights.”<sup>46</sup> The Mandate was eventually dropped altogether in 2002, in favor of a broader mission statement linking Amnesty’s objectives to the full range of rights contained in the UDHR. By the start of the twenty-first century, Prisoners of Conscience had dropped down the list of Amnesty’s central concerns, being largely superseded by the wider “Individuals at Risk” work, and at the time of writing is not listed on its website alongside the 15 central areas upon which they work. The conscientious concerns of Amnesty had expanded into a far wider range of human rights issues.

### **Discriminating Cakes**

Let us now return to the cake with which we started. The case against Ashers Bakers has to be seen against a long history of struggles for gay rights in Northern Ireland. In the run up to the decriminalization of homosexuality, the Rev. Ian Paisley had led the Save Ulster from Sodomy Campaign throughout the late 1970s. Paisley later became Democratic Unionist First Minister of Northern Ireland under the Good Friday Peace Agreement. However, following the Northern Ireland Peace Process, sexuality was included as a protected characteristic in relation to anti-discrimination legislation

(Curtis 2014). Sexual equality was therefore effectively written into the constitutional settlement of Northern Ireland.<sup>47</sup> In this context, gay rights activists also took part in a broader project of public visibility, seen most notably in Pride marches. Yet, although civil partnerships became legal in 2004, attempts to introduce same sex marriage have been rejected four times by the devolved assembly.

Paul Givan, who proposed the conscience clause, was a member of Paisley's protestant Democratic Unionist Party (DUP). Importantly though, his proposed amendment received cross-denominational support. The Catholic Church in Northern Ireland said that it backed the general objective of the bill, and the Presbyterian Church in Ireland called for "reasonable accommodation in matters of conscience."<sup>48</sup> It appeared to be going nowhere however, when Sinn Fein announced that under the power sharing arrangements in place as a result of the Northern Ireland Peace Process, it would block the law for failing to have cross community support.<sup>49</sup>

In court, Ashers Bakers claimed that making the cake would "conflict with freedom of conscience".<sup>50</sup> The Northern Ireland Attorney General – a DUP member - intervened supporting the family, saying the actions of the Equality Commission amounted to a form of "cruelty" and "coerced expression".<sup>51</sup> In response Mr. Lee – the man who had ordered the original cake - told the court that the refusal had "made me feel like a second class citizen." The Belfast judges ruled that the refusal to make the cake was a form of unlawful discrimination.<sup>52</sup> £500 damages were agreed between the parties. The decision also confirmed that freedom of religion and conscience protection did not apply to commercial businesses such as Ashers. The usual argument put forward in such cases is two fold. First, in a free market, commercial businesses should not discriminate amongst customers. Second, conscience is an attribute of real person, not legal fictions such as companies. This argument though has recently been challenged in the US, where the Supreme Court famously ruled that private companies have a right to freedom of religion (*Burwell vs. Hobby Lobby Stores, Inc*).

Givan called the Belfast court's decision an attack on "religious conviction": "today there's a clear hierarchy being established that gay rights are more important than the rights of people to hold religious beliefs." Interestingly sexuality and religious faith were being implicitly compared as similar categories. An appeal against the initial decision was rejected in October 2016. Amnesty International simply said that "No surprise in the Ashers case: unlawful discrimination."<sup>53</sup> However, support for Ashers came from perhaps unexpected quarters. Jeff Dudgeon, the veteran gay rights activist who had been central to the decriminalization of homosexuality, said: "I am nervous of gay zealotry, or any type of zealotry against Christians. It is a sort of triumphalism of people who were previously marginalised. There has been a lot of court activity, street preachers being charged with incitement. I think things have gone too far in that direction."<sup>54</sup>

Although the link between sexuality and conscience is far from self-evident, Northern Ireland is not alone in seeing the link being made. In Washington State, for example, florists have refused to provide flowers for gay weddings, and in New Mexico a photographer declined to shoot a same sex-commitment ceremony, both resulting in legal action. The right to decline making cakes celebrating same sex marriage has also gone all the way to the US Supreme Court.<sup>55</sup> In both the US and the UK marriage registrars have refused to officiate at same sex weddings and civil ceremonies. Kentucky registrar Kim Davis, a born again Apostolic Christian, was sent to prison for six days for refusing to issue marriage licenses to same sex couples.

When asked about the case, Pope Francis was reported as saying “I can say that conscientious objection is a right that is a part of every human right... And if a person does not allow others to be a conscientious objector, he denies a right.”<sup>56</sup> In April 2016, Mississippi Governor Phil Bryant signed the *Protecting Freedom of Conscience from Government Discrimination Act* (or more formally House Bill 1523). The Act was designed to “protect sincerely held religious beliefs and moral convictions of individuals, organizations and private association.” The law has been subject to legal action (*Barber vs. Bryant*). Congressional Republicans have proposed a Federal Version of this Act.

There is not room here to examine in detail why and how the religious right has increasingly made legal claims to conscience, done so in relation to sexuality and often used human rights terms. The intense focus on sexuality itself seems relatively novel in theological terms (Williams 2010). The story of the Christian right’s turn to conscience also involves new cross-denominational coalitions, where particular Catholic and Protestant groups that might previously been in conflict – in Northern Ireland and elsewhere – have formed new strategic partnerships (Brown 2012; Greenhouse and Siegel 2012). It is also a story involving a shift from majoritarian attempts by Christian conservatives to enforce moral principles more widely, to a strategically defensive position that seeks to carve out spaces of exemption (McIvor 2016; NeJaime and Siegel 2015). In this process, there are important - largely dialectical - links between the relative decline in interest in conscience by the human rights movement, and the increase in focus on the concept by the religious right. The use of the language of “conscience” rather than “religion” is potentially significant, as it allows religious groups to forge new alliances, to claim a language of respectability, and to operate on a nominally secular base.

Importantly though, the turn to conscience by the Christian right is not simply an example of an opportunistic manipulation of a malleable human rights category. And neither is it an inversion or distortion of the key meanings of conscience as a human rights term. Rather, human rights practices themselves have a history of reproducing distinct forms of exclusion (Perugini and Gordon 2016, 8). And as such, human rights attempts to protect conscience can therefore directly resonate with the exclusionary implications of the politics of the Christian right. The line between liberal and illiberal attempts to protect conscience is far from absolute.

## **Conclusion**

In the middle of the twentieth century liberal cosmopolitan types – such as many human rights actors - routinely made claims of conscience in relation to questions of life and death, peace and war. Conscience was at the heart of the things that human rights activists wanted to protect. But, by the start of the twenty-first century, the human rights movement seems to have lost its enthusiasm for the term. If you mention freedom of conscience to many human rights activists they are likely to either look at you blankly, or mutter something about it being a slightly old fashioned term. In contrast, people of convinced conscience seem largely to be found amongst the religious right. But, it is not as if the liberal left has nothing left to worry its moral scruples. So why has there been a relative decline of interest in issues of conscience on the part of many human rights practitioners? And what difference does this make?

The conscience of human rights has often sat uneasily alongside wider struggles for equality. Indeed, from the mid-twentieth century, if not before, the conscience of human right was often narrow and exclusionary, rather than universal and inclusive. Claims of conscience sought to protect a tightly circumscribed form of

conviction - one that was nonviolent, anti-authoritarian, and deeply individual - and found it difficult to respond to struggles over collective rights and equality that marked the latter decades of the twentieth century.

But the increasing human rights discomfort with conscience is not simply a response to its exclusionary implications. Rather, it can also be seen as linked to a wider anxiety over all claims of conviction (Toscano 2010). Liberal politics – in which we can include much human rights - values convictions inasmuch as they stem from the moral will of autonomous individuals. But convictions are also mistrusted if they appear too fanatical, too fervent, or directed at the wrong sorts of goals. If conscience is associated with sincere and deep convictions, beliefs that are too strongly held can also seem suspect and irrational. At one level we value sincere commitments in general, but are also deeply cynical about anyone who claims to hold those commitments. At another level, the *freedom* of “freedom of conscience” implies the ability to choose. This is a situation described by Talal Asad where beliefs have to be held “so lightly that they can be changed” (2003, 115). To have a free conscience is to have the freedom to abandon that conscience. The *freedom* of “freedom of conscience” can therefore be seen as containing within it its own potential dissolution.

Whilst conscience might well provide a source of moral energy for human rights work, it can also lead us into exclusionary and reactionary directions. And any attempt to protect and valorize specific people because of their conscience ends up being arbitrary at best, and discriminatory at worst.

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<sup>4</sup> Excerpt of speech given by Amnesty International's Patrick Corrigan at a rally at Belfast City Hall on Saturday 31 January, available at: <https://www.amnesty.org.uk/blogs/belfast-and-beyond/your-moral-compass-broken-opposing-northern-irelands-anti-gay-conscience>, last accessed 20 December 2016.

<sup>5</sup> *Travaux Préparatoires*, Drafting Committee of the Universal Declaration of Human Rights, AC.1/SR.8/p.2 (all following references according to UN system).

<sup>6</sup> E/CN.4/AC.1/SR.23.

<sup>7</sup> E/CN.4/82/Add.2.

<sup>8</sup> E/CN.4/AC.1/SR.31.

<sup>9</sup> E/CN.4/AC.1/4 Annex 1.

<sup>10</sup> E/CB/4/82.

<sup>11</sup> Interview with Joyce Baker, Amnesty International Origins: Oral History Project (AIOH), International Secretariat Archives (AI) 980, Institute of International Social History.

<sup>12</sup> Amnesty International Annual Reports 1961/2, 1965/6.

<sup>13</sup> Amnesty International Annual Report 1961.

<sup>14</sup> Religious Persecution in the World Today, AI 1025; Prayer for Human Rights Day, AI 1025.

<sup>15</sup> Interview with Peter Benenson, AIOH, AI 982.

<sup>16</sup> Peter Benenson, "The Forgotten Prisoners", Observer, May 28, 1961.

<sup>17</sup> Circular to Miscellany (sic) Societies, Eric Baker, Peter Benenson, Joint Directors, AI 1025.

<sup>18</sup> Letter from Victor Gollancz to Baker and Benenson, 30 May 1961, AI 2013.

<sup>19</sup> Martin Ennals, for example, was the former Secretary of the London based Anti-Apartheid Movement (AAM) and became Secretary General of Amnesty International in 1968. The AAM would make campaigning for political prisoners, whether they advocated violence or not, a key part of its activities (see, Klein 2009).

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<sup>21</sup> 3<sup>rd</sup> International Assembly, 26-27 Sept 1964 Canterbury, Great Britain, AI 5.

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<sup>23</sup> Amnesty International, *Political Imprisonment in South Africa*, London, 1978, p. 7.

<sup>24</sup> Communist Prisoners of Conscience, May 1964, Peter Benenson, POL 30/164, AI 427.

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<sup>26</sup> IEC March 1984 Discussions of Civil Disobedience POL 03/IEC 01/84.

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- <sup>39</sup> Articles 2 and 3 respectively.
- <sup>40</sup> Minutes of the Second Meeting of the Standing Committee on the Mandate (SCM), London 16-18 April 1991, SCM 21/93.
- <sup>41</sup> *Dudgeon v. the United Kingdom* (1981), European Court of Human Rights.
- <sup>42</sup> *Dudgeon*, para. 28
- <sup>43</sup> I thank akshay khanna for this insight.
- <sup>44</sup> Mandate Review Committee: Draft Final Report, Part 4: Types of Measures Taken Against Freedom of Conscience/Expression, POL 21/02/91.
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