(2019) 21 Ecc LJ 289–311 © Ecclesiastical Law Society
doi:10.1017/S0956618X1900067X

Women's Ordination in the Church of England: Conscience, Change and Law

Jane Steen[1]
Archdeacon of Southwark

Women's ordination raised issues of conscience across church traditions. The Church of England's statutory legal framework prevented these issues being confined to the Church; they were also played out in parliamentary debate. The interface between law and conscience has, however, considerable historical and contemporary resonance, as well as sound theological pedigree. This article therefore considers the place of conscience in legal and philosophical thought before the Enlightenment. It looks at norms of conscience in Roman Catholic and Church of England liturgical use. On a broader canvas, it looks at the interplay between thought, conscience and religion in human rights case law. The article suggests that a consensus of thought which sees the dictates of conscience as founded in, and inseparable from, the teachings of religion begins to break down in the early seventeenth century. Yet human rights courts find themselves deciding cases of conscience or religion where conscience and religion are often intertwined and where the external manifestation of one is governed by the inner promptings of the other. Such difficulties are not limited to the human rights courts but also play out in debates pertaining to ordination. While the North American churches sought to deal with issues of conscience head on, the Church of England very carefully avoided the language of conscience in its early discussions of women's ordination, conscious, it seems, of a lack of consensus around its meaning and source. As the women's ordination debates developed, arguments of conscience were often deployed more by those opposed to the move than those who supported it. Conscience became as much the locus of pain caused by another's action as it was an inner faculty for self-guidance. Its valence shifted from an intellectual to an emotional category.

Keywords: conscience, ordination, Church, law, women

This article looks at the role of conscience in legislative change. It studies shifts in the influence and meaning of conscience in relation to the ordination of women as deacons, priests and bishops in the Church of England. Conscience was invoked on all sides of the arguments, which were played out not only in the Church's own debating spheres but also, because of its statutory legal framework, within the British parliamentary arena. To set these debates in context, the article begins with an exploration of the meaning of conscience in

1 Much of this article originally formed part of a dissertation for the LLM (Canon Law) in the University of Cardiff. The dissertation was awarded the 2018 Deddens Thesis Award by the Deddens Kerkrecht Centrum, part of the Theologische Universiteit Kampen, which is gratefully acknowledged here.

moral and legal terms, historically and theologically. It also looks at Church of England and Roman Catholic norms of conscience, and at the protection of conscience in some human rights cases. These discussions form the background to the consideration of the women's ordination debates, where the use of conscience is studied in some detail. The article ends by looking at the House of Bishops' 'Declaration on the ministry of bishops and priests' (2014), together with *The Five Guiding Principles: a resource for study* (2018). It considers two reviews carried out in accordance with Regulations made under the House of Bishops' Declaration, in 2017 and 2019. The article concludes that, within the debate about women's ordination, the valence of 'conscience' has moved from an intellectual to an emotional category, a shift which made public agreement on its weighting harder even as it loomed larger in debate. It tentatively suggests that, although the Church of England resolved the issue of women bishops, it could yet usefully rediscover in public debate the language of conscience remaining in its liturgy and canons.

THE MEANING OF CONSCIENCE

Conscience is a moral quality before it is a legal one.[2] It is closely associated not only with right and wrong but also with knowledge, awareness, perception and experience.[3] Its derivation implies knowing with, not simply absorbing factual information, suggesting that there is something inherently communal as well as personal in its meaning. Legal dictionaries tend to use rather than define 'conscience', so that it is perhaps more frequently apprehended through its cognates and adjectival use. Thus, a 'conscience clause' is one recognising moral sensibility, and 'conscientious objection' describes protest in relation to personal ethical consideration, leading to a relaxation of a legal duty.[4]

In legal and moral terms, conscience has a long-standing connection with religion. Their association sits comfortably within a natural law framework, where natural law is 'a form of divine law' through which

> God implanted in the minds or hearts of every human the capacity to know right and wrong and thus to discern these universal principles which are normative, which provide moral standards, or ethical constraints on

2 'The internal acknowledgement or recognition of the moral quality of one's motives and actions; the sense of right and wrong as regards things for which one is responsible; the faculty or principle which judges the moral quality of one's actions or motives': *Oxford English Dictionary* (third edition), sv 'conscience', <http://www.oed.com>, accessed 2 April 2019.

3 Ibid, sv 'conscious, *adj* and n.', senses A1 and 2.

4 'A clause in a law or contract that allows a person to be exempted from certain actions for which he morally disapproves. For example, in the contract of employment for doctors, there is usually a conscience clause concerning exemption from carrying out abortions.' J Law (ed), *The Oxford Dictionary of Law* (eighth edition, Oxford, 2015), p 135.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

> human behaviour, and which determine what actions are right and wrong.[5]

The principles of natural law are universal. For humanity, they are discoverable through the use of reason and the exercise of conscience, and should be used in the conduct of life, providing criteria against which to assess the legitimacy of behaviour.[6] The history of the relationship between natural law, reason and conscience is beyond the scope of this article but certain developments are worth noting. These include, albeit briefly, the work of St Thomas Aquinas, which marks a very different approach to that of later thinkers considered below, as well as the writing and judgments of certain early lawyers whose work invokes conscience.

For Aquinas, the principles of natural law are discerned by *synderesis*.[7] *Synderesis* is a habit; conscience, by contrast, is an act, the act by which we apply the principles discerned by *synderesis*.[8] Conscience acting on the principles of natural law is normatively binding, but human laws also bind because of conscience: 'If they are just, they have binding force in the court of conscience from the Eternal Law from which they derive.' Among the reasons for which laws are said to be just, Aquinas includes 'when they are ordered to the common good'.[9] However, he also discusses circumstances in which conscience does not bind, including some instances in which conscience errs,[10] and cases in which human law forbids less than natural law.[11] It is for this second reason that human law can neither prescribe all virtue nor prohibit all vice.

Laws are made for the whole variety of people, but

> The ability of and resource for acting in a certain way spring from an interior disposition or habit; the same course of action is not possible for a man who has a habit of virtue and for a man who lacks it.[12]

Law therefore focuses its prohibitions on what 'the average man can avoid' but its precepts cannot compel action 'being done in the virtuous style of a good

5 N Doe (ed), *Christianity and Natural Law: an introduction*, (Cambridge, 2017), 'Preface', p xiv.
6 Ibid.
7 Thomas Aquinas, *Summa Theologiae*, ed T Gilby et al (London and New York, 1964–1971), 1a, q 79, a 12.
8 Ibid.
9 Ibid, 1a2ae, q 96, a 4.
10 'If, then, the reason or conscience is mistaken through voluntary error, whether directly or from negligence, then, because it is on a matter a person ought to know about, it does not excuse the will from evil in following the reason or conscience thus going astray. If, however, it be an error rising from ignorance of some circumstance without any negligence that makes the act involuntary, then it excuses, so that the corresponding act of will is not bad.' Ibid, 1a2ae, q 19, a 6.
11 Ibid, 1a2ae, q 96, a 2.
12 Ibid.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

man'.[13] As human law cannot regulate the 'interior habit', a separation arises between the *forum externum* governed by human law, and the *forum internum*, which is not so governed.[14] For Aquinas, the two *fora* are intimately joined, the *externum* being to all intents and purposes the expression of the *internum*. Nevertheless, his distinction paves the way for a chasm which human rights law later encounters: if matters of conscience are not bound by human law as long as they remain private, conscience may not – indeed cannot – be the most appropriate faculty whereby to regulate public action for the common good.[15]

Aquinas was concerned with moral, rather than legal, matters, but reasoning comparable to his appears in the fifteenth-century legal work of Christopher St German.[16] For St German, conscience consists in the application of moral knowledge to particular situations, and the best application of 'any law of cunnynge' to 'any partyculer acte of man: foloweth the most parfyte the most pure and the moste beste conscience'.[17] Conscience is a moral faculty, dependent on the law of God that is found both in and beyond Scripture:

> as a lyght is sette in a lanterne that all that is in the house may be seen thereby / so almighty god hathe sette conscience in the myddes of euery reasonable soule as a light wherby he may dyscerne and know what he ought to do: and what he ought not to do.[18]

Such a combination of legal and moral thinking is not unique to St German. It also appears in case law, such that the co-inherence of law, morality and conscience can almost be described as a working assumption of the courts. This

13 Ibid.

14 For succinct definitional discussion of the *forum internum* and the *forum externum*, see G Puppinck, *Conscientious Objection and Human Rights: a systematic analysis* (Leiden and Boston, MA, 2017), pp 10–12.

15 See also P Petkoff, '*Forum internum* and *forum externum* in canon law and public international law with a particular reference to the jurisprudence of the European Court of Human Rights', (2012) 7 *Religion and Human Rights* 183–214 at 208–211.

16 For a recent contribution to scholarship on St German's work, including his religious motivation, his appreciation of equity in the common law (discussed below) and his understanding of conscience and *synderesis*, see I Williams, 'Christopher St German: religion, conscience and law in Reformation England', in M Hill and R Helmholz (eds), *Great Christian Jurists in English History* (Cambridge, 2017), pp 69–91.

17 C St German, *Doctor and Student*, ed T Plucknett and J Barton (London, 1974), p 89. Like Aquinas, St German admits that conscience may err but, before the law, someone may be excused from following an erring conscience if 'those learned in the law shall have advised him otherwise than in accordance with the truth of the law, yet if he has formed his conscience according to their advice, his conscience is clear' (ibid, p 93).

18 Ibid, p 95. St German's reference to the 'lyght is sette in a lanterne' echoes Matthew 5:15: 'No one after lighting a lamp puts it under the bushel basket, but on the lampstand, and it gives light to all in the house.'

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

may be particularly claimed for the Chancery cases[19] but, as the words of a chancellor cited below indicate, was also true of the common law.[20]

Evidence has been adduced of judicial decisions in the common law courts 'preferring to apply conscience over the requirements of law'.[21] Conscience was also drawn into the common law in the formation of substantive and administrative legal rules.[22] It is perhaps hardly surprising that it was significant in legal self-regulation, not least because of the severe salvific consequences for those at whose hands justice miscarried.[23] Mediaeval lawyers across courts shared with writers from the New Testament onwards the assumption that conscience is resourced by the prescripts of reason and natural law and by the doctrines of the Church. They assumed a harmony between conscience and what is judicial, principled and faithful. During the seventeenth century, however, this consensus broke down, both at law and in religious and philosophical thought.[24]

Atkins v Temple (1626) concerned the ploughing of ancient meadow and pasture. The argument turned not to conscience but to precedent to find a basis for equity. The court 'directed precedents to be produced' and the chancellor

> did find by divers Precedents, Part in the Time of the Lord Elesmere, and others since, that the Plowing of ancient Pasture has been restrained by Decrees of this Court, … and declared … that the Plowing of ancient Pasture is of equal Value with Meadow … and therefore fit to be restrained in Equity.[25]

As if to extract the general principle behind these and other cases, in *Cook v Fountain* (1676), Lord Nottingham Ch declared that 'with such a conscience as is only *naturalis et interna*, this court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures'.[26]

19 Chancery is described as 'an ancient court of conscience' in a case of 1594: see W Bryson (ed), *Cases Concerning Equity and the Courts of Equity 1550–1660*, 2 vols (London, 2001), vol I, p 139; also cited in D Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Farnham and Burlington, VT, 2010), p 80.

20 For the importance of conscience in mediaeval common law and, indeed, its currency in common parlance, see N Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge, 1990), pp 132–154. Doe also suggests the demise of the place of conscience in common law in favour of what might be regarded as a more modern rationalism (p 174).

21 Ibid, p 142.

22 For a fuller treatment of conscience and the law courts in the mediaeval period, see ibid pp 139–154.

23 Ibid, pp 146–148.

24 In relation to the law, this is perhaps most famously expressed in the often-quoted remark of John Selden that 'Equity is a roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity.' See S Singer (ed), *The Table-Talk of John Selden* (second edition, London, 1856), p 49.

25 *Atkins v Temple* (1626) 1 Reports in Chancery 13, 21 ER 493.

26 *Cook v Fountain* (1676) 3 Swan 585; also cited in Bryson, vol I, p xlviii, n 227.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

Lord Nottingham was not immune from a *forum internum* conscience-based approach to equity. He rejected precedent in *Lawrence v Berney*, declining 'to build upon such ill Foundations, and charging his own Conscience with promoting an apparent Injustice'.[27] Nevertheless, these cases contribute to the emergence of a different consensus from that of earlier years, one prescient of later developments. The harmony previously assumed between conscience and what is judicial, principled and faithful can no longer be taken for granted, either in law or in religious and philosophical thought.[28] This divergence continues in later centuries and may be exemplified through the work of two authors with legal connections: John Locke and Joseph Butler.[29]

John Locke discussed conscience in his *Essay Concerning Human Understanding* (1690). He separated it from its natural law and spiritual background, in part by denying that such principles as Aquinas would have discerned, by *synderesis*, exist. Locke conceded that people agreed on moral rules, but argued that they did so for a variety of reasons, 'from their Education Company, and Customs of their Country'; '*Conscience*', then, is 'nothing else, but our own Opinion or Judgment of the Moral Rectitude or Pravity of our own Actions'.[30] Locke's scepticism seems a long way from Aquinas' trust in a conscience that acts 'to witness, to bind, to incite, and also to accuse, to torment, or to rebuke' in accordance with values which, if not themselves innate, were discernible by innate human faculties.[31]

Joseph Butler, later Bishop of Bristol and Dean of St Paul's and subsequently Bishop of Durham, was influenced by Locke but also expounded a quite different approach to conscience, familiar from the natural law thinking noted above. In his Rolls Chapel sermons (1726), he cited Romans 2:15 to establish 'what it is in man by which he is *naturally a law to himself*': 'the superior principle of reflection or conscience in every man, which distinguishes between the internal principles of his heart, as well as his external actions'.[32] Butler's 'internal principles' were proper 'to each particular person's heart and natural conscience'.[33]

27 *Lawrence v Berney* (1683) 2 *Reports in Chancery* 229, 21 ER 665.

28 In relation to the law, this is perhaps most famously expressed in the often-quoted remark of John Selden that, 'Equity is a roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity.' See *The Table-Talk of John Selden*, (above, n 24), p 49.

29 Locke's father was a legal clerk and one of Locke's early works was *Essays on the Laws of Nature* (1664). Butler was preacher to the Rolls Chapel in Chancery Lane from 1719 to 1725; his *Analogy of Religion* (1736) offers a substantive critique of Locke, by whom he was also influenced.

30 J Locke, *An Essay Concerning Human Understanding*, ed P Nidditch (Oxford, 1975; rpt 1979), p 70, emphasis in original.

31 Aquinas, *Summa Theologiae*, 1a, q 79, a 13.

32 J Butler, *Fifteen Sermons Preached at the Rolls Chapel*, Sermon 2, in D White (ed), *The Works of Bishop Butler* (Rochester, NY, 2006), p 58, emphasis in original. It is interesting to note in passing that these sermons were preached in the chapel of the Master of the Rolls and are dedicated to Sir Joseph Jekyll, Master between 1717 and 1738, and Keeper of the Great Seal in 1725.

33 Ibid, p 56.

Conscience 'carries its own authority' as one of the 'chief or superior principles' in human nature.[34] Butler did not reject but rather recast a theological view of conscience, for he concurred with older, natural law, thinking that conscience is given to us by God.[35] After Butler, as the next section shows, conscience remained firmly in the provenance of religious thought and practice. Even so, just as Aquinas arguably anticipated a relegation of conscience to private life, so Butler's *Sermons* presaged developments whereby the rights of the human person whom conscience informs would of themselves constitute the grounds for its protection.

Changes in religious and philosophical thought were, however, no more linear and immediate than the changes in the legal world were undeviating and instantaneous. Forty years before Butler became Bishop of Bristol, Edward Stillingfleet, Bishop of Worcester, published *A Discourse Concerning Bonds of Resignation of Benefices, in Point of Law and Conscience*. Stillingfleet challenged the view that clergy could appropriately secure a benefice upon promise of its resignation; anyone 'who pretends to a conscience' should consider it inappropriate, he declared, even if they are told that the acquisition may be 'fit to be condemned in Equity, but not in Law'.[36] Stillingfleet might have taken a dim view of the diminution of the role of conscience in the courts of law but he called Edward Coke as his witness that:

> no *Bishop* can be bound to accept a *corrupt Resignation*; and whether it be so or not, he is bound to enquire: and if he be not satisfied, by what Law can he be required to do that, which he cannot do with a good Conscience?[37]

Nearly two hundred years later, and writing as a Roman Catholic in the 1870s, John Henry Newman would also acknowledge the waning of what we might call a natural law view of conscience. Somewhat trenchantly, Newman argued that

> when men advocate the rights of conscience, they in no sense mean the rights of the Creator, nor the duty to Him, in thought and deed, of the creature; . . . it is the very right and freedom of conscience to dispense with conscience, to ignore a Lawgiver and Judge, to be independent of unseen obligations.[38]

34 Ibid, Sermon 3, pp 62 and 64.
35 For more discussion of Butler's view of conscience, see J Worthen, 'Joseph Butler's case for virtue' (1995) 23 *Journal of Religious Ethics* 239–261.
36 E [Stillingfleet], *Ecclesiastical Cases Relating the Duties and Rights of the Parochial Clergy Stated and Resolved According to the Principles of Conscience and Law* (London, 1698), p 1.
37 Ibid, p 66, emphasis in original.
38 J Newman, *Certain Difficulties Felt by Anglicans in Catholic Teaching Considered*, 2 vols, new impression (London, New York and Bombay, 1901), vol II, p 250.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

Newman, however, continued to see that 'conscience is the voice of God', and he was sure that Anglicans, and indeed Wesleyans, shared his view.

CONSCIENCE IN CHURCH OF ENGLAND AND ROMAN CATHOLIC LEGAL NORMS

The canon law of the present-day Church of England would seem to vindicate Newman. Conscience has an internal but not privatised role. If it is to be quietened, its dictates must be in accordance with the Word of God. It is precisely because conscience is not only personal that Canon B 29 prescribes 'the duty of all baptized persons at all times to the best of their understanding to examine their lives and conversations by the rule of God's commandments'. Where they have offended 'by will, act, or omission', they are 'to bewail their own sinfulness and to confess themselves to Almighty God with full purpose or amendment of life', that they may receive from him the forgiveness of their sins'.[39] The Canon regards the general confession of the congregation in the liturgy as the most appropriate place for this repentance and absolution. However, it also acknowledges that not all will find comfort in this way and so instructs: 'any who by these means cannot quiet his own conscience, but requires further comfort or counsel, let him come to some discreet and learned minister of God's Word'.[40] This duty of the examination of conscience is imposed also on ministers, who are to be 'diligent' in its exercise. By this means, all Christian people can be assured that they live in accordance with the law of God.[41]

Roman Catholic canon law also treats conscience as the faculty whereby to discern what is right and wrong in the Christian life. For example, seminarians are advised to seek spiritual directors to whom they may confidently open their consciences (Canon 246(4)) and religious are frequently to examine their conscience (Canon 664) for the conversion of their inner life. Laity are to confess their grave sins after diligent examination of conscience (Canon 988(1)). At law, a judge must appraise proofs in accordance with his or her conscience, in order to find moral certitude before sentencing (Canon 1608(3)).[42]

In both the Roman Catholic Church and the Church of England, conscience, as rooted and grounded in the Word of God and the teaching and law of the

39 *The Canons of the Church of England 2012* (seventh edition with first and second supplements, London, 2015), Canon B 29(1).
40 Canon B 29(2).
41 Canon C 26(1).
42 All references are to J Beal, J Coriden and T Green, *New Commentary on the Code of Canon Law* (New York and Mahwah, NJ, 2000). For the wider Anglican Communion, see N Doe, *Canon Law in the Anglican Communion: a worldwide perspective* (Oxford, 1998), p 175. Doe notes that, in some member churches of the Anglican Communion, a deputy chancellor is to act 'according to his own conscience'.

Churches, continues to direct Christian behaviour. In secular law, however, and particularly in human rights law, as the historic trends considered above predict, conscience is increasingly seen as pertinent to the private person and independent of public religion. Religious concerns may be (but do not need to be) a facet of private conscience.

THE PROTECTION OF CONSCIENCE

Article 9 of the European Convention on Human Rights (ECHR) makes the protection of conscience axiomatic for human rights law:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.[43]

However, human rights case law shows that the way in which conscience is understood in a human rights context has changed. In 1974, *Hynds v Spillers Bakery* held 'that "grounds of conscience" involved a belief or conviction based on religion in the broadest sense or on intellectual creed as contrasted with personal feeling'.[44]

Hynds pre-dated both the ECHR and the UK Human Rights Act. Nevertheless, its view is clear that, to quote Locke, conscience must be grounded on something other than 'our own Opinion or Judgment of the Moral Rectitude or Pravity of our own Actions' if it is to merit protection.[45] Some forty years later, in *Eweida v United Kingdom*, the European Court of Human Rights (ECtHR), arguably softened this, holding that 'the right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance'.[46]

Although *Sahin v Turkey* noted that 'Article 9 does not protect every act motivated or inspired by a religion or belief',[47] there is an increasing tendency, not evident in *Hynds*, for religious freedom to be subordinated to that of conscience,

43 ECHR, Article 9. The text here is that of the ECHR as enshrined in the UK Human Rights Act 1998, Schedule 1.

44 *Hynds v Spillers Bakery* [1974] SLT 191; see above n 7.

45 Locke, *Essay Concerning Human Understanding*, p 29. See also K Vance, 'The golden thread of religious liberty: comparing the thought of John Locke and James Madison', (2017) 6 *Oxford Journal of Law and Religion* 227–252 at 232, for Locke's argument that religious matters should be excluded from those which the state protects.

46 *Eweida and others v United Kingdom*, App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) at para 81.

47 *Sahin v Turkey*, App no 53147/99 (ECtHR, 3 February 2005), 44 EHRR 5, 99–147 at 125.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

rather than for religion to be the guide and guarantor of conscience.[48] *Sahin v Turkey*, *Kosteski v Former Yugoslav Republic of Macedonia* and *Eweida v United Kingdom* all hold that 'religious freedom is primarily a matter of individual conscience'.[49] *Sahin v Turkey* explicitly based Article 9 freedoms on the subjective person:

> freedom of thought, conscience and religion is . . . one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.[50]

The convictions may be based on shared or (it would seem) unique assumptions. They may need to be cogent and communicable, but they are essentially private. This is a very different view from that taken in *Hynds*: for *Hynds*, conscience depended upon religion, but for *Sahin* there is an important independence.

Human rights cases are fought for the freedom not only to hold but also and more particularly to manifest deeply held and often religious beliefs. Indeed, the court itself demands evidence of such manifestation. Thus, *Kosteski v Former Yugoslav Republic of Macedonia* sought evidence of life lived in accordance with the religious belief claimed: 'it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available'.[51] The court agreed that 'the notion of the state sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent', while maintaining that it was nevertheless not 'unreasonable that an employer may regard absence without permission or apparent justification as a disciplinary matter'.[52] In a manner reminiscent of the place of conscience in the Christian life, in which inner belief and moral dictate give rise to external act, the court looks, in part, to exhibited behaviour as evidence of belief if it is to protect either conscience or religion.

Eweida v United Kingdom concerned the demonstration of belief through behaviour. *Eweida* joined four separate United Kingdom cases, involving British Airways, the Royal Devon and Exeter NHS Foundation Trust, Islington

48 N Doe, *Christian Law: contemporary principles* (Cambridge, 2013), p 397, suggests that the churches recognise and contest this. In his 'Principles of Law Common to Christian Churches', he includes, at 48(5), that 'the State should recognise, promote and protect the religious freedom of churches corporately and of the faithful individually, *as well as* their freedom of conscience' (emphasis added).

49 *Sahin v Turkey* (2007) 44 EHRR 5, 99–147 at 125; *Kosteski v Former Yugoslav Republic of Macedonia*, App no 55170/00 (ECtHR, 13 April 2006), (2007) 45 EHRR 31, 713–723 at 719; *Eweida v United Kingdom* (2013) 57 EHRR 8, 213–259 at 242.

50 *Sahin v Turkey*, 125.

51 *Kosteski v Former Yugoslav Republic of Macedonia*, 720.

52 Ibid.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

Borough Council and Relate, Avon. The ECtHR upheld only the claim of the first applicant, Ms Eweida, in relation to Article 9. It held that the right to inner freedom of religion was absolute, encompassing the more limited freedom to manifest that religion within the constraints necessarily imposed by law for the well-being of a democratic society. The court stated that if the cogency requirements were satisfied, the state's duty of neutrality and impartiality is incompatible with any power on its part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.[53]

However, this is arguably disingenuous. The court does take a view on 'the ways in which those beliefs are expressed'; were it not to, it could not find in favour of, or against, petitioners who argued that their expression of their beliefs were compatible with Article 9. In this instance, supported by the fact that British Airways had changed its uniform policy, the court found the expression of beliefs that offered no 'real encroachment on the interests of others' to have been entirely within 'the first applicant's right to manifest her religion' and 'in breach of the [State's] positive obligation' to protect that right.[54] The basis on which freedoms of thought, conscience and religion are protected under modern human rights law may be that of subjective human identity. The actual operation of the court in affording that protection, however, demonstrates that the exercise of conscience is not expected to be without effect in the public domain.[55]

This, together with the evidence of a dissenting judgement in *Eweida*, intimates the delicate relationship now subsisting between conscience and religion. Two judges in *Eweida* spoke of the 'fundamental difference between the two'. 'Conscience – by which is meant moral conscience—is what enjoins a person at the appropriate moment to do good and to avoid evil.' It 'may be nurtured by religious beliefs', but 'is not necessarily so'. Rather, it is 'a judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed'.[56] The judges then cited Cardinal Newman to claim the superiority, and indeed anteriority, of conscience over religion: 'Conscience may come into collision with the word of a Pope, and is to be followed in spite of that word.'[57] It

53 *Eweida v United Kingdom*, 244.
54 Ibid, 247.
55 For a possible application of Article 9 to the Church of England in relation to the freedom of conscience, see N Doe, *The Legal Framework of the Church of England: a critical study in a comparative context* (Oxford, 1996), p 316, n 41. Doe suggests that Article 9 might come into play in the case of baptismal families apparently unlikely to raise children in the Christian faith, and that the minister may have a duty to protect the conscience of adults in this position.
56 *Eweida v United Kingdom*, 255–256.
57 All citations here are from ibid. The quotation from Newman is from 'A letter to His Grace the Duke of Norfolk', in *Certain Difficulties Felt by Anglicans*, p 246.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

is hard to see Aquinas disagreeing – but impossible to imagine his condoning the implied discarding of religious faith.

WOMEN'S ORDINATION

The General Synod of the Church of England voted in favour of legislation to enable the ordination of women as priests on 11 November 1992.[58] Conscience featured surprisingly rarely in the debates and reports leading up to this decision, but substantially shaped the final legislation and supporting quasi-legislation. In this, the Church of England differed from other provinces of the Anglican Communion which passed specific resolutions concerning the place and protection of conscience in the response to women's priestly ordination. The General Synod of the Anglican Church of Canada resolved in 1975 that none of its clergy or laity

> should be penalized in any manner, or suffer any canonical disabilities, nor be forced into positions which violate or coerce his or her conscience as a result of General Synod's action in affirming the principle of the ordination of women.[59]

In 1977, the House of Bishops of the Episcopal Church in the USA asserted: 'no Bishop, Priest, or Lay Person should be coerced or penalized in any manner, nor suffer any canonical disabilities as a result of his or her conscientious objection to or support of … the ordination of women'.[60] However, these conscience clauses did not last; both were gone within a decade. That of the Episcopal Church was not adopted beyond the House of Bishops and so never possessed canonical authority. That of the Canadian Church was revisited in 1982.[61] In 1986, its General Synod ceased application of the conscience clause to those new into ministry and dropped the word 'conscience' from its resolution

58 For a summary of the timeline and General Synod voting figures between 1973 and 1988, see *The Ordination of Women to the Priesthood: a second report by the House of Bishops* (London, 1988), pp 3–5. Decisions concerning women's presbyteral and episcopal ordination required a two-thirds majority in each of the three Houses of General Synod. For a comparative point, see Doe, *Canon Law in the Anglican Communion*, p 34, n 142. Doe notes that the standard of a two-thirds majority in the governing body for decisions which are contentious, divisive or 'like to cause grave problems of conscience to members of the Church' is normal in the Anglican Communion.

59 For this 1975 Resolution, see Anglican Church of Canada, General Synod Archives, available at <http://archives.anglican.ca/en/permalink/official2273>, accessed 5 May 2019.

60 See <http://archive.episcopalchurch.org/109399_14090_ENG_HTM.htm>, accessed 5 May 2019.

61 The National Executive Council passed a motion to General Synod which affirmed the 1975 resolution 'for those who belonged to The Anglican Church of Canada at the time', continued 'to recognize the rights of individual consciences' and declared that new members or ministers 'must recognize and accept that the ministry of women priests must also be protected conscientiously as the expressed will of our Church'. See Anglican Church of Canada, General Synod Archives, (above, n 59).

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

altogether.[62] It is tempting to suggest that conscience was becoming as charged a concept for the Church in North America as it was in England.

The Church of England noted what had happened elsewhere. In 1986, the same year in which the Anglican Church of Canada moved away from special provision for the newly ordained, the Church of England published what might be appropriate provision for England – and did so before conscience dominated its own debates. The Ordination of Women to the Priesthood (GS738) reviewed the North American experience and 'deliberately used the term "safeguards"', in part 'to get away from the emotive language of "conscience clauses"'.[63] In the eventual English legislation, care would be taken to protect the consciences of those for whom women's ordination would be unacceptable. By the provisions of the supporting quasi-legislation, the Episcopal Ministry Act of Synod 1993, provincial episcopal visitors (additional suffragan bishops for each province) would be consecrated to give extended episcopal care to traditionalist parishes, people and priests who could not accept women's ministry.[64] Financial arrangements were made for those who felt compelled to leave the Church of England once its bishops ordained women as priests.[65] These provisions felt hard-won,[66] yet, as GS738 suggests, it had already been clear some eight years before the vote both that they would materialise and that there would be no talk of 'conscience' arrangements – although it is now a principle of canon law throughout the Anglican Communion that

62 The General Synod Resolution was as follows: 'That subject to the continued applicability of the 1975 Conscience Clause to those who have heretofore availed themselves of its provisions regarding ordination, this General Synod rescind the Conscience Clause and adopt the following position statement: 1) this General Synod reaffirm its acceptance of ordination of women to the priesthood; 2) no action which questions the integrity of any priest or postulant on grounds of sex alone can be defended; 3) this General Synod honours all priests, upholds them in its prayers and desires that God's will may be done in and through all priests, regardless of sex; 4) while Christian love cannot be legislated, it needs to be practised and demonstrated in the Body of Christ.' The decision not to permit those newly coming to ministry to avail themselves of the protection clause was considered but, while the views of those ordained at the time 'were sincere and worthy of respect, those now coming into the church have the choice of accepting or rejecting it as it now is'. See W Hemmerick, 'The ordination of women: the Canadian experience', (1991) 2 Ecc LJ 177–180.

63 The Ordination of Women to the Priesthood (GS738), 30 April 1986, p 7.

64 'Traditionalist' refers here to those describing themselves as 'traditional catholics' within the Church of England. Evangelicals opposed women's ordination on different grounds and were not so obviously addressed in the legislative and other provisions for opponents. The Episcopal Ministry Act of Synod did not create these additional sees.

65 See the Episcopal Ministry Act of Synod 1993 for the provincial visitors, and the Ordination of Women (Financial Provisions) Measure 1993 for details of the compensation arrangements. Those claiming compensation were required to do so within ten years of the promulgation of the Canon for women's ordination: see Financial Provisions Measure, s 1(2)(d).

66 The desire for adequate provision for those opposed to women's ordination did not only come from within the Church. In Parliament, 'The Ecclesiastical Committee pressed Church representatives hard on whether the safeguards for those opposed to the development were adequate and, in the course of the Committee's consideration of the 1993 Measure, Synod representatives explained that the Synod had removed time limits in earlier draft.' See <https://publications.parliament.uk/pa/jt201415/jtselect/jtecc/45/4511.htm#n116>, accessed 27 April 2019.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

'special provision may be made for parishes which in all conscience cannot accept the ministry of their own bishop'.[67] Indeed, it is possible that the language of conscience reappeared in the Church of England's debates in the light of parliamentary usage rather than at the Church's own instigation for, where the Church feared to tread, Parliament walked.

The Priests (Ordination of Women) Measure 1993 was debated at length in both Houses. The Second Church Estates Commissioner, Mr Michael Allison, told the Commons of its 'elaborate and comprehensive set of safeguards' to ensure that opponents of women's priesting 'are not asked to act against their conscience'.[68] Parishes could prevent women being appointed as an incumbents, priests-in-charge or team vicars. The Church of England 'uniquely among these provinces of the Anglican Communion who have ordained women as priests' would compensate clergy who resigned their office.[69] Not all MPs were convinced. The Rt Hon Tony Benn, MP for Chesterfield, inquired: 'if it is a matter of conscience, how many people have gone to the stake for exercising their consciences?' The majority, however, supported the attempts 'to make sure that the rights and liberties of Her Majesty's subjects were protected' without any need for extensive suffering.[70]

The Lords, too, were supportive. Lord Marlesford spoke in favour of both Measures and on the basis of conscience:

> Whether or not the ordination of women is a moral issue, certainly for most of us, it is an issue of conscience. We have to respect the view of those who disagree with us, and to respect that view in practice.[71]

He explained his distinction between 'moral' and 'conscience' by analogy. Conscience issues were comparable to cases of people who preferred a doctor of their own gender. 'Arrangements can be made, have been made, and must

67 *The Principles of Canon Law Common to the Churches of the Anglican Communion* (London, 2008), Principle 38(5), available at <http://www.anglicancommunion.org/media/124862/AC-Principles-of-Canon-Law.pdf>, accessed 5 May 2019. Matters of conscience also appear in 76(4), where, in common with Canon B 29(2), those who cannot quiet their conscience 'may offer private confession'.

68 HC Deb 29 October 1993, vol 230, col 1089, available at <http://hansard.millbanksystems.com/commons/1993/oct/29/priests-ordination-of-women>, accessed 5 May 2019. The Rt Hon Roger Evans, MP for Monmouth, objected to the wide scope of this provision. See ibid, col 1095.

69 Ibid, col 1094.

70 Ibid, col 1114.

71 He continued: 'Perhaps I may give an example which your Lordships may feel is irrelevant, although I think that it has some relevance. Let us think about doctors. There are a number of women who prefer not to be examined by a male doctor. There are, I suppose, a number of men who prefer not to consult a woman doctor. Arrangements can be made, have been made, and must be made to meet those feelings. But surely no one will suggest that the logic of that is that there shall not be men doctors or that there shall not be women doctors.' See HL Deb 2 November 1993, vol 549, col 1070, available at <http://hansard.millbanksystems.com/lords/1993/nov/02/priests-ordination-of-women-measure>, accessed 5 May 2019.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

be made to meet those feelings.' It would be unthinkable, morally, to suggest that there should not be male and female doctors but entirely appropriate to 'adapt to the conscience of those who disagree with us'. His words are reminiscent of the 'emotive' anxiety of 1986 and associate conscience with feeling, sentiment, even passion, but not with morality or, except as the specific case required, religion.

The emotive note was struck again when the General Synod debated the question of women bishops. There were clarion calls for the protection of the conscience of those dissenting. In 2004, David Banting, fighting prospective 'tyranny' against opponents, had asked

> will you be heard to make provision for those whose conscience will be offended by moving too precipitously towards this? … The Scriptures themselves tell us how those who are of the stronger conscience should act towards those with the weaker conscience.[72]

Prebendary David Houlding spoke more in sorrow than in anger in November 2012 but there is no mistaking his awareness of the emotional power of conscience:

> We lock ourselves into our corners, but we also have to be true to ourselves and follow our consciences, as the Bishop of Manchester said in his opening speech. We have to protect the rights of the minority who find themselves unable to accept this legislation. The majority can afford to be generous.[73]

The tone is reminiscent of that which GS738 sought to avoid in 1986. Dr Rosemarie Mallet, in favour of women's episcopal ordination, noted not only the emotional pain associated with conscience but also the power of another's conscience to cause an individual pain:

> Whether this motion stands or falls, the decision will be painful for all, as those who feel pleased at the outcome will also have to share the pain of those for whom this will be the wrong decision according to their conscience.[74]

72 General Synod, *Report of Proceedings: February Group of Sessions 2005*, vol 36, no 1 (London, 2005), p 212.

73 General Synod, *Report of Proceedings: November Group of Sessions 2012*, vol 43, no 3, p 92, available at <https://www.churchofengland.org/sites/default/files/2017-10/November%202012.pdf>, accessed 27 April 2019.

74 Ibid, p 104.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

In July 2013, Miss Prudence Dailey, like the Church nearly thirty years before, reflected on the experience of the Anglican Church of Canada:

> Ordination candidates are being asked by their bishop whether they would be prepared to receive communion from a woman priest. That has happened as a condition for ordination. Ordinands who have doubts about women's ordination being deliberately placed with women priests in order to put pressure on their consciences – that has happened.[75]

Aching hurt had become conscience's new normative association. A faculty or habit which once governed an individual's action seemed now rather to feel the individual's response to the actions of others. By the time of these speeches, however, it was clearly a matter of 'when' not 'if' the Church of England would consecrate women bishops. It was much less clear by what means it could be a fully valid position, in a Church of England with bishops of both genders, to be unable, in conscience and on theological grounds, to receive the priestly and episcopal ministry of women.[76]

The concerns of scriptural and traditional truth required Synod to effect 'a fair balance between competing interests' comparable to that discussed in *Eweida*.[77] Both those supporting, and those opposing, women's ordination as bishops, also needed to accept that the exercise of jurisdictional authority by the diocesan bishop, whether male or female, should actually remain intact while not divesting himself or herself of any of his or her functions.[78] Emotionally charged appeals to conscience did not initially enable Synod to achieve this jurisdictional clarity; in 2012, the draft Measure fell. Furthermore, and in keeping with the argument of this article concerning the changed relationship between conscience and religion, the final legislation and accompanying House of Bishops' document made no explicit mention of conscience at all.

The use of the word 'conscience' in debate suggests two reasons for this silence. First, in debate (although as discussed above, not in the Church's liturgical and prayer life) conscience had accrued almost too much emotional currency to be discussed in ways amenable to legislative or quasi-legislative expression. Second, and not unrelated, the word was used almost exclusively by those opposed to the ordination of women. This imbued it with connotations of pain, oppression and exclusion which subtly changed its moral valence.

75 General Synod, *Report of Proceedings: July Group of Sessions 2013*, vol 44, no 1, p 170, available at <https://www.churchofengland.org/sites/default/files/2017-10/July%202013.pdf>, accessed 27 April 2019.

76 Mr Aiden Hargreaves-Smith, in General Synod, *Reports of Proceedings: February Group of Sessions 2012*, vol 43, no 1, p 236.

77 *Eweida v United Kingdom*, 217.

78 Archbishop of York, in General Synod, *February 2012*, p 218.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

Within the Anglican Communion, such a possibility was also seen in relation to the Anglican Covenant, which seemed to some to risk 'achieving uniformity at the expense of conviction and conscience'.[79] In the Church of England's debates on women's episcopacy, to respect conscience came to mean allowing a minority to flourish, not only because that minority's arguments satisfied the claim to 'a certain level of cogency, seriousness, cohesion and importance',[80] but also and perhaps primarily because the mission of its conscience 'to witness, to bind, to incite, and also to accurse, to torment, or to rebuke' was deployed as effectively externally against the majority as it was internally by the members of that minority. This led, at least within the General Synod debate (and again in disjunction from the Church's liturgical and prayer life), to an ecclesial understanding of conscience as a faculty of feeling and even passion belonging to a minority, rather than one of 'knowledge ordered towards something' for and within the whole Body of Christ.[81]

As with other fluctuations in the meaning of conscience considered in this article, this ecclesial shift was neither immediate nor total. A sense of the inner moral challenge posed by conscience remains. In November 2014, for example, the Archbishop of York spoke of the need to act equitably towards the poor, describing the increase in food poverty and malnutrition in the north of England, 'which disgrace us all and leave a dark stain on our consciences'.[82] Conscience also, occasionally, appeared for those supporting women's episcopal ordination: in 2009, Kevin Carey asked, 'Have we who support this Measure not got consciences too?'[83] There were even some attempts to offer a basis of meaning for conscience that was less rooted in pain. In 2012, the Bishop of Chichester described Synod's commitment 'to hearing all the voices of theological conscience', whether minority or not.[84] In a completely different debate, the Bishop of Chelmsford made a speech which, incidentally for his purposes, demonstrates an older understanding of conscience as a guide to one's own behaviour whether or not one succeeds in influencing others. The Bishop cited Bishop George Bell's opposition in the House of Lords to allied bombing:

> In his memoirs he recalls how his speech was received, 'Nobody took the slightest bit of notice', he wrote. 'I sat down in dead silence. I was

79 N Doe, *An Anglican Covenant: theological considerations for a global debate* (London, 2008), p 66.
80 *Eweida v United Kingdom*, 243.
81 See above, n 9.
82 General Synod, *Reports of Proceedings: November Group of Sessions 2013*, vol 44, no 2, p 100, available at <https://www.churchofengland.org/sites/default/files/2017-10/November%202013.pdf>, accessed 5 May 2019.
83 General Synod, *Report of Proceedings: February Group of Sessions 2009*, vol 40, no 1 (London, 2009), p 175.
84 General Synod, *November 2012*, p 90.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

> conscious that all the noble Lords considered that I had made an ass of myself. Probably I had but the ass's burden no longer included an uneasy conscience.'[85]

These are, however, relatively isolated examples. While some voices criticised the Church of England's continued exemption from the Equality Act in regard to women's ministry, others consciously sought to avoid the secular language of rights and bias, and thus potentially depriving the conversation of its lessons, rejecting any sense that 'we are discriminators when we hold theological views as a matter of conscience'.[86] In the end, the quasi-legislative document, the House of Bishops' 'Declaration on the ministry of bishops and priests', accompanying the final Bishops and Priests (Consecration and Ordination of Women) Measure 2014, spoke not of theological conscience but of theological conviction in its arrangements for parochial church councils (PCCs) to pass a resolution whereby, 'on grounds of theological conviction', ministry arrangements would be made.[87] Conversation between the bishop and the PCC would establish that 'the nature of the theological conviction that had prompted the PCC to pass the resolution' pertained 'to gender and ordained ministry'.[88] Group protection was not afforded to the same extent as when women were ordained priests, and perceptions of 'group' largely gave way to those of 'minority'.

Considerable parliamentary time was given to the question of women in the Church of England's episcopate. Concerns of conscience were not absent. During an emergency House of Commons debate following the defeat of draft legislation in November 2012, the MP for Hertsmere, James Clappison, asked whether the Church should make 'every effort to accommodate those of faith and conscience who have a long-standing doctrinal view', even one that seemed old-fashioned.[89] The Rt Hon Ben Bradshaw MP replied that 'the Church should make every reasonable effort to accommodate those views, but the feeling of the overwhelming majority, both of Synod and of the Church of England, is that concessions have gone far enough'.[90] The debate reflected a

85 General Synod, *Reports of Proceedings: July Group of Sessions 2018*, vol 49, no 2, p 193, available at <https://www.churchofengland.org/sites/default/files/2018-08/Report%20of%20Proceedings%20July%202018.pdf>, accessed 29 April 2019.
86 General Synod, *February 2012*, p 237.
87 'House of Bishops' declaration on the ministry of bishops and priests: guidance note from the House', GS Misc 1077, June 2014, p 2, available at <https://www.churchofengland.org/sites/default/files/2017-11/GS%20Misc%201077%20House%20of%20Bishops%20Declaration%20on%20the%20Ministry%20of%20Bishops%20and%20Priests%20-%20Guidance%20note%20from%20the%20House.pdf>, accessed 5 May 2019.
88 Ibid, pp 2–3.
89 HC Deb 12 December 2012, vol 555, col 378, available at <https://hansard.parliament.uk/Commons/2012-12-12/debates/12121240000002/ChurchOfEngland(WomenBishops)>, accessed 5 May 2019.
90 Ibid.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

marked change in attitudes since the ordination of women as priests in the 1990s: 'when a resurrected Women Bishops Measure comes before the House, the main danger for it is not that it will contain insufficient safeguards for its opponents but that it will contain too many'.[91]

When the House of Lords debated the approved Measure in 2014, both they and the Commons conceded that the Church's premises were not necessarily those of secular human rights law: 'this is not in the end about gender discrimination. It is not about society's view on equality; the church has made its decision for its own reasons. It got there for theological and ecclesial reasons.'[92] It was clearly a relief that the Church of England had, for whatever reasons, come down on the side of 'the right thing to do'.[93]

The Church of England's final arrangements for women bishops and their opponents rose above the emotivism of its debates and succeeded, in affording collective protection of conscience for a minority religious organisation within itself exceeding the protection offered by Article 9, despite eschewing any talk of rights and resisting a secular human rights agenda. The final legislation and associated documents showed the Church of England disagreeing more constructively than had been possible in the past. Conscience, despite all the vicissitudes to which history had subjected its meaning, did seem to have retained, however invisibly and inchoately, a role in directing behaviour in accordance with moral probity. Its remaining strength, however, arguably came as much from remaining unnamed and unidentified as from an appreciation of its long pedigree in directing Christian action.

SINCE WOMEN BISHOPS

The Bishops and Priests (Consecration and Ordination of Women) Measure 2014 was accompanied by the House of Bishops' 'Declaration on the ministry of bishops and priests'. This contains five guiding principles which, accompanied by 'simplicity, reciprocity and mutuality', aim to help the Church of England live in harmony even though some of its ministers, including bishops, and some of its laity cannot accept the ordination of women as priests and bishops.[94] The House of Bishops commended the five guiding principles to the General Synod in May 2013, when it submitted legislative proposals for women's episcopal consecration. The Synod welcomed the principles in its resolution of 20 November

91 Ibid, col 377. It is notable that it is the 'feeling', not the 'conscience' or even the 'conviction', of the overwhelming majority to which reference is made.

92 HL Deb 14 October 2014, vol 756, pt 38, col 182, available at <https://publications.parliament.uk/pa/ld201415/ldhansrd/text/141014-0002.htm>, accessed 5 May 2019.

93 Ibid.

94 'House of Bishops' declaration on the ministry of bishops and priests', GS Misc 1076, 2014, p 2, available at < https://www.churchofengland.org/sites/default/files/2017-11/GS%20Misc%201076%20Women%20in%20the%20Episcopate.pdf>, accessed 26 April 2019.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

2013. In November 2014, the House of Bishops also made Regulations to establish a dispute resolutions procedure with regard to their Declaration and its principles. This is now included as supplementary material in the *Canons of the Church of England*, and the Regulations themselves are made under the authority of Canon C 29. The Regulations require the archbishops to appoint an independent reviewer to consider grievances brought against an office-holder in the Church of England in relation to the House of Bishops' Declaration. Legitimate grievance includes action taken or failure to act in accordance with certain specified paragraphs of the Declaration. In hearing grievances, the independent reviewer is to 'act impartially and fairly' and 'have regard to the "five guiding principles"' of the Declaration.[95] There have been two independent reviewers appointed, each of which has published a report on a grievance he has heard.

The first reviewer, Sir Philip Mawer, considered the appointment to the See of Sheffield. The bishop initially appointed did not ordain women and withdrew his candidacy after widespread opposition to his appointment became apparent. Sir Philip's report is almost entirely silent on the question of conscience. It notes that significant numbers within the Diocese of Sheffield could not in conscience accept women's ministry and cites the diocesan profile: 'as a diocese we recognise that these different views are reasonably held in good conscience and for good theological reasons within the spectrum of Anglicanism'.[96] It draws out five themes raised by four authors, including that, while diocesan bishops who did not ordain women

> could affirm that all the clergy (male and female) with whom they shared the 'cure of souls' in the diocese were lawful holders of their office, they would not in conscience regard their priesthood as 'true' (in the language of Guiding Principle 1).[97]

It explains why the bishop in question, Bishop Philip North, could not ordain women, citing his own words:

> The basis of my own objection to women's ordination is the authority and unity of the Church. … Extending the historic threefold order to women constitutes a major doctrinal change … an action that the Church of England does not have the unilateral authority to undertake. … This

95 *Canons of the Church of England*, p 214.
96 'Review of nomination to the See of Sheffield and related concerns', 2017, p 14, available at <https://www.churchofengland.org/sites/default/files/2017-11/Review%20of%20the%20Nomination%20to%20the%20See%20of%20Sheffield%20and%20Related%20Concerns.pdf>, accessed 5 May 2019.
97 Ibid, pp 50–51.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

> means that I feel the need to stand aside from it and thus in conscience cannot ordain women to the priesthood.[98]

Finally, it cites Professor Martyn Percy's claim that he is

> willing and able, in all conscience, to see those groups that wish to practise discrimination – be they ontologically-based in 'catholic' wings of the Church or 'complementarians' in conservative Evangelicalism – continue as part of the Church of England, and to be resourced for their flourishing,

but takes issue with Professor Percy's understanding of 'mutual flourishing'.[99]

For the purposes of this article, the report demonstrates the extent to which the Church of England has left 'conscience' behind as a means whereby to determine the right course of action in particular circumstances. The report notes that

> we need as a Church to get beyond thinking of 'mutual flourishing' in terms of what will contribute to *my* flourishing to a point where we consider the question 'What would a state of mutual flourishing look like which was more than one of merely tolerating difference and living with hurt but in which … "those of differing conviction will be committed to making it possible for each other to flourish" and in which the aim of all concerned is to promote what is held in common, honouring each other in the process'.[100]

The silent space aching to be filled by 'conscience' is eloquent. Its replacement by 'conviction' clearly does not do justice to the Church's need for theological grounds for guiding human endeavour.

The absence of conscience as an active faculty of ongoing discernment in the Sheffield nomination review is echoed in the Faith and Order Commission's publication, *The Five Guiding Principles: a resource for study*, and in the report of the second independent reviewer. In the *Resource*, conscience takes a stand rather than discerning a route. Thus, the *Resource* accepts that 'not every member of the Church of England may, in conscience, feel able to receive the sacrament at every celebration of the Eucharist'.[101] It recognises that conscience might demur in certain circumstances, but references the House of Bishops' Declaration in which such demurring is arguably of no effect: 'all ministers of

98 Ibid, p 52.
99 Ibid, p 59.
100 Ibid, p 60.
101 Faith and Order Commission of the Church of England, *The Five Guiding Principles: a resource for study* (London, 2018), p 21.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

the Church of England will be able, in good conscience, to take the oath' of canonical obedience to the bishop, because 'doing so adds nothing legally to the duty of canonical obedience, which already exists in law'. It is perhaps not surprising that the second independent reviewer's report does not even mention 'conscience', speaking once of 'conscientious reasons' but preferring in the main to stay with the language of conviction and theological conviction.[102]

CONCLUSION

This article has contended that there has been a gradual but profound dissociation between religion and conscience even though, in human rights law, religion continues be cited as providing one of the most convincing foundations for claims of conscience. The Church of England has increasingly ceased to employ the vocabulary of conscience in its contentious, and still ongoing, discussions about ordination. Within the public arena of the General Synod and in the context of women's episcopal ordination, the language of conscience has been reconstructed into a grammar of conviction and emotion. As a result, while the Church's conclusions satisfied the moral meaning of conscience within the legislative context of the Houses of Parliament, the Church in debate has become detached from the significance and power of conscience found in such earlier divines as Stillingfleet and Butler, although both canon law and liturgy still resonate with such meaning.

However, as this article has previously noticed, 'conscience' implies 'knowing with', that there is something inherently communal as well as personal in the word's meaning. This remains true, even though, in the realm of human rights law, conscience has become more clearly a faculty of personal than of societal moral decision-making. Following the loss of 'conscience' first to emotion and then to silence, the epistemological significance of 'together' tried to creep into the Church of England, as it were by the back door, with the language of 'conviction'. It has done so, however, with the cognate no longer of 'knowing' but of 'conquering', a concept quite differently freighted from the more active and dynamic conscience acting on the principles of natural law.

Yet, as this article has endeavoured to show, the Church of England has a rich seam of theological writing and reflection on this more dynamic conscience-based approach to its inner life, in its own teaching and that of other churches. Not only is this apparent in pre-Reformation writers and lawyers; it clearly persisted into the seventeenth century and even the nineteenth century. In Book V

102 'House of Bishops declaration on the ministry of bishops and priests: Wakefield Cathedral – report of the independent reviewer', 2019, p 7, available at <https://www.churchofengland.org/sites/default/files/2019-03/wakefield_cathedral_independent_reviewer_report_0.pdf>, accessed 5 May 2019.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press

of *The Laws of Ecclesiastical Polity*, Richard Hooker used conscience for the purposes of equity. Almost half a millennium later, Lord Denning would take a not dissimilar approach, holding 'the difficult balance between achieving a just and fair result in the specific case before him and the need at the same time to ensure that the law in general was developed for the benefit of future cases as well'.[103] As the Church of England continues to work out, ecumenically and for itself, the implications not only of women's ordination but also of other contemporary challenges to Christian consciences, a step away from the conquests of conviction towards a rediscovery of the equitable and reasonable mutual knowledge which conscience gave to our forebears may serve us in good stead.

103 N Doe, 'Richard Hooker: priest and jurist', in Hill and Helmholz, *Great Christian Jurists*, p 126; A Phang, 'A passion for justice: Lord Denning, Christianity and the law', in ibid, p 338.

https://doi.org/10.1017/S0956618X1900067X Published online by Cambridge University Press