**The Case for a General Constitutional Right to be Granted Conscientious Exemption**

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**ABSTRACT**

Conscientious exemption is called for when a person’s conscience conflicts with the demands or the requirements of the law. Most of the academic research about the practice of granting conscientious exemptions and its justification explores the question of when such exemptions should be granted. The purpose of this paper is to explore the largely neglected yet highly important and interrelated questions of how conscientious exemptions should be granted – and by whom.

The argument proposed is that there is no single model for granting conscientious exemptions that is preferable in all cases. Therefore, conscientious exemptions should be granted in different ways and by different authorities in different cases. These typical cases are discussed throughout the paper. The argument that there is no single preferred model for granting conscientious exemptions leads to a more specific argument, namely that, alongside other ways of granting conscientious exemptions, there should always be a general constitutional right to be granted such an exemption.

Key words: conscientious objection, conscientious exemption, constitutional rights.

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# 1. Introduction

Conscientious exemption is called for when a person’s conscience conflicts with the demands or the requirements of the law. In other words, the conscientious objector seeks an exemption from the law because he deeply holds an alternative set of basic values or an alternative way of balancing his basic values – which are all part of his conscience, or the result of it – that conflicts with the ends, the means or the values of a specific law and ultimately contradicts the demands of that law.

Most of the academic research about the practice of granting conscientious exemptions and its justification explores the question of *when* such exemptions should be granted. Many scholars explore the more specific question of when religious conscientious exemptions should be granted, as well the related question of how claims to these exemptions differ – if at all – from non-religious conscientious claims.[[1]](#footnote-1)

In this paper, I will overlook these questions. This paper’s purpose is to explore the interrelated questions of *how* conscientious exemptions should be granted – and by whom. The argument proposed is that there is no single model for granting conscientious exemptions that is preferable in all cases. Therefore, conscientious exemptions should be granted in different ways and by different authorities in different cases. Typical cases will be discussed throughout this paper. The argument that there is no one better model for granting conscientious exemptions leads, as will be argued in detail, to a more specific argument, namely that, alongside other ways of granting conscientious exemptions, there should always be a general constitutional right to be granted such an exemption – or a general constitutional right to be a conscientious objector.

I will first describe, in short, the nature of the right to be a conscientious objector or the related right to be granted conscientious exemption. I will then present a short and deliberately sketchy description of how conscientious exemptions are granted – and will conclude by answering the normative questions of how they should be granted and by whom.

# 2. The right to be granted conscientious exemption as a right to be tolerated

The question of whether there is a right to be a conscientious objector or whether there is a right to be granted conscientious exemption will not be addressed here. It will be assumed that there is such a right and that the interest of the conscientious objector (to be able to act upon his conscience) is of a kind that justifies, under certain circumstances, imposing duties on others. One of these duties may, but does not have to be, a duty to grant conscientious exemption. A person’s right to act upon his conscience, if such a right indeed exits, may impose a duty on the state to accommodate the objector’s conscience by means other than granting conscientious exemption. This paper, however, discusses only cases in which tolerating conscientious objection is exercised by granting an exemption from the law.

The following argument which will also be assumed is that a right to be granted a conscientious exemption is in fact a right to be tolerated.[[2]](#footnote-2) It is a right not to be harmed even when the state believes it has good reasons to harm the objector by imposing on him the duty to obey the law. Typically, granting conscientious exemptions from a legal rule presupposes that the state does not share the conscientious objector’s values or his way of balancing between values, or believes it would be unbearable and indeed intolerable if everyone shared the objector’s kind of conscience and reasoning. Otherwise, the exemption would have been the general rule rather than the exception to it. In other words, the state usually makes an adverse judgement about the conscientious objector’s values or his way of balancing between values. This judgement gives the state reasons not to grant the conscientious objector an exemption from the legal rule. If the state decides to grant conscientious exemptions after all, it can be seen as tolerant. This tolerance can result from acknowledging that the conscientious objector has a right to be tolerated – but it can also result from pragmatic, utilitarian reasons, i.e. without acknowledging the objector’s right to be tolerated.

If granting conscientious exemptions is almost always the result of an attitude of tolerance it affects the questions of how conscientious exemptions should be granted and by whom. We should now ask which methods of granting exemptions are more likely to result in justified tolerance towards conscientious objections and which state’s organs are more likely to tolerate conscientious objectors in the right cases. These questions will be answered after describing the main ways of granting conscientious exemptions.

# 3. How conscientious exemptions are granted

The purpose of the following review is not to present a comprehensive or even an up-to-date comparative research about how conscientious exemptions are granted. Neither does it aim to describe all possible examples of the various ways of granting conscientious exemptions. The purpose of this section is merely to describe the main ways of granting conscientious exemptions in order to better evaluate them in the following discussion.

## a. Conscientious exemptions in ‘superior legal norms’

The right to be granted conscientious exemption can be entrenched in ‘superior legal norms’. Normally, this norm would be the constitution. It could also be included in legal norms other than the constitution that are still superior to ‘regular’ statutes. Such norms are, for example, federal laws or state constitutions in a federal legal system and perhaps also international treaties or conventions. I will refer to all of the above as ‘superior legal norms’ and will separate these from ‘regular statutes’, or simply ‘statutes’ or ‘laws’.

The only example of granting an explicit, general constitutional right to be a conscientious objector is Article 41(6) of the Portuguese Constitution (1982) that states that ‘the right to be a conscientious objector, as laid down by law, shall be guaranteed’. This is a general right in two important ways: it is not limited to specific areas and it includes one’s religious and secular conscience without giving any priority to the former, as opposed to numerous other legal documents and practices. The right is to ‘be a conscientious objector’ rather than to be granted conscientious exemption. However, since granting conscientious exemption is one of the main ways of accommodating conscientious objection, having a right to be a conscientious objector directly leads to a right to be granted conscientious exemption.

In addition to the Portuguese Constitution, there are other constitutions that contain specific articles regarding the right to be granted conscientious exemption from compulsory enlistment into the army, from fulfilling military service involving the use of arms or from enlistment to combat forces.[[3]](#footnote-3)

Naturally, every constitution that protects the individual’s freedom of conscience and religion, as presumably most constitutions do, allows judicial interpretation according to which the constitutional right to freedom of conscience and religion imposes a general duty on the state to grant conscientious exemptions. However, courts normally do not adopt this line of interpretation.[[4]](#footnote-4)

Many international conventions do include articles concerning freedom of thought, faith, conscience and religion but not a general or a specific right to be granted conscientious exemption or to be a conscientious objector.[[5]](#footnote-5)

There are two main exceptions to the general avoidance and reluctance to having an international right to be granted conscientious exemption. First, according to the ruling of the European Court of Human Rights in *Bayatyan v. Armenia*,Article 9 of the European Convention on Human Rights imposes a duty to respect the right to conscientious objection to military service.[[6]](#footnote-6) This right will normally impose a duty to grant conscientious exemptions. Second, there are the common exemptions from equality laws that are granted to religious institutions in appointing members of staff or religious leaders. An implicit right to be granted an exemption from equality laws is drawn, as a matter of judicial practice, from the general right to freedom of religion that can be found in many international legal documents.[[7]](#footnote-7)

## b. Conscientious exemptions in statutes

This is by far the most common way of granting conscientious exemptions.[[8]](#footnote-8) The legislature may use various techniques for granting statutory conscientious exemptions. I will describe only some of the most popular ones.

*Granting conscientious exemption to a specific group – or to its members*

The practice of granting conscientious exemption to a specific group or groups – or more accurately – to specific religious groups was a common practice a few centuries ago but has become less popular over time. Many of the exemptions that were granted to specific religious groups are now being granted to all religious groups (and, frequently, only to religious groups).

A good example of granting conscientious exemption to specific religious groups can be found as far back as 17th-century England. The Oath of Allegiance and Supremacy Act of 1559 imposed a duty to take an oath of a religious-Christian nature as a condition for serving in some public positions and as a condition for validating some legal acts.[[9]](#footnote-9) Three different laws, enacted in 1696, 1749 and 1833, exempted the Quakers, Moravians and Separatists from the religious-Christian character of the oath. Only in the Oaths Act of 1888 did the law grant exemption to anyone who claimed it.[[10]](#footnote-10) Similar exemptions were granted in England at that time from compulsory military service. Laws passed in 1757 and 1786 exempted only Quakers from this, while a law from 1803 exempted Moravians.[[11]](#footnote-11)

One of the most common statutory conscientious exemptions that are granted only to religious believers is the exemption from the principle of equality in labour laws. This exemption is usually granted from the duty not to discriminate on the basis of religious belief, sex and sexual orientation in the workplace.[[12]](#footnote-12)

Another common statutory religious exemption is the one that is granted by ‘Sunday Laws’. Many Western states grant an exemption from the prohibition of some commercial activities on Sunday for religious believers whose religion designates their day of rest as Friday (Muslims) or Saturday (Jews and Sabbatarians).[[13]](#footnote-13) Occasionally, the exemption is granted only to those whose day of rest is Saturday rather than any other day.[[14]](#footnote-14)

*A general statutory exemption that leaves considerable discretion to the executive*

In this case the law states in general terms the conditions for the grant of an exemption and authorises the executive to decide whether or not these conditions are met.

In the case of the American Indian Religious Freedom Act of 1978, the law merely stated that ‘the President shall direct the various Federal Departments, agencies, and other instrumentalities responsible for administrating relevant laws to evaluate their policies and procedures in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices’. This general statement, which can be and indeed has been perceived as a general authority to grant conscientious, religious or cultural exemptions, was implemented in a series of executive orders, regulations and directives. In this case, the executive acted more as a legislature than as a judicial or executive authority, as far as the differences between these functions are discernible.

An example of the executive operating as a judicial authority can be found in England, where exemptions from military service during the two World Wars were granted by special tribunals.[[15]](#footnote-15) The tribunals were administrative authorities that acted as quasi-judicial ones and enjoyed a wide discretion in deciding the cases before them. The law (first the military Service Act 1916 and then the Military Training Act 1939), apart from setting appointments and procedure, simply authorised the tribunals to grant anyone who was a conscientious objector conscientious exemption from serving in the combat forces or in the military altogether. It was up to the tribunals to decide how to determine whether or not individuals were sincere conscientious objectors.

*A general statutory exemption that leaves considerable discretion to the judiciary*

This is usually the case where the exemption is granted in a superior legal norm (typically a constitution or an international legal document) since the text in this kind of legal norm generally consists of principles or general rules that allow extensive judicial discretion while interpreting them. This is either when the superior legal norm explicitly constitutes the right to be granted conscientious exemption or when it grants such a right implicitly by reference to freedom of conscience, belief or religion.

Occasionally, the judicial interpretation may contradict the legislature’s will. This, in turn, could result in a ‘constitutional dialogue’ between the judiciary and the legislature. This kind of dialogue occurred in the USA, and in a very interesting way, following the *Smith* decision of 1990.[[16]](#footnote-16) In that decision the court decided that freedom of religion, which is entrenched in the First Amendment, does not entail a right to be granted religious exemptions from ‘neutral’ laws, even in cases where there is no ‘compelling state interest’ in not granting the exemption. Instead, the court decided that, in cases where the law is neutral i.e. it does not intend to infringe freedom of religion, religious exemption can be granted if: (a) the law infringes another constitutional right; or (b) the law itself grants a specific religious exemption from its specific demands.

In response to that, the Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), which in fact contradicts *Smith* by saying that the court is indeed under a duty to grant religious exemption from any law whenever there is no ‘compelling state interest’ in not granting the exemption.[[17]](#footnote-17) The Supreme Court replied by ruling that the RFRA was unconstitutional so far as it applies to the states, i.e. it can only be applied to the federal government.[[18]](#footnote-18)

This is an extraordinary case, in which the court interprets the Constitution in a way that limits its own discretion in future cases where conscientious exemption would be claimed, and, accordingly, states that it is the legislature’s responsibility to grant specific religious exemptions whenever the legislature finds it necessary. The legislature, however, first through the federal RFRA and then through states’ RFRAs, specifically stated that the court is the appropriate authority for granting religious exemptions and that it is under a duty to do so in the right cases.

## c. Conscientious exemption as a judicial remedy

As already shown, conscientious exemptions can be granted in the law itself, whether it is a ‘superior’ law or a ‘regular’ one. The law itself may sometime grant the judiciary wide discretion in deciding cases of conscientious exemption. However, exemptions can be granted also as a judicial remedy following a legislative omission. In these cases, the specific law does not grant an exemption or grants one that is too narrow, by which (and here I assume that this is the case) it fails to comply with an explicit or implicit constitutional rule or principle. Although the court can now strike down the law entirely, in most cases this would not be a desirable remedy, since we assume that the general rule itself is not unconstitutional. Another option is to ‘read into the law’ the required exemption and thereby comply with the (implied) constitutional demand to tolerate conscientious objection by granting exemptions – or to tolerate all conscientious objections equally. In this way, the desirable general rule remains intact, apart from the specific exemption to it, as added by the court.[[19]](#footnote-19)

This judicial practice can be perceived as a special case of constitutional interpretation whereby the court, through its interpretation, narrows the scope of the rule, or widens the scope of the existing under-inclusive exemption, in order for it to comply with the Constitution. It can also be seen as judicial law-making. In cases in which the constitutional text is unclear about the existence of a duty or power to grant conscientious exemptions, granting conscientious exemptions as a judicial remedy gives rise to complicated constitutional issues, most of which are related in one way or another to the separation of powers principle, an issue that will be addressed later.

# 4. How conscientious exemptions should be granted

The general question of how conscientious exemptions should be granted can be addressed in many different ways. A preliminary discussion of this complex topic would have to address the following questions: in which legal norm should the exemption be included? How should the exemption be phrased? And which state organ should play the major role in granting the exemption? Taking these questions into account, I will divide the following discussion into four parts.

Firstly, assuming that there is a legal right to be granted conscientious exemption and that this right is included in specific laws regarding specific cases, I shall enquire whether statutory conscientious exemptions should be granted to specific groups, to unidentified individuals according to a neutral test, or to anyone who claims it.

Secondly, I shall enquire whether there should be a general legal right to be granted conscientious exemption (either a statutory or a constitutional one) or whether conscientious exemptions should be granted only in specific laws regarding specific cases.

Thirdly, assuming that there should be a general legal right to be granted conscientious exemption, I shall ask by which legal norm this right should be protected: by ‘regular’ statutes or by the constitution?

Fourthly, I shall ask who should be the dominant authority in deciding whether or not to grant exemptions: the legislature, the judiciary or the executive.

These four questions are interrelated in various ways, and so will be discussed separately only to some degree. Other parts of the following discussion will address some of these questions simultaneously.

The main purpose is to determine whether there is a better way of granting conscientious exemptions in all or most cases and, if not, which ways are preferable and in which circumstances.

Before embarking on this normative analysis, its framework should be clarified. No doubt the right way to grant conscientious exemptions may depend on various legal, cultural, sociological and historical differences between democratic states. Nevertheless, the following discussion will ignore these variants. For the purposes of this paper, I will assume a basic model of constitutional democracy that has some sort of ‘Bill of Rights’ and, by definition, adopts the principle of the separation of powers. Whatever other specific features the principle of separation of powers may have, I will assume the existence of an independent court that has the power to strike down legislation that contradicts the constitution or to declare that a statute is incompatible with a ‘superior legal norm’ (as UK courts are authorised to declare that an Act of Parliament is incompatible with the European Convention on Human Rights). Within this framework, the following arguments can apply in a similar way to any democracy that falls within the very basic model described above.[[20]](#footnote-20)

## a. To whom should conscientious exemptions be granted?

I shall examine three models for granting conscientious exemptions: granting exemptions to specific groups; granting them to unidentified individuals according to a neutral test; and granting exemption to anyone who claims it.

As to the model of granting conscientious exemptions to members of specific groups (‘the specific group model’), some of its advantages are merely a mirror image of the other models’ drawbacks and vice versa.

Most of the specific groups to which membership entitles individuals to be granted conscientious exemptions are religious groups. Only a few are cultural groups. I will not discuss here the differences between conscientious exemption, religious exemption and cultural exemption. I will also refer to granting exemptions to a ‘specific group’ as including granting exemptions to members of a specific religious group or any religious group. Notwithstanding the differences between these two cases, both can be separated from the other two models for granting exemptions.

The specific group model has three main advantages. Firstly, in some cases, it is justifiable to grant the exemption only to members of an identified group. In these cases, there is little point in trying to conceal the aim of the exemption by using either alleged or real general and neutral criteria. Apart from the undesirable dishonesty, such concealment would result in increasing the danger of fraud and lead to unnecessary loss of judicial and administrative resources.

Assume that a legal norm prohibits the carrying of weapons by pupils in schools.[[21]](#footnote-21) Sikhs, however, believe that their religion requires them to carry a kirpan (a small metal knife) at all times. Assuming that there is a compelling reason to exempt Sikh pupils from the general rule, there is also a compelling reason to grant the exemption only to Sikh pupils. There is no point in phrasing the exemption in general terms, e.g. ‘to anyone whose conscience or religion requires him to carry a weapon to school’. Not only do we know of no other similar religious or conscientious demand but, as argued above, describing the exemption in general terms will only increase the risk of fraud and lead to an unnecessary loss of judicial and administrative resources.

Secondly, the specific group model decreases the uncertainty of the potential objector, at least when this model is compared to the ‘neutral test’ one, as being a member of the protected group practically ensures the granting of the exemption.

Thirdly, not only does this model reduce the risk of the exemption being abused, it also reduces the risk of people being forced by others to object to the law. Take, for example, a law that allows physicians to refuse to perform abortions. If the law grants this right only to practising religious physicians whose religion clearly objects to the performance of abortions (whether at all or only ‘non-indicated’ ones), it is highly reasonable that most exemptions would be granted to sincere conscientious objectors. However, if the law grants the exemption to any sincere conscientious objector or to anyone who claims the exemption, it is reasonable to assume that some claimers would object to performing abortions because of social pressure or even threats. When the exemption is granted to any conscientious objector or worse – to anyone who claims it – it would be much easier for pressure groups or even for medical institutions themselves to force or encourage physicians to object to performing abortions. Naturally, this is not an inevitable outcome of a more relaxed policy of granting exemptions. It will possibly be the case, however, in places where the ‘pro-life’ approach is held by the majority, by a strong or militant minority or by the medical establishment itself.[[22]](#footnote-22)

Granting conscientious exemptions only to members of a specific group also has several substantial drawbacks.

Firstly, it ignores the individual and the secular conscience. As noted, this kind of exemption is given mostly to members of religious groups, for several reasons: some of these religious groups are more organised and thus more powerful than others; others are better known and have long-established historical roots; and all offer the state an easy method of assessing the objector’s sincerity. Yet, none of these reasons can justify disregarding completely the freedom of conscience of those who are not members of such groups.

Secondly and partly related to the above, granting exemptions only to members of specific groups should always raise suspicion. Too often, this practice results in the unjustified exclusion of other groups that are powerless, less known, unpopular or simply fail to comply with any acceptable definition of ‘religion’ or indeed ‘group’. More generally, this model might not comply with the requirement of generality which is part of any meaningful account of the rule of law. Although the requirement for generality may be overridden by compelling interests in some cases, arguably the one who wishes to deviate from this requirement needs to provide reasons for this.

The ‘neutral test’ model is, in a sense, the opposite of the ‘specific group’ model. It avoids the danger of under-inclusive exemptions and allows flexibility, although at the risk of fraud and inefficiency. Good examples of the use of the ‘neutral test’ model are the exemption of all pacifists from compulsory military enlistment and that of physicians from performing abortions if it contradicts their conscience. Note that the ‘neutral test’ model puts the focus on the act from which an exemption is sought rather than on the identity of the objector as a member of a discrete cultural or religious group. Nevertheless, this model does not grant exemption to anyone who seeks it. One still has to prove that one is a conscientious objector, which may be a demanding task from the factual-evidential point of view and also from emotional and mental perspectives.

An examination of the advantages and disadvantages of the ‘specific group model’ and the ‘neutral test’ model leads to the following three intermediate conclusions.

Firstly, the specific group model should be applied only when there is an extremely high probability that there are no other conscientious objectors to the specific law apart from the group’s members (e.g. the Sikh kirpan case) and when any other model would significantly increase the risk of fraud and inefficiency.

Secondly, using the specific group model would be more justifiable if the legislature acknowledges the legitimacy of the judicial remedy of reading into the law in order to expand the exemption’s scope, whenever necessary. The judicial remedy of ‘reading in’ offers flexibility and brings the specific group model closer to the ‘neutral test’ model, thus weakening the drawbacks of both models. The legitimacy of the ‘reading in’ remedy in this context can be best achieved when the constitution includes a general right to be a conscientious objector, although the same result can be achieved by entrenching freedom of conscience or by applying the general right to equality or non-discrimination.[[23]](#footnote-23)

The possibility of using the remedy of ‘reading in’ does not transfer the ‘specific group’ model to the ‘neutral test’ one. It is one thing to have a law stating that every conscientious objector – having proved his sincerity – is exempt from the law, but another to name one group, the members of which are entitled to exemption, and to recognise the court’s discretion to grant exemptions to other objectors in future, currently unexpected cases. Presumably, the court will be more reluctant to grant exemptions in the second case, assuming, of course, that there was a good reason to apply the ‘specific group’ model initially. Moreover, the conscientious objector who is not part of the ‘chosen group’ would have to defeat the law’s implied assumption that his objection is neither a conscientious nor a sincere one. For these reasons, there is less danger of fraud when applying the ‘specific group’ model combined with the ‘reading in’ remedy, than in applying the ‘neutral test’ model.

Thirdly, granting exemptions according to the ‘neutral test’ model is justified in cases where the following two cumulative conditions apply: firstly, when some of the conscientious objectors are not expected to be part of any specific group, and, secondly, when granting the exemption to anyone who claims it will result in undermining the justified purpose of the law or of any other justified and compelling interest. The case of granting exemption from compulsory military enlistment, for example, usually meets these conditions.

I have not yet discussed the third model, according to which conscientious exemption should be granted to anyone who seeks it. At first sight, this seems slightly odd. It can be argued that there is little point in enacting a law if the law itself allows practically anyone to disobey it regardless of their motives. This is, of course, only partly true. As noted above, applying this model will protect more effectively freedom of conscience in cases where the conscientious objectors are not expected to be part of any specific group, and when this will not result in undermining the justified purpose of the law or of any other justified and compelling interest.

However, we cannot always know in advance whether granting exemption to anyone who claims it will actually undermine the purpose of the law. There are numerous considerations that should be taken into account while trying to evaluate the risks of applying this model. The difficulty is that these considerations do not apply in the same way in all cases. This is one good reason why the decision will have to be made on a case-by-case basis. Three examples can clarify this point.

Firstly, in some cases, the expected number of objectors (some of whom will not be sincere conscientious objectors) is crucial, whereas in other cases it is not. Even if we assume, for example, that there are good reasons for granting conscientious exemptions from tax laws or social security laws, clearly there is not much sense in granting them simply to anyone who seeks them. This might also be the case regarding numerous laws, the main aim of which is to coordinate behaviour. However, when the law imposes a duty to take a religiously oriented oath during legal proceedings, for example, and grants exemption to anyone who claims it, the expected number of objectors seeking the exemption is simply irrelevant.

Secondly, in some cases, it will be crucial or at least extremely helpful to impose an alternative duty to the one from which the objector is being exempted. Even if we assume, for example, that taking a religious oath before being appointed to certain public positions is vital (even if only symbolically) acknowledging a non-religious affirmation as a reasonable alternative duty would enable an exemption to be granted to anyone who claims it.[[24]](#footnote-24)

In some cases, there may be no appropriate alternative duty that would enable the law to grant exemption to anyone who claims it, as in the case of a generally justified compulsory military enlistment, and under the assumption that granting an exemption to anyone who claims it will result in jeopardising the rationale of having compulsory military enlistment to begin with. In other cases, there is no alternative duty possible, although this will not be a sufficient reason not to grant an exemption to anyone who claims it, as in the case of exempting pupils in state schools from school prayers, religious classes or saluting the flag (assuming, of course, that these are generally justified practices).

Thirdly, it is always important to ask whether applying this model adds only non-conscientious objectors when comparing it to other models. Assume that there is a good case for imposing a legal duty to wear a crash helmet when riding a bike or motorcycle. The only known conscientious objectors to this demand are the Sikhs, who are religiously committed to wearing the turban at all times. Granting an exemption from the law to anyone who claims it would add only non-conscientious objectors, compared with the ‘specific group’ model. In other words, it will undermine a justifiable and compelling interest while not enhancing the protection of freedom of conscience at all.

Looking back at the three models for granting conscientious exemptions, it is clear that no single model is preferable in all cases. Choosing the right model must be done on a case-by-case basis. Moreover, the constant checking of changes in circumstances is vital, as these may justify the transferral from one model to another.

Even though a case-by-case policy is inevitable, I have laid out some general guidelines that, although inconclusive, do exemplify the kind of cases in which each model should be applied. Moreover, having examined the models’ advantages and disadvantages, a general conclusion does appear. If the state takes freedom of conscience seriously, then conscientious exemptions should be granted to anyone who seeks them, whenever this is possible. Granting exemptions according to the ‘neutral test’ model might be a reasonable, second-best solution. In other cases, as noted, it might even be the best way to protect individuals’ freedom of conscience. Turning to the ‘specific group’ model should be a last resort and should be done only when there is a high degree of certainty that the conditions for its application are met. For reasons that were mentioned only briefly above and that will be elaborated in the following discussion, using the ‘specific group’ model should always be accompanied by the availability of the judicial remedy of reading into the law in order to amend under-inclusive exemptions.

## b. A general legal right or separate and specific ones?

There are two main reasons for having a general legal right (either statutory right or constitutional one) to be granted conscientious exemption.

Firstly, the legislature cannot be expected to predict every specific case in which freedom of conscience would justify granting an exemption from the demands of a specific law. Even when the legislature does predict a potential contradiction between a general rule and freedom of conscience of certain individuals, it may miscalculate the extent of such a contradiction. Miscalculating the extent of the harm that may be caused by the law, or, more generally, lacking the ability to fully anticipate the results and implications of every law are unavoidable characteristics of any legislative process. Nevertheless, these general limits of the legislative process apply in a special way when a new law affects the freedom of conscience of members of small and unfamiliar religious or cultural groups, or simply that of individuals.[[25]](#footnote-25) Precisely because the powerless minorities or simply individuals who are not part of an organised group do not have an effective voice – if any – in the legislative process, they should be protected from the result of that process, even when the harm caused to them was neither intentional nor predicted. Having a general right to be a conscientious objector is one way of granting such a protection.

This line of argument is not necessarily part of a general theory of process-minded constitutional law, since it is now assumed that the general right to be a conscientious objector can also be a statutory rather than a constitutional one.[[26]](#footnote-26) The related constitutional issues will be discussed when the argument for a *constitutional* general right to be granted conscientious exemption is presented.

The above argument is also not to be considered as purely procedural. Firstly, any procedural rights theory must have certain substantial values (and, indeed, substantial rights) as its basis.[[27]](#footnote-27) Here, the argument for the need to amend the results of having no (or very little) political power is incidental to the argument for the importance of freedom of conscience. Moreover, the specific argument for a general right to be a conscientious objector is not an argument for basing judicial review on suspect classifications, which is one of the central ideas of a procedural rights theory. Proving prejudice against ‘discrete and insular minorities’ is not a condition for judicial review in cases of conscientious exemption. As noted above, judicial review should take place also in cases where the harm to freedom of conscience was not predicted and so was not the result of intention or prejudice.

The second reason for having a general right to be granted conscientious exemption is that if exemptions were granted only by specific laws, the legislature could deliberately ignore the need to tolerate the conscientious objections of those who hold appalling values (in the majority’s opinion) or the conscientious objections of members of unpopular groups. A general right to be granted conscientious exemption would enable the court to apply it equally, in order to remedy the minority’s lack of political power and implement more successfully an attitude of tolerance. As the last argument shows, having a general legal right to be granted conscientious exemption shifts some legislative power from the legislature to the courts. This issue will be discussed in detail later.

There are also good reasons for granting specific conscientious exemptions in specific statutes, rather than in a law that constitutes a general statutory right. However, none of these reasons, separately or cumulatively, justifies granting exemptions only in specific statutes. These reasons can only justify granting exemptions in specific statutes alongside a general legal right to be granted conscientious exemption.

The first possible reason for granting specific exemptions is that no general balancing test (as the ‘compelling state interest’ test) can be the right test for all exemption cases. One may argue that these cases are too complicated. Every so often they are utterly different from one another and, occasionally, they are simply unpredictable. The lack of a sufficient general balancing test or guideline is a good reason for enacting specific exemptions in specific statutes. It is not, however, a reason to avoid enacting a general legal or constitutional right to be granted conscientious exemption.

More specifically, the argument that there should not be a general right to be granted conscientious exemption since no general balancing test can cover the complexity of the subject is unconvincing. This could be part of a coherent argument, although not necessarily a persuasive one, only if one opposes general statutory or constitutional rights altogether. If this is not the case, then with regard to the inability of a general balancing test to answer all future cases, there is nothing special about a general right to be granted conscientious exemptions. The same inability can be found with regard to most general legal rights, such as freedom of expression, privacy, property and so on.

A second possible reason for granting specific exemptions is that a general right is inevitably vague; thus, conscientious objectors would find it extremely difficult to predict whether or not their objection falls within the scope of the general right. This is a valid argument but only in the short term. In the long term, we can expect the court to develop judicial guidelines that would significantly decrease uncertainty in typical cases.[[28]](#footnote-28) The vagueness of the general right is a good reason for enacting specific exemptions alongside the general right. It is not a good reason for granting exemptions only in specific statutes.

Thirdly, a general right to be granted conscientious exemption is, by definition, a right granted to all conscientious objectors, regardless of whether or not they belong to a discrete group. Such a right is more likely to be abused by allegedly conscientious objectors. It is easier to examine the sincerity of the objector and the extent of the harm caused to his conscience when he is part of a specific group, the members of which share the same values. Specific exemptions, as opposed to a general right, can indeed solve this evidential difficulty in different ways in different cases. Yet, once again, this is a good argument for adding specific exemptions to the general right. It is not a persuasive argument for granting exemptions solely on the base of specific laws, as the argument about the evidential difficulty does not apply in the same way and to the same extent in all cases. Evidential difficulties may help in deciding the scope of the general right to be granted exemptions – and its limits. It is not a strong enough argument against having such a right.

Fourthly, a general right to be granted conscientious exemption does not mean that anyone who declares himself to be a conscientious objector is always to be regarded as such. In some cases, and presumably in the usual case, the conscientious objector will have to prove his sincerity. This will have to be done by allowing the authorities to examine his motives and way of life, to investigate his friends and family and so on. In other words, the application for the exemption results in a significant loss of privacy that eventually might be in vain.[[29]](#footnote-29) The case here is that of a sincere conscientious objector who fails to prove his sincerity having to compromise his privacy – in vain. Granting exemptions in specific laws (mainly but not only to members of discrete groups) can partially solve this problem, as being part of a specific group may be prima facie evidence that one shares its values. In this way, the risk of the unnecessary invasion of one’s privacy is reduced. This is a paternalistic argument for granting exemptions in specific laws and therefore should be treated with caution. Any method of granting exemption that allows a judicial or administrative body to exercise discretion is not fault-proof as it may result in wrong decisions for or against both sincere and insincere objectors. However, the same thing can be said about granting specific exemptions to specific groups in specific statutes (e.g. exempting only members of a certain religious group from compulsory enlistment to the army). This model may not result in having individuals compromising their privacy in vain but may cause other forms of individual injustice. Granting exemption according to this model may unjustly discriminate against sincere conscientious objectors who are not members of the protected group – and to benefit members of the group who do object to military service but not necessarily for conscientious reasons.

Fifthly, many of those who prefer the ‘specific statutes model’ over the ‘general right model’ base their preference on the separation of powers principle, on a general mistrust of the courts or on the will to prevent the courts from being the dominant authority in cases of conscientious exemptions.[[30]](#footnote-30) I will come back to the separation of powers issue and to the question of which authority is better placed to decide cases of conscientious exemptions in the following section.

To sum up, there are good arguments for granting conscientious exemptions in specific laws regarding specific cases. The downside of this technique is remedied by having a general legal right to be granted conscientious exemption. The question of whether this legal right should be statutory or constitutional is a separate question that will now be addressed.

## c. A general statutory right or a general constitutional one?

Here, it is assumed that there should be a general legal right to be a conscientious objector or to be granted conscientious exemption. This right could be an explicit one, as in Article 41(6) of the Portuguese Constitution (‘the right to be a conscientious objector, as laid down by law, shall be guaranteed’), or an implicit one, as in cases where a constitution protects freedom of conscience. For the sake of simplicity and clarity, it will be assumed that the general right should be an explicit one. The question that follows is should such a general right be included in a statute or in the constitution?

This question is quite similar to the question of who should grant the exemption or decide its content and limits. A general constitutional right to be granted an exemption places the power in the hands of the court as the interpreter of the constitution. Since most constitutions are protected from being changed by an ordinary political procedure, the majority may find it extremely difficult to amend the constitution in response to a disputable judicial interpretation of it. Presumably, in most constitutional democracies, there are also informal obstacles that restrict the possibility of amending the constitution in response to a judicial interpretation of it. A stable political culture, which generally accepts the need and the legitimacy of a supreme court as the constitution’s interpreter, would sometimes hold back the will of any current majority to implement its short-term policy or even basic values by amending the constitution.

However, when a general right to be granted conscientious exemption is granted by a statute, then whenever the court grants or refuses to grant conscientious exemption as a result of its interpretation of that statute, all the legislature has to do, if it disagrees with the court, is to turn to the regular legislative process and enact a new statute that specifically overrides the court’s ruling. Here, there are no special formal procedural obstacles and, arguably, the informal obstacles are far weaker than in the former case. The courts still exercise wide discretion in interpreting and applying the general statutory right to be granted exemptions. The legislature, however, can quite easily override judicial decisions by enacting specific statutes or by qualifying the general right to be granted exemptions.[[31]](#footnote-31)

Eugene Volokh refers to having a constitutional general right to be granted exemption as a ‘constitutional exemption model’ and to having such a right in a statute as a ‘common law exemption model’.[[32]](#footnote-32) The latter is a common law model in the sense that the law is being made initially by the court but is subject to statutory override.[[33]](#footnote-33)

Volokh argues for this common law model.[[34]](#footnote-34) In his opinion, the constitutional exemption model grants the courts excessive power, with no real possibility for the legislature to react to the judicial interpretation of the constitutional right. The common law model, however, succeeds in enabling judicial discretion, on the one hand, and in creating a real possibility of legislative reaction, on the other. For this balance to occur, Volokh suggests that (at least in the US context) the general right should be placed in states’ statutes rather than in states’ constitutions, federal laws or the US Constitution. Volokh’s view about the desirability of the common law model derives from a more general theory, according to which determining the correct balance between freedom of conscience and other rights or interests is an exercise of moral and practical judgement that must, ultimately, be left to the political process.[[35]](#footnote-35)

There are, however, overriding reasons for rejecting legislative dominance, or, more accurately, legislative supremacy, when deciding questions of conscientious exemption. The argument presented here against the common law model being the sole model is actually an argument for having a general constitutional right to be granted conscientious exemption. Naturally, every argument for having a constitutional right to be a conscientious objector is part of the more general argument for having constitutional rights at all. However, here, I assume that there should be constitutional rights in general or that we face a regime that has constitutional rights, so the only question remaining is whether the right to be a conscientious objector should also be a constitutional one.[[36]](#footnote-36)

The first reason for having a constitutional right to be a conscientious objector is the nature of that right (note that Volokh argues there should be such a right, although not a constitutional one). It is a special right in at least two important aspects.

Firstly, it enables its holders not to comply with a general rule that was decided by the majority, because they reject the content of the rule. It is a right to disobey the will of the majority, as reflected in a legal norm, because the right-holder strongly, and indeed conscientiously, rejects the majority’s values or its way of balancing values. It is unreasonable to expect the majority to exempt from obedience, in all right cases, those who perceive the majority’s values as utterly unacceptable or immoral. More accurately, it is unreasonable to expect the majority to do this better than an independent judiciary.[[37]](#footnote-37) These are not mere speculations. In a recent study, Zoe Robinson found that state legislatures in the United States are overly responsive to majoritarian interests at the expense of minority religious liberty, and that expected constituent voting support heavily affects legislative decisions as to whether to create statutory exemption from neutral laws.[[38]](#footnote-38) Robinson’s conclusion that a person’s religious freedom in the USA is dependent on their political power is alarming but also quite expected as an almost inevitable result of trusting representative institutions to protect minority rights while denying any possibility of effective judicial review.

Secondly, the right to be granted conscientious exemption is normally not exercised by those who have the potential of forming a political majority, whereas most constitutional or human rights are. Most human rights are exercised or have a real potential of being exercised, albeit in different ways, by virtually all citizens, or at least are not limited, by their nature, to ideological minorities. The right to be a conscientious objector, however, is exercised or has the real potential of being exercised mostly by ideological minorities, small or powerless groups, or simply individuals who depart from consensual values. All of them, by definition, cannot form a political majority. They may, of course, share the majority opinion concerning certain issues. However, the possibility that the specific value upon which they rest their conscientious objection would be endorsed by a future majority is presumably quite distant. There is little incentive for a current or potential political majority to protect a right that they cannot enjoy, especially when this right, by its nature, benefits only those who hold, in the majority’s opinion, unacceptable values.

It is important to appreciate the above argument accurately. The argument is not that the legislature is incapable of granting conscientious exemptions or that the legislature may be reluctant to grant them in most cases.[[39]](#footnote-39) This argument would be false since most conscientious exemptions are granted by the legislature. This fact, however, does not necessarily mean that the legislature can protect, or simply does protect, freedom of conscience better than the court.All it means is that the legislature is capable of protecting freedom of conscience to some extent. Thus, the argument here is that we cannot trust the legislature to reach the correct decisions in some typical cases. This means that a complementary judicial power to grant exemptions, which should be relatively immune from legislative response, is necessary in order to better protect freedom of conscience and the public interest alike.

The second reason for rejecting the common law model is the general incapability of the political majority to determine the justifiable limits of tolerance towards conscientious objectors.

Leaving these kinds of decision to the political process is likely to lead to deciding these issues according to temporary political interests and contemporary political power, which has nothing to do with the desirable way to protect freedom of conscience.[[40]](#footnote-40) More generally, Jeremy Waldron’s assumption that the normal outcome of the political process is decisions that are being made by those who have ‘good faith and relatively impartial opinion’ is simply indefensible, especially in cases of tolerating conscientious objections.[[41]](#footnote-41) The political majority will normally grant exemptions to relatively powerful minorities or to those who do not pose a symbolic or actual threat to the majority’s values or simply to those who have gained the majority’s empathy. Laycock put it nicely when he said that ‘judges *sometimes* are willing to protect unpopular minorities, but legislators are hardly ever willing – not if the legislature has to legislate specifically about the unpopular minority and its religious practices’.[[42]](#footnote-42)

The political majority is likely to adopt an attitude of tolerance due to pragmatic reasons rather than regarding tolerance as a right. That may lead to unjustifiable intolerance towards powerless minorities, as well as to unjustifiable tolerance towards powerful or favourite minorities. An independent court in a constitutional democracy is more likely to tolerate powerless minorities and not to tolerate intolerant powerful ones in the right cases.

More specifically, the common law model allows an easy legislative response to the judicial decision with no constitutional restraint whatsoever. It is likely that this response will take one of the two following forms: firstly, cancelling justified exemptions that were granted by the court to powerless or non-popular minorities (or individuals who hold unpopular values), and, secondly, granting unjustified exemptions to powerful or popular minorities after a judicial refusal to do so.

The third reason for rejecting the common law model is the nature of statutory exemptions vis-à-vis the nature of constitutional ones. According to the common law model, whenever the court grants or refuses to grant conscientious exemption the legislature can reply by enacting an overriding statute. The statutory reply is bound to be relatively specific. As such, it should be suspected of favouritism towards specific groups or of discrimination against others. A constitutional right, however, is, by its nature, a general one. Applying this right by the court normally does not raise similar difficulties. Naturally, this argument should be read in line with a more general approach that, overall, prefers judicial supremacy in interpreting a Constitution over legislative supremacy within the regular legislative process, and certainly within the context of granting conscientious exemption.

A fourth reason for rejecting Volokh’s view of favouring legislative dominance over a judicial one is the misguided connection made by Volokh between the existence of harm and the superiority of the political process. Volokh’s argument is as follows:

Hostility to a particular practice, which is usually justified by the belief (right or wrong) that the practice causes harm, is a presumptively proper basis for legislative action … so long as there is no objective standard by which courts can determine whether or not the legislature erred, judges ought not … replace legislative definitions of harm with their own … laws that prohibit certain behavior and therefore rest on a discrimination between what the majority thinks is harmful and what the majority thinks is harmless are the essence of democratic decision making … this sort of burden on minorities is inevitable and generally proper.[[43]](#footnote-43)

Indeed, there might be no objective standard for the court, or for anyone for that matter, by which to decide what constitutes harm. The answer to the question of whether harm has actually occurred depends on how the term ‘harm’ is defined. The latter may depend on the political or moral theory one holds. More importantly, the question of whether it is justifiable to cause harm or to prevent it always depends on the kind of values one holds. Having said that, it is not clear why it provides a reason for leaving the final decisions in these matters in the hand of the political majority.

Volokh’s view that the court should not replace the legislature’s perception of harm or the legislative view regarding when harm should be prevented could easily be part of a more general view, according to which there should not be any constitutional rights whatsoever. However, Volokh is not arguing against constitutional rights in general but only against the constitutional exemption model. He does not explain what is special about the right to be a conscientious objector (within the context of defining what harm is) that justifies applying the common law model rather than the constitutional one. I suspect no such explanation exists. Limiting our discussion to the connection between the existence of harm and the desirability of the common law model, it remains unclear why this model, if we follow Volokh’s line of argument, should not be applied regarding other rights, e.g. freedom of expression, equality, privacy and so on. All constitutional rights engage in one way or another with the harm principle, which requires us to decide the definition of ‘harm’, the proper ways to prevent it and the proper ways to respond to its infliction. Yet, Volokh does not argue that the majority’s views about the limits of freedom of expression, privacy and so on form the essence of democratic decision-making and that the burden on minorities that results from this democratic process is ‘inevitable and generally proper’.

A fifth drawback to Volokh’s thesis is his argument that the constitutional exemption model will deter the courts from granting exemptions even in cases where they should be granted.[[44]](#footnote-44) Volokh argues that the courts would prefer to grant exemptions when there is a realistic opportunity for a legislative response than in cases where the court is the final interpreter of the constitution.

Volokh fails to provide any empirical support for this argument, nor does he quote judicial decisions or *obiter dicta* reflecting this line of thinking. Unsurprisingly, neither is there any evidence that the opposite view is correct. It might be impossible to back up this kind of argument with indisputable empirical findings. All that is left is to set forth a few short, non-empirical, principled comments. Volokh’s main thesis is that the constitutional model places extensive and unjustifiable power in the hands of the courts. Here, however, he argues that the constitutional model would deter the courts from granting exemptions. These two arguments cannot be proposed simultaneously. One cannot raise concerns about placing extensive and unjustifiable power in the hands of the courts – and at the same time argue that these powers will probably not be exercised. Also, even if we agree that the ‘constitutional exemption model’ will result in judicial reluctance to grant exemptions, this reluctance is likely to be expressed by a judicial decision according to which there is no constitutional right to be granted exemption rather than by a decision that the constitution prevents granting an exemption. Therefore, the legislature will normally be able to decide to grant a statutory exemption despite a judicial decision that the constitution does not impose a duty to do so. In fact, the judicial reluctance that Volokh is concerned about will normally allow the legislature to make the final decision in these cases. It will take the constitution out of the equation and will make way for the ‘common law’ model (which Volokh supports), according to which the legislature has the last say in exemption cases.

The above response assumes that Volokh is right when he suggests that the constitutional model will result in judicial reluctance to grant exemptions. However, this argument is unconvincing. Precisely because the constitutional model prevents a legislative response, the court should be more willing to grant conscientious exemptions. State institutions (of any kind) normally exercise the powers allocated to them rather than expressing reluctance to do so. Moreover, even if the possibility of judicial reluctance exists, it is far less troubling than the risk of having the political majority deciding the limits of tolerance towards conscientious objectors, without any restraining judicial review.

A sixth reason for rejecting the common law model lies in the weakness of another of Volokh’s arguments, which is fairly similar to the previous one. Volokh argues that, in a constitutional exemption regime, the courts will be reluctant to grant exemptions in hard cases or for a fixed period of time (the latter can also be called an experimental exemption). This is so, Volokh argues, because the courts usually refrain from making frequent changes in constitutional interpretations or in constitutional doctrines and, thus, would prefer not to make new, controversial or risky decisions at the constitutional level. Things are different, according to Volokh, at the statutory level.[[45]](#footnote-45)

This argument also fails to support the common law model. Firstly, if Volokh agrees that the courts should be allowed to grant temporary, experimental exemptions, then it should not make any difference if the court does so as an interpretation of a general constitutional right or a general statutory right. In both cases, the court can cancel the exemption if the experiment fails. While doing so, the court will not set aside a judicial precedent or change legal doctrines. It will merely follow its previous decision that allows cancelling an exemption in response to a change in circumstances or after being provided with new information.

Secondly, it may be true that constitutional doctrines are, or at least should be, more difficult to change than most other legal doctrines. However, there is nothing inherently wrong about a relatively stable general doctrine for granting conscientious exemptions. Moreover, being related to a basic human right, this kind of general doctrine should indeed not be subject to legislative or judicial whims. Furthermore, changing constitutional doctrines is not that rare and, when necessary, the court does take up the challenge and change them. Volokh himself mentions that, in the USA, the general judicial-constitutional doctrine regarding conscientious exemptions has been changed, and quite significantly, three times since the 1960s.

Finally, Volokh is wrong to assume that a change to a doctrine or a judicial precedence is required whenever the court wishes to cancel an exemption that was granted as a judicial remedy, or to grant an exemption that the court previously refused to grant. A general constitutional right usually requires a general balancing test alongside some more specific guidelines. The court can change its former decisions while keeping the constitutional balancing test intact when there is a change in circumstances or when the court reads or applies the same test differently.

The seventh reason for rejecting the common law model is that the constitutional model does not necessarily lead to judicial tyranny or legislative incapacity. When a constitutional right to be granted conscientious exemption does exist, the court has three courses of action from which to choose in each and every specific case. Firstly, it can decide that there is a constitutional duty to grant the exemption. Secondly, it can decide that there is a constitutional prohibition against granting the exemption. In these two cases, the legislature is, indeed, relatively powerless. However, the court can also decide in response to a claim to be granted exemption that the constitutional right does not apply or that there is no constitutional duty to grant the exemption, yet the legislature is free to grant the exemption in a specific statute, if it wishes to do so. In other words, the court has the final word when it finds that the conscientious objector has a right to be tolerated. The legislature, however, has the final word, even under a constitutional exemption model, when the court decides that the conscientious objector does not have a right to be tolerated, yet the legislature may grant the exemption as a matter of grace or because of pragmatic justifications.

The eighth and final reason for rejecting the common law model is the principle of equality, which Volokh disregards (and quite rightly within the US context). If, however, the general principle of equality is, or should be, a constitutional right or principle, it enables the court to expand under-inclusive exemptions or to narrow over-inclusive ones, regardless of the existence of a right to be granted conscientious exemption. Unless Volokh suggests that the principle of equality should only be applied, as freedom of conscience, through a common law model rather than a constitutional one, then nothing in the common law exemption model prevents the court from applying the constitutional right to equality and to modify any conscientious exemption that was granted by the legislature in specific statutes. In other words, if equality is a constitutional right, and if it includes equality between conscientious objectors, the common law exemption model simply cannot be applied, at least not in full.

The arguments for and against having a constitutional right to be granted conscientious exemption, much like the general argument for and against judicial dominance in granting exemptions, are – at least to some extent – speculative. Much of Volokh’s arguments, and my response to them, are hybrid ones, in that they contain both principled and empirical elements, yet they are not supported by empirical findings. I suspect that the speculative nature of these arguments is inevitable also because of the lack of relevant empirical studies. The lack of such studies is unsurprising. It is difficult to think of any empirical study that could provide definite answers to questions such as who protects minorities better – the court or the legislature; which authority is more likely to tolerate conscientious objectors, and so on. Such questions can be answered empirically, if they can be answered at all, only within specific contexts of time, political culture and subject matter.

Two relevant studies exemplify this point. In a study conducted in 2005, Sisk found that the hypothesis that minority religious adherents in the USA are more likely to lose and that the Christian faithful are more likely to win religious liberty claims is of doubtful continuing validity.[[46]](#footnote-46) This conclusion, however interesting, should be read within the very narrow context of contemporary US politics and the relatively recent and unique legal developments that have occurred in the United States. Interestingly, even within this narrow context, this conclusion does not coincide with the findings of a research from 2001 that examined 2,109 court cases on religion in the USA, from 1981 to 1996, and which concluded that religious sects and cults were more likely to be involved in court cases and more likely to receive unfavourable rulings.[[47]](#footnote-47)

Therefore, although the above discussion does speculate about the possible consequences that may or may not take place if a constitutional right to be granted conscientious exemption were to be recognised, the strength of the relevant arguments should also be appreciated by their principled, theoretical merits.

## d. Granting conscientious exemptions: who is to decide?

As mentioned above, some of the earlier questions about *how* conscientious exemptions should be granted are closely related to the question of *who* is to decide when they should be granted. The constitutional exemption model places the power with the courts, whereas the common law exemption model creates a more balanced distribution of power between the courts and the legislature. A general statutory right to be granted exemptions enables judicial flexibility, whereas specific statutory exemptions limit judicial discretion. A statutory exemption regime can grant wide discretion to the executive by allowing it to apply its quasi-legislative or quasi-judicial functions but can also address the executive as a mere administrator.

Some of the relevant considerations have already been discussed throughout this paper. Here, I wish to add more focused and specific ones, i.e. considerations that derive not from the general issue of the balance of powers between a state’s three branches but from the specific case of granting conscientious exemptions. No single consideration is a decisive or sufficient reason for placing the power of decision-making in one authority and not in others. In many cases, contradictory considerations will apply. The purpose of the following is merely to set forth some basic guidelines for deciding who is to decide when to grant conscientious exemptions.

Firstly, in cases where the expected number of conscientious objectors is relatively small and where their motives may vary, it is better to leave the decision to the court by formulating a relatively general statutory exemption. In these cases, the court would not have to face too many applications; it would be able to discuss the special merits of each case – a classic judicial function – and even when the court deviates from the political majority’s will or simply errs, other rights or interests would normally not be threatened, at least not severely, because of the small number of anticipated exemptions. Such is the case, for example, regarding conscientious objections to receiving medical treatment or to paying income tax.[[48]](#footnote-48)

However, in cases where the expected number of conscientious objectors is relatively high or when granting the exemption is not a single action but a continuing necessity (e.g. exemptions from compulsory military conscription as opposed to exempting the Church from equality law), it is preferable that the law would be relatively detailed and precise, thus preventing unnecessary judicial proceedings. Alternatively, the law can grant the executive relatively wide discretion, as the executive is more capable of dealing with mass and repeated applications. In appropriate cases, special administrative tribunals could be established. In any case, judicial review of the administrative process and outcome should be guaranteed.

Secondly, judicial supremacy or effective judicial review of administrative decisions should be guaranteed in cases where the evaluation of the sincerity of the conscientious objection and the evaluation of the extent of the expected harm, both to the objector’s right and to other rights and interests, are likely to be complex ones. This is also the case where relevant circumstances are expected to change frequently. The judiciary and the executive are more capable than the legislature of dealing with complex applications on a case-by-case basis and more capable of adjusting to changing circumstances. Such is the case, for example, in granting conscientious exemptions to pharmacists (e.g. regarding the sale of contraceptives) and to physicians (e.g. regarding the performance of abortions).

Thirdly, in some cases, time is of the essence. Changes in factual or legal circumstances may result in an unexpected need to be granted conscientious exemption. Moreover, public opinion may change, as well as the political majority’s views, and support the granting of exemptions to objectors whose previous claims were denied by the legislature or even the courts. Even if the political majority would support changing the law, the legislative process may be too time-consuming. Meanwhile conscientious objectors might suffer from civil or penal sanctions. A general statutory or constitutional right to be granted conscientious exemption makes it possible for the court to grant immediate remedies that may precede the legislative process, or, in some cases, make it unnecessary.

Fourthly, the time factor may play another role in conscientious exemptions cases. In some cases, disobedience to a law due to conscientious reasons is long premeditated (e.g. in cases of conscientious objection to compulsory enlistment to the army). Here, an administrative procedure prior to the judicial one may offer a faster and cheaper way for a conscientious objector to discover whether or not he is entitled to exemption from the law. It will also leave sufficient time to appeal to the court if the claim to the exemption is rejected. In other cases, the conscientious disobedience might be unexpected, even by the objector himself. Here, there is an advantage in having a general right to conscientious exemption that would allow the court to examine, even if only retroactively, whether the disobedience should be protected or not.

# 5. Conclusion

The above discussion leads to one conclusion. Although there are cases in which freedom of conscience can be sufficiently protected without it being a constitutional right, clearly there are also cases where a general constitutional right to be granted conscientious exemption is a pre-condition for an effective protection of freedom of conscience. Thus, regardless of the various reasonable ways from which the legislature may choose to protect freedom of conscience, this protection will never be sufficient without having a constitutional right to be granted conscientious exemption.

There is no one preferable way of granting conscientious exemptions. As explained throughout this paper, different methods should be applied in different circumstances. Thus, instead of arguing for one model that excludes all others, one should adopt a more flexible approach, according to which there should be a general constitutional right to be granted conscientious exemptions, alongside statutory exemptions of various kinds. This ‘integrated’ model offers flexibility and has the greatest potential for striking the correct balance between freedom of conscience and other rights or interests.

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 For recent views about these questions see for example: Y Nehushtan, *Intolerant Religion in a Tolerant-Liberal Democracy* (2015, Hart Publishing, Oxford); A Sarat (ed), *Legal Responses to Religious Practices in the United States: Accommodation and its Limits* (Cambridge, Cambridge University Press, 2012); B Leiter, *Why Tolerate Religion* (Princeton NJ, Princeton University Press, 2012); J Maclure and C Taylor, *Secularism and Freedom of Conscience* (Cambridge MA, Harvard University Press, 2011). [↑](#footnote-ref-1)
2. I presented in more detail the argument that a right to be granted a conscientious exemption is a right to be tolerated in Y Nehushtan ‘What Are Conscientious Exemptions Really About?’ 2(2) Oxford Journal of Law and Religion (2013) 393. [↑](#footnote-ref-2)
3. For the first kind of exemption, see, for example, Article 9a(3) of the Austrian Constitution and Article 30(2) of the Spanish one. For the second and third kinds of exemption, see, for example, Article 4(3) of the German Constitution, Article 47 of the Croatian Constitution and Article 45 of the Serbian Constitution. Similar articles were included in states constitutions in the USA in the 18th century. See, for example, Article 8 of the Constitution of the state of Pennsylvania (1776), Article 9 of the Constitution of the state of Vermont (1777); Article 10 of the Constitution of the state of Delaware (1776) and Article 13 of the Constitution of the state of New Hampshire (1784). [↑](#footnote-ref-3)
4. For an argument that the Free Exercise Clause within the American Constitution had originally been interpreted as imposing a constitutional duty to grant religious conscientious exemptions see: MW McConnell, ‘The Origins and Historical Understanding of Free Exercise of Religion’ 103 HARV. L. REV. 1409 (1990). For the current position in the USA see *Employment Division, Department of Human Resources v. Smith* 494 US 872 (1990) where the court refused to grant religious exemption to Native Americans from a neutral law forbidding the use of drugs, including peyote, a drug used by Native Americans during their religious rituals. More generally, the courts decided that the Constitution allows rather than compels the legislature to grant (religious) conscientious exemption in specific cases. [↑](#footnote-ref-4)
5. See, for example, Article 18 of the Universal Declaration of Human Rights; Article 18(1) of the International Covenant on Civil and Political Rights; Article 9(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms; and Article 12(1) of the American Convention on Human Rights. [↑](#footnote-ref-5)
6. *Bayatyan v. Armenia* (2012) 54 EHRR 15. See especially in para 110, where the court ‘considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9’. [↑](#footnote-ref-6)
7. See (n 5) above. A more explicit right can be found, for example, in Article 6(g) of the Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief, which protects the right to ‘train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief’. [↑](#footnote-ref-7)
8. In the USA, for example, up until 1992, there were over 2,000 statutory conscientious exemptions, most of them in state laws. Some were granted to religious and secular objectors alike, while others were granted only to religious objectors: JE Ryan, 'Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment' (1992) 78 Virginia Law Review 1407, 1445–1446. [↑](#footnote-ref-8)
9. C Braithwaite, *Conscientious Objection to Compulsions under the Law* (1995) 3–47. [↑](#footnote-ref-9)
10. Braithwaite (n 9) 47, 335. Hence, for a period of time in the 19th century, up until 1888, religious Jews, members of other non-Christian religious groups and atheists were unable to hold many public positions or be elected as Members of Parliament. [↑](#footnote-ref-10)
11. Braithwaite (n 9) 110–120. [↑](#footnote-ref-11)
12. For a good survey of the American debate on this issue see A Sarat (n 1). [↑](#footnote-ref-12)
13. R Gavison and N Perez, ‘Days of Rest in Multicultural Societies: Private, Public, Separate’in *Theoretical and Historical Context* (edited by P Cane, C Evans and Z Robinson; Cambridge University Press, 2008) 186. [↑](#footnote-ref-13)
14. *R v. Edwards Books and Art* [1986] 2 SCR 713, regarding the Retail Business Holidays Act, in Ontario, Canada. [↑](#footnote-ref-14)
15. For a detailed discussion about these tribunals, see Braithwaite (n 9) 140–142, 185-191, 227-232, 355-375. [↑](#footnote-ref-15)
16. (n 4). [↑](#footnote-ref-16)
17. In 1994, and in response to the *Smith* decision, Congress also amended the American Indian Religious Freedom Act and added section 3(b)(1), which states that ‘notwithstanding any other provision of the law, the use, possession, or transportation of peyote by an Indian who uses peyote in a traditional manner for bona fide ceremonial purposes in connection with the practice of a traditional Indian religion is lawful’. [↑](#footnote-ref-17)
18. *City of Boerne v. Flores* 521 [U.S.](https://en.wikipedia.org/wiki/United_States_Reports) [507](https://supreme.justia.com/cases/federal/us/521/507/) (1997). [↑](#footnote-ref-18)
19. For applying the ‘reading in’ remedy (though only implicitly) with regard to conscientious objection to compulsory enlistment into the army see *Welsh v. United States* 398 U.S 333 (1970). For ‘reading in’ as a judicial remedy see: D Beers, 'Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative' (1975) 12 Columbia Journal of Law and Social Problems 115; KW Simons, ‘Overinclusion And Underinclusion: A New Model” 36 U.C.L.A. Law Review(1989) 447; DM Bizar, 'Remedying Underinclusive Entitlement Statutes: Lessons From a Contrast of the Canadian and U.S Doctrines' (1992) 24 Miami Inter-American Law Review 121; D Potheir, ‘Charter Challenges To Underinclusive Legislation: The Complexities Of Sins Of Omission’ 19 Queens Law Journal(1993) 261. [↑](#footnote-ref-19)
20. Even though the normative arguments below are applicable to all constitutional democracies, special consideration is given to the American jurisprudence as it offers more attempts than any other jurisdiction (both in scholarly work and in the case law) to tackling the questions of how exemptions should be granted – and by whom. [↑](#footnote-ref-20)
21. And see *Multani v. Commission scolaire Marguerite‑Bourgeoys* [2006] 1 S.C.R. 256. [↑](#footnote-ref-21)
22. In other cases, the risk of fraud and compelled objections might be a good reason for not granting the exemption at all. This is one of the arguments employed regarding the Islamic veil dispute. In this case, limiting the right to be granted exemption from dress codes only to religious Muslims still results in Muslim women being forced to wear a veil and to claim a conscientious-religious exemption on a false basis. [↑](#footnote-ref-22)
23. Note that a constitutional right to freedom of conscience enables the court to grant exemption from a law that does not grant exemption to anyone, whereas a general constitutional right to equality enables the court only to expand the scope of a statutory exemption to all sincere conscientious objectors. Applying the general right to equality in order to grant exemptions from a law that does not include any exemption is more complicated. [↑](#footnote-ref-23)
24. I leave aside the question of whether a non-religious affirmation is indeed an alternative duty or actually the same duty being fulfilled in a different way. [↑](#footnote-ref-24)
25. For good examples, see: T Berg, 'What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act' (1994) 39 Villanova Law Review 1, 21; D Laycock, 'The Religious Freedom Restoration Act' [1993] BYU L Rev 221, 225-227. [↑](#footnote-ref-25)
26. The procedural rights theory, as a constitutional rights theory, is usually attached to J Ely, *Democracy and Distrust* (1980). [↑](#footnote-ref-26)
27. L Tribe, 'The Puzzling Persistence of Process Based Theories' (1980) 89 Yale L J 1063. [↑](#footnote-ref-27)
28. For a more pessimistic view regarding religious exemptions, see: I Lupo, 'The Case Against Legislative Codification of Religious Liberty' (1999) 21 Car L Rev 565, 592: ‘Judicial interpretation will be inconsistent and unprotective, the bureaucrats and their lawyers will not respond pro-actively and will eventually catch on to the farce’. [↑](#footnote-ref-28)
29. See also J Raz, *The Authority of Law* (1979) 287-288. [↑](#footnote-ref-29)
30. M Hamilton, *God vs. The Gavel: Religion and the Rule of Law* (2005) 9–11, 175–77, 288, 299–302; WP Marshall, ‘The Case Against the Constitutionally Compelled Free Exercise Exemption’ 40 Case W. Res. L. Rev. 357 (1989-90); WP Marshall ‘In Defense of *Smith* and Free Exercise Revisionism’ 58 U. Chi. L. Rev. 308 (1991); E West, ‘The Case Against a Right to Religion-Based Exemptions’, 4 Notre Dame Journal of Law, Ethics and Public Policy 591 (1990); M Tushnet, ‘The Rhetoric of Free Exercise Discourse’ 1993 BYU L. Rev. 117; CL Eisgruber & LG Sager, ‘The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct’ 61 **U.** Chi. L. Rev. 1245 (1994); E Gressman and AC Carmella, ‘The RFRA Revision of the Free Exercise Clause’, 57 Ohio State Law Journal 65 (1996). [↑](#footnote-ref-30)
31. For examples of legislative responses to judicial decisions or to claims to be granted exemptions see: D Laycock, ‘The Religious Exemption Debate’ 11 Rutgers Journal of Law and Religion (2009) 139, 156. Within the American context, these responses followed judicial decisions or claims to exemptions which were based on states RFRAs (which impose a duty to grant religious exemptions in the absence of a ‘compelling state interest’). [↑](#footnote-ref-31)
32. E Volokh, 'A Common-Law Model for Religious Exemptions' (1999) 46 UCLA L Rev 1465. Although Volokh discusses religious exemptions, there is no reason not to apply his arguments to conscientious exemptions in general, as will be done in the following discussion. [↑](#footnote-ref-32)
33. I will not deal here with general aspects of the common law system or with the general model of common law rights, but limit myself to Volokh’s perception of the ‘common law model’ and its implications on the specific issue of granting conscientious exemptions. [↑](#footnote-ref-33)
34. Volokh (n 32) 1470. Within the American context, Volokh argues that state RFRAs are superior to either a rule of constitutional exemptions or to a rule of no exemptions. [↑](#footnote-ref-34)
35. Volokh (n 32) 1551. [↑](#footnote-ref-35)
36. Thus, and without elaborating on this point, I reject most, if not all, of the common arguments against having constitutional rights, as presented by Jeremy Waldron, one of the prominent opponents to a regime of constitutional rights: J Waldron, *Law and Disagreement* (Clarendon Press, 1999), 10–17, 211–312; J Waldron, ‘A Rights Based Critique of Constitutional Rights’ 13 *Oxford Journal of Legal Studies* 18 (1993); J Waldron, ‘The Core of the Case against Judicial Review’ 115 *Yale Law Journal* 1346 (2006). Accordingly, I share Jospeh Raz’s general argument in support of constitutional rights: J Raz, *The Morality of Freedom* (1986) 255 – 263. See also A Harel, *Why Law Matters* (OUP, 2014) chapters 5 and 6. [↑](#footnote-ref-36)
37. S Macedo, ‘Liberal Civic Education and Religious Fundamentalism: The Case of God v John Rawls?’ 105 *Ethics* (1995) 468, 487: ‘To leave accommodations and exceptions to the democratic branches is virtually to insure that complaints advanced by minority religious communities will often be slighted, so the courts must play a role’. [↑](#footnote-ref-37)
38. Z Robinson, ‘Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion’ (2011) 20 *William & Mary Bill of Rights Journal* 133. See also Laycock (n 31) 159. [↑](#footnote-ref-38)
39. And compare to SS Smith, 'The Restoration of Tolerance' (1990) 78 California Law Review 305, 354: ‘since the majority of exemptions – and the most consequential ones – have been the product of legislation rather than judicial decree, representative or majoritarian institutions are clearly capable of exercising and promoting tolerance’. [↑](#footnote-ref-39)
40. For a more general mistrust of the legislature in such cases see Laycock (n 31) 159-161; IC Lupu, ‘The Case Against Legislative Codification of Religious Liberty’ 21 Cardozo L. Rev. 565 (1999). [↑](#footnote-ref-40)
41. For Waldron’s argument, see Waldron 1999 (n 36). [↑](#footnote-ref-41)
42. Laycock (n 31) 163 [↑](#footnote-ref-42)
43. Volokh (n 32) 1534-1535. For a very similar argument see also Hamilton (n 30) 297. [↑](#footnote-ref-43)
44. Volokh (n 32) 1488. [↑](#footnote-ref-44)
45. Volokh (n 32) 1488–1489. [↑](#footnote-ref-45)
46. GC Sisk, 'How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases' (2005) 76 University of Colorado Law Review 1021. The study was conducted within the particular venue of the federal courts. See also HY Levin, ‘Rethinking Religious Minorities’ Political Power’ 48 U.C Davis Law Review 1617 (2015). [↑](#footnote-ref-46)
47. J Wybraniec and R Finke, 'Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule ' (2001) 40(3) Journal for the Scientific Study of Religion 427. [↑](#footnote-ref-47)
48. This is not to say that only a small number of people wish to avoid the obligation to pay income tax, but rather that, in most states, the number of people who may have an objection that is even remotely linked to a conscientious objection to paying income tax is relatively small. Things may be different concerning other types of tax. [↑](#footnote-ref-48)