

Conscientious Objection in the Medical Sector

Towards a Holistic Human Rights Approach

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1. A HIGHLY CONTESTED THEME

On 7 October 2010, the Parliamentary Assembly of the Council of Europe (PACE) adopted resolution 1763 on »the right to conscientious objection in lawful medical care«. The resolution *inter alia* demands that

»[n]o person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of human miscarriage or euthanasia or any act which could cause the death of a human fetus or embryo, for any reason.«²

While 56 PACE members voted in favour of the resolution, 51 rejected the text and four abstained from the vote. When adding the abstentions to the

1 An earlier version of this article was published in Frewer et al. (2016b). The present version has been updated and further complemented.

2 PACE resolution 1763 (2010), para. 1. It is worth noting that the resolution goes beyond the issue of conscientious objection by also including hospitals and other institutions. However, freedom of conscience – as well as the right to conscientious objection as its necessary implication – applies to individuals only.

no-votes, the resolution received the smallest majority imaginable, i.e. by one vote. This narrow outcome testifies to the highly controversial nature of the subject, which had been a matter of fierce and emotional controversies in the weeks preceding the vote. A few months after the adoption, the Swedish Parliament explicitly distanced itself from the PACE resolution and called upon Swedish PACE members to try to change the text.³ This unprecedented move likewise illustrates the degree of contestation that the theme can trigger. It polarizes legislators and judiciaries, and it has even led to splits within the human rights community.

Conscientious objection in the medical sector is a thorny issue, because it may cause tensions or even direct collisions between two fundamental human rights: freedom of conscience, which is part of freedom of religion or belief,⁴ and the right to the highest attainable standard to health,⁵ which includes the availability and accessibility to reproductive health services. Both rights are enshrined in international conventions; and they both have received broad endorsement by states as well as civil society organisations and other stakeholders. Qua their nature as human rights they are furthermore considered »inalienable«. This precludes simplistic solutions, such as the idea that one of the two rights could just »trump« the other.⁶ Just as it would be irresponsible to endorse an unqualified right to conscientious objection without considering the possible consequences for the right to health, it would likewise be problematic simply to dismiss conscientious objection in healthcare by giving a general priority to the right to health. Setting up a clear and simple normative hierarchy, as envisaged by some commentators, would be at variance with the invisibility, interrelatedness and interdependency of all human rights, as corroborated by the 1993 Vi-

3 See Astra Network (2011). Sweden does not accommodate any conscientious objection by health professionals when requested to perform abortions.

4 For references see below, under section 2.

5 The right to health has inter alia been enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights. See Krennerich (2016), 57–92.

6 This seems to be the predominant understanding in Sweden. The Swedish midwife Ellinor Grimmark, who refuses to participate in abortions, cannot work in her country and has lodged a complaint against Sweden with the Committee overseeing the implementation of the European Social Charter.

enna World Conference.⁷ Hence, any viable coping strategy for conflict situations must do justice to both human rights at issue – or at least try to do so to the maximum degree possible in a given context.

In this article,⁸ I try to shed some light on the complex and *prima facie* uneasy relationship between the two rights at stake: the right to freedom of conscience and the right to health. I start by exploring the normative significance of respecting the conscience within the system of human rights protection. As we will see, due respect for the inner nucleus of a person's moral identity confronts us with the ultimate foundations as well as the insuperable limits of any legal order. Assuming that in many cases it will be impossible to reach fully-fledged »solutions« that would easily satisfy the interests of all involved parties, it will be all the more necessary to develop criteria on how to cope with remaining conflicts occurring in healthcare in a fair, consistent and manageable way. My conclusion is that for all the difficulties that doubtless arise in this area, respecting the right to conscientious objection in the medical sector is ultimately also in the interest of the right to health, which – qua its nature as a human right – presupposes responsible agency, in particular also on the side of doctors and nurses.

2. THE CONSCIENCE IN THE CONTEXT OF HUMAN RIGHTS

Freedom of conscience constitutes a strangely underexplored component within a comprehensive human right that is usually summarized under the heading of »freedom of religion or belief« – or even more succinctly: »religious freedom«. The full title »freedom of thought, conscience, religion or belief« is rarely cited. This comprehensive right has been enshrined in Article 18 of the *Universal Declaration of Human Rights* (UDHR), Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR), Article 9 of the *European Convention of Human Rights* (ECHR) and other hu-

7 See Vienna Declaration and Programme of Action, A/CONF.157/24 (Part I), chap. III, sect. I, para. 5: »All human rights are universal, indivisible and interrelated and interdependent.«

8 This article is based in parts on chapter 1.3.11 of the book by Bielefeldt et al. (2016), 258–305.

man rights instruments. Its purpose is to protect the existential self-understanding of human beings with regard to their profound convictions and the ways in which they lead their lives, individually and together with others, in conformity with those convictions.⁹ In this context, the conscience represents a person's moral identity, often, albeit not always, originating from a particular religion or belief. While other aspects of freedom of religion or belief also cover institutional aspects of community life, freedom of conscience is a right held by individuals, strictly speaking.¹⁰ Its exercise remain limited to human beings and does not include institutions or organizations, whose representatives when wishing to uphold a certain moral policy have to resort to other normative titles.

A famous metaphor describing the moral authority exercised by the conscience is the person's »inner court« – in Latin: the »forum internum«. Mahatma Gandhi, who often referred to his conscientious convictions when opposing British colonial rule in South Africa and later in India, underlined the specific rank of the conscience by declaring: »There is a higher court than the courts of justice and that is the court of conscience. It supersedes all other courts.«¹¹ When dealing with this theme, Gandhi *inter alia* liked to cite Socrates. He apparently saw his own political fight in analogy to the Socratic search for justice. Gandhi even translated Socrates' famous »Apology« into his native language Gujarati. In that Apology, Socrates defended himself before a criminal court in Athens. When addressing his jury he invoked an inner moral voice from which he had found guidance from childhood onwards. Using religious language, Socrates circumscribed that peculiar inner voice as a »divine« command or »the daimónion«. Interestingly, the commands issued by the daimónion, he said, were usually nega-

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- 9 The preamble of the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief stresses: »religion or belief, for anyone who professes either, is one of the fundamental elements of his conception of life«.
 - 10 The PACE resolution cited at the beginning mixed freedom of conscience with the autonomy of religious or belief-related institutions. Although both derive from freedom of thought, conscience, religion or belief, these two aspects must be kept distinct.
 - 11 Mahatma Gandhi, *Young India*, 15 December 1921, quoted from the compilation by Mishra/Gupta (2008), 23.

tive commands in the sense of moral vetoes.¹² By insisting on the superior authority of his inner voice, Socrates ultimately went as far as to accept the death penalty, thus bearing witness to the apodictic force of his conscience.

Another famous notion illustrating the peculiar authority attributed to the person's conscience is the »categorical imperative«. According to Kant, »the moral law within me« arouses an admiration akin to the majesty of »the starry heavens above« me.¹³ Similar concepts, metaphors, images and proverbs exist in most different religious, cultural and philosophical traditions. They reflect the basic insight that normative obligations among human beings ultimately derive from profound moral convictions whose inner personal nucleus commands respect.

Before turning to a brief analysis of the human right to freedom of thought, conscience, religion or belief, as it has been enshrined international human rights law, it is worth noting that this specific right is not the only place within human rights documents where the term conscience occurs. The preamble of the 1948 UDHR invokes »barbarous acts which have outraged the conscience of mankind« thereby coining a metaphor (»conscience of mankind«) which is historically located in the world community's necessary response to crimes of unprecedented dimensions (»crimes against humanity«).¹⁴ In a non-metaphorical meaning, the term conscience furthermore occurs in Article 1 of the UDHR. The first sentence of that article may be the most-frequently cited sentence of any human rights document: »All human beings are born free and equal in dignity and rights.« By contrast, the rest of the same article receives much less attention. It reads: »They [i.e. human beings] are endowed with reasons and conscience and should act towards one another in a spirit of brotherhood.« The term »brotherhood« sounds somewhat anachronistic, which may give a partial explanation why the whole sentence is not very popular nowadays. On top of that, everyone's »endowment with reason and conscience« is certainly not self-explanatory and thus may warrant a short interpretation.

12 See Plato, *The Apology of Socrates*: »This sign I have had ever since I was a child he sign is a voice which comes to me and always forbids me to do something which I am going to do [...]«, quoted from Plato (2002), 36.

13 Kant (1996), 269.

14 See Morsink (2009).

What does it mean that all human beings are »endowed with reason and conscience«? What is the epistemological quality of that particular proposition? Obviously, the assumed »endowment« does not describe any particular empirical talents, skills or gifts. Article 1 makes an all-inclusive, universalistic claim by covering no less than »all human beings«. Hence, the sentence cannot refer to particular empirical qualities that different individuals may possess in different measures. However, if the proposition cannot be read as a *description* – certainly not as an empirical description – would it make more sense to understand it as a *prescriptive proposition*, e.g. as a moral appeal? Actually, such an interpretation may lead to even bigger problems, since any moral appeal (e.g. the subsequent request that human beings »should act in a spirit of brotherhood«) already presupposes that the addressees of that appeal possess reason and conscience. Moral appeals would be impossible without the underlying assumption that the addressed individuals are receptive to moral considerations and demands. It is this very receptiveness that the formula »endowed with reason and conscience« tries to capture.

I would suggest that the formula »endowed with reason and conscience« makes more sense as an »*ascriptive*« (rather than »descriptive« or »prescriptive«) proposition, i.e. a quality we have to ascribe to all human beings. The assumption that human beings are endowed with reason and conscience has the status of a *necessary presupposition* without which normative interaction in human society would simply be inconceivable. Whatever example of normative interaction we may have in mind, the potential of human beings to act responsibly is always presupposed. Binding promises, contracts, normative standards or institutions from the local to the global level would not even be conceivable without the assumption that human beings have the *potential of responsible agency* for which they – and indeed all of them – deserve an elementary respect.¹⁵ Even if a person actually does not live up to that expectation, the presupposition as such remains meaningful. In some cases this may manifest itself as a (moral or legal) reproach. Blaming a certain individual for not acting responsibly corroborates counterfactually the necessity to stick to the assumption that human beings deserve respectful treatment as persons endowed with reason and conscience. Indeed, this presupposition has an axiomatic status for any

15 See Bielefeldt (2011), 31–41.

normative interaction. As the wording of Article 1 of the UDHR furthermore testifies, this basic respect is closely associated with respect for human dignity, i.e. the foundational normative insight underpinning human rights in general.¹⁶

3. FREEDOM OF CONSCIENCE AS A SPECIFIC HUMAN RIGHTS CLAIM

The following interpretation of freedom of conscience mainly refers to Article 18 of the ICCPR, which is the most important relevant norm in international human rights protection. However, the wording used in Article 9 of the ECHR is very similar. The general insights derived from the following observations thus also apply to the European system of human rights protection.

3.1 Absolute Protection of the Person's Inner Moral Nucleus

As one of the few absolute formulations of the ICCPR, Article 18 paragraph 2 rejects any coercive interference with the inner nucleus of a person's existential conviction: »No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice«. ¹⁷ Although the term »conscience« does not occur in this sentence, it is implicitly included as the moral corollary of a person's religion or belief. The strict rejection of any coercive interference positively means to re-

16 By presupposing a *potential* of responsible agency, recognition of human dignity does not depend on a person's any *actual* positive performance. It precedes any concrete normative actions, efforts, accomplishments, laws or institutions to which it relates as their implicit sine qua non. In other words, human dignity is not a meritocratic concept.

17 See also CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 3: The Covenant »does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally [...]«

spect an internal sphere of personal freedom in questions of thought, conscience, religion or belief, which therefore enjoy unconditional legal protection.¹⁸ Article 18 paragraph 2 of the ICCPR belongs to those few international human rights norms, which do not allow for any »balancing« with conflicting norms or interests, not even in situations of emergency. The prohibition of coercive interferences can neither be limited, nor balanced against other consideration, nor be derogated, whatever situation of conflict may occur. The UN Human Rights Committee, tasked with monitoring the implementation of the ICCPR, corroborates this apodictic understanding in its General Comment No. 22 by emphasizing that Article 18 paragraph 2

»does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally. [...]«¹⁹

It is worth noting that the Human Rights Committee expressis verbis lists freedom of conscience as part of the unconditional prohibition of coercion.

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- 18 It should be noted in passing that the term »choice« can lead to misunderstandings. In the context of Article 18 para. 1 and 2 of the ICCPR »choice« is used only as a legal term. The existential experience of a person in questions of conscientious position may be they have in fact »no choice«. For instance, conscientious objectors to military service may claim that they obey the »dictates of their conscience«, which seems to be the opposite of »choice« in the everyday understanding of the word. In order to avoid confusion around the term choice it is important not to mistake the legal concept of freedom of choice as representing the existential experiences in the area of conscience. In other words, legal terminology and legal languages have its specific functions and concomitant limitations which one should bear in mind.
- 19 CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 3. Incidentally, the same holds true for Article 19 para. 1 of the ICCPR which concerns the forum internum of freedom of opinion and expression. Here again, the Human Rights Committee points out in a more recent General Comment that »[t]his is a right to which the Covenant permits no exception or restriction« (CCPR/C/GC/34, 12 September 2011, para. 9). Both norms jointly protect human beings in their freedom to develop their own independent thinking, to form their own personal opinions and to build their own identity-shaping religious or non-religious convictions.

Other examples of apodictic human rights norms not permitting any limitations on whatever grounds are the prohibition of slavery and the prohibition of torture.²⁰ The rejection of coercion in the person's forum internum has a similarly elevated normative status, because coercive interferences with the inner nucleus of an identity-shaping existential conviction would directly collide with the due respect for human dignity. Being forced to conceal one's profound moral or religious conviction or to feign a conviction that is not authentic ultimately means no less than to betray one-self, which can undermine the preconditions for developing a stable sense of self-respect. This justifies the analogy of the unconditional prohibition formulated in Article 18 paragraph 2 of the ICCPR to the equally unconditional bans on slavery and torture.²¹

Against a possible misunderstanding, I would like to emphasize that respecting conscience as the inner core of a person's moral identity does not mean to turn it into a fortress immune to any societal influences. Conscientious positions held by a person usually reflect socialization processes within the family, community norms and practices, existing religious or non-religious values in the society and other moral factors to which that person has been exposed. In short, conscientious positions presuppose human interaction and communication; they can never develop in isolation. Although in this sense always influenced and informed by fellow-humans and the broader social environment, however, there remains a decisive element of active identification or »adoption« of a position by the individual person. A genuine moral conviction is more than the merely passive reception of normative ideas that happen to exist in a society. In responding to normative positions of others, existing community practices, values and belief systems etc., which he or she encounters, the human being actively develops conscientious convictions.

Such moral development can never finish as long as the person lives. Driven by new insights, ideas and experiences, individuals can also change their conscientious positions. Fundamental changes in this regard are never easy and typically proceed in complicated and sometimes painful learning processes. The formulation of Article 18 paragraph 2 of the ICCPR reflects and explicitly protects that possibility. Thus, the freedom to »have or

20 See Article 7 and 8 of the ICCPR.

21 For a detailed discussion see Bielefeldt et al. (2016), 77–82.

adopt« a religion or belief of one's choice also includes respect for an individual's freedom to change a conscientious position and adopt a new position.²²

3.2 The Right to Act in Accordance with One's Conscientious Position

Representing the inner moral »court«, the conscience is inherently linked to a person's moral identity – and frequently also to their religious or belief-related identity. In this sense, the conscience is a highly personal and even »intimate« dimension of human existence. At the same time, the conscience drives the person to take actions in the external world, in accordance with his or her moral convictions. A conscientious position can hardly be serious without practical consequences taken by the individual, often together with fellow-humans who share the same moral intuition.

Thus, freedom of conscience would be pointless without the right to take actions in conformity with one's conscientious positions. However, since the results of conscientious actions may directly affect the rights and freedoms of others and/or important interests of public order, the right to act upon one's conscience is not without possible limitations. It falls within Article 18 paragraph 3 of the ICCPR, which deals with external »manifestations« of a religious, philosophical or conscientious conviction in »worship, observance, practice and teaching«. The term »practice« must be broadly interpreted so as to also include conscientious actions originating from a person's identity-shaping profound moral convictions.

Whereas Article 18 paragraph 2 of the ICCPR provides an unconditional protection of the forum internum and precludes any coercive interferences in this sphere for whatever reasons, external manifestations in the understanding of Article 18 paragraph 3 of the ICCPR can be limited under certain conditions. For limitations to be justifiable, however, they have to meet all the criteria set out in that paragraph. Accordingly, limitations must be legally prescribed and they must be obviously needed to pursue a legitimate aim – the protection of »public safety, order, health, or morals or the fundamental rights and freedoms of others«. In addition, restrictions must remain within the realm of proportionality, which *inter alia* means they must

22 For details see Bielefeldt et al. (2016), 55–69.

be limited to a minimum degree of interference needed to pursue one of the said legitimate purposes. In General Comment No. 22, the Human Rights Committee insists

»that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there [...]. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.«²³

These strict conditions for setting limitations are intended to protect freedom of thought, conscience, religion or belief also in the external sphere. While this protection – unlike in the forum internum – cannot be absolute, it is still quite strong.

Although »internal« conscientious convictions and their »external« manifestations in conscientious actions enjoy different degrees of legal protection,²⁴ these two dimensions are typically closely intertwined. A conscientious conviction must be more than just wishful thinking with no consequences in the real world; it can only demonstrate its seriousness by manifesting itself in real actions. Vice versa, a moral action receives its moral quality by originating from a genuine conviction, which has taken shape in the forum internum. The internal and external dimensions protected under Article 18 of the ICCPR should therefore be viewed in their interrelatedness, since neither of these dimensions could even hypothetically exist in isolation. Hence, the unconditional protection accorded to the person's forum internum strengthens his or her conscientious agency in general, including in the area of practical actions deriving from a conscientious position in the person's social environment. These external actions themselves, however, are not beyond possible limitations, but can be limited in accordance with the criteria set out in Article 18 paragraph 3 of the ICCPR.

Conscientious actions also include »negative« actions in terms of refusals or objections. As already evidenced by the testimony of Socrates, the commands of the conscience are often particularly clear and strong when assuming a veto function. Dictates of the conscience frequently take shape

23 CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 8.

24 See also Bielefeldt et al. (2016), 82–85.

as a categorical »no«. It thus may be more than a coincidence that issues of conscience have typically been treated under the heading of »conscientious objections«. Recent years have seen an increasingly broad endorsement of conscientious objection, which – at least when concerning compulsory military service – now has been accorded the status of an international human right. Hallmark decisions within that development are the views expressed by the UN Human Rights Committee on a number of South Korean cases of objection to performing compulsory military service in 2011²⁵ and the European Court’s 2011 judgment on *Bayatyan versus Armenia*, which equally dealt with military service.²⁶

There have been discussions, including within the UN Human Rights Committee, as to whether conscientious objection falls within the forum internum or the forum externum of freedom of thought, conscience, religion or belief.²⁷ Given the different degrees of legal protection accorded to the forum internum and the forum externum, this is not a merely academic question. In my view, conscientious objections constitute a subcategory of external actions broadly speaking, thus falling within external manifestations of freedom of conscience as enshrined in Article 18 paragraph 3 of the ICCPR. This means that acts of conscientious objections are not without possible limitations. Locating conscientious objection within the forum externum, does not amount to denying the seriousness of conscientious claims, which of course will be ultimately rooted in the forum internum – where else should they originate? But the point is that an act of objection is a »manifestation« that may have – and often is intended to have – an impact on the person’s social environment. In other words, it is an action with consequences for others as well. That is why the rights and freedoms of others, too, warrant systematic attention. The right to health, including the availability and accessibility of reproductive health, is a prominent example.

25 See CCPR/C/101/D/1642-1741/2007, 24 March 2011.

26 See *Bayatyan v. Armenia*, Application No. 23459/03, 7 July 2011.

27 For details see Bielefeldt et al. (2016), 264–275 and 289–290.

4. GENERAL CRITERIA FOR CONSCIENCE-BASED EXEMPTIONS FROM LAWFUL OBLIGATIONS

The issue of conscientious objection confronts us not only with the very foundations of any legal order (and even of any normative interaction whatsoever); it likewise pushes us to the insuperable limits of what a legal order can provide. Laws governing societal coexistence in a pluralistic society usually are not – and cannot be – fully in line with every individual's conscientious convictions. Why is that so? The reason simply is that conscientious positions may point in different and often irreconcilably conflicting directions, while the legal order claims binding force upon all members of a society.²⁸ Taking the conscience seriously requires becoming aware of a broad range of sometimes irreconcilable moral positions held by people who often live closely together. Strict pacifists live alongside people who strongly believe that the military plays an indispensable role in upholding peace and defending human rights. Vegetarians objecting to the slaughter of animals sometimes cannot avoid sharing their kitchen with meat-eaters. While some people abhor stem-cell research as an act of human hubris, others appreciate such research as an important step towards enhancing human life expectancy. Issues like abortion or euthanasia have triggered moral wars in some societies, and they are typically controversial among professionals working in healthcare, too.

Given the wide range of irreconcilable moral positions in modern society, the legal order will never be identical with every individual's moral convictions.²⁹ Whoever expects that all existing legal obligations harmoniously correspond with their own conscientious convictions would be either naïve or arrogant – or even both. Obviously, obedience towards legitimately enacted laws cannot generally hinge on every individual's full moral approval of those laws; otherwise laws would from the outset lose their binding force in a morally pluralistic society. Thus, conflicts between one's deeply held moral convictions on the one hand and lawful obligations on the other are to be expected. Indeed, such conflicts are just normal in a morally pluralistic society.

28 See also Maclure/Taylor (2011), 100–105.

29 In his *Metaphysics of Morals*, Kant therefore conceptually differentiates between morality and law.

Conscientious objection cannot provide the general recipe for coping with discrepancies between existing laws and one's own moral conviction. A democratic society offers numerous possibilities to tackle such discrepancies. For instance, people are free to voice their opposition in public discourse, they can appeal to their fellow citizens and hold public demonstrations, and they can try to put their moral convictions on political agendas that might even become binding for their political representatives. Issues of profound moral concern can thus enter public discourse, where the boundaries between majorities and minorities remain fluid. Moral dissenters from mainstream politics always have a chance to make their conscientious convictions heard in public, with a view to changing public opinion and eventually creating new laws.

Conscientious objection is not part of the general arsenal of voicing moral dissent. It must remain an exception reserved for specific dilemma situations when a person would otherwise feel torn between feelings of moral self-betrayal and the requirement to honour lawful obligations. I would like to propose a combination of five criteria for qualifying conscientious objections that may warrant exemptions from lawful obligations:

- the gravity of the moral concern,
- the situation of a conscientious veto,
- the connectedness to an identity-shaping principled conviction,
- immediacy of involvement in the requested action and
- the willingness to perform an alternative service.³⁰

4.1 Gravity of the Moral Concern

The urgency of a conscientious objection naturally depends on the gravity of the moral issue that has caused the conflict. Although it may be difficult and ultimately impossible to reach a consensus in a morally pluralistic soci-

30 In order to avoid misunderstandings, I would like to reiterate that such qualifications can merely concern the *forum externum* dimension of freedom of conscience, i.e. actions deriving from a conscientious position which itself – as belonging to the *forum internum* dimension of Article 18 of the ICCPR – remains beyond any legitimate restrictions, limitations or qualifications for whatever grounds.

ety on how to measure »gravity« in this regard, it remains important to understand that the objected action would run counter to profound moral concerns of the objecting person. In other words, the moral pathos of conscientious objections should not be wasted for minor issues. In fact, in most (albeit not all) of the cases in which the right to conscientious objection has been claimed human life seems to be at stake. Even those who finally do not share the conscientious position based on which an objection is made should thus be able to at least understand the moral seriousness of the issue.

4.2 Situation of a Conscientious Veto

Conscientious objection goes beyond moral criticism in that it presupposes the experience of an existential moral conflict. Many people may have critical reservations against certain laws, often based on moral grounds. As pointed out, this is a normal situation, even more so in a pluralistic society in which everyone can actively voice their criticism and publicly campaign for legislative changes. Conscientious objection differs from mere criticism voiced on moral grounds. It represents the situation of a direct conflict, in which the individual's conscience strictly vetoes any personal involvement, as it were. As the only way to avoid an existential moral dilemma, which would otherwise occur, conscientious objection concerns situations of such a direct conscientious veto and it should be limited to such situations.

4.3 Connectedness to an Identity-shaping Principled Conviction

Conscientious objection presupposes profound convictions, which differ from ad-hoc opinions that a person may have on this or that moral question. This does not mean that conscientious positions are unchangeable. As emphasized earlier, conscientious convictions always develop; they can even change fundamentally. What counts is the identity-shaping quality of religious and/or moral convictions, which the concerned individual cannot waive without thereby betraying himself or herself. The right to conscientious objection is a way to avoid such situations of threatened betrayal of one's identity-shaping principles, i.e. the nucleus of the moral self.

4.4 Immediate Involvement in the Requested Action

Many people are somehow involved in practices that run counter to their conscientious convictions of a religious and/or moral nature. Usually, such involvement is an indirect one. For instance, citizens must pay taxes although the tax money supports projects they may disapprove on moral grounds. The classical paradigm is the pacifist who pays taxes thereby co-financing the military that he morally rejects. People may also oppose stem-cell research and nonetheless contribute to the public budget, thereby indirectly supporting such research. This kind of indirect involvement is unavoidable in a morally pluralistic society.³¹ Conscientious objection therefore presupposes a certain degree of »immediacy« of the requested involvement.

4.5 Willingness to Perform an Alternative Service

Conscientious objection is not a »privilege« some individuals request for themselves. Rather, it reflects an existential predicament in which a person seems to be caught between conflicting normative requirements. The guiding idea must be to do justice to both the imperative of one's conscience and the requirement to uphold the lawful order in general – or at least to try to do so to the maximum degree possible. Insistence on the supremacy of the conscience in a particular case should therefore go together with a willingness to honour the lawful public order by performing an alternative service to society whenever this seems possible. The meanwhile classical paradigm is the alternative civilian service replacing mandatory military service.

The proposed five criteria should be seen and applied in combination. Although their application to concrete cases may still be difficult and lead to controversial assessments, the criteria may help to determine those conscientious objections that warrant exemptions from lawful obligations. In order to apply them in practice, claims of conscientious objection require a

31 The appropriate way to resolve the resulting moral conflicts is by campaigning publicly for a change of the respective policies and law. By contrast, refusal to pay taxes would qualify as »civil disobedience«, which includes the willingness to accept the prescribed penalties for such acts. See Thoreau (2003).

willingness on all sides to communicate in a spirit of mutual respect. On the one hand, those who claim an exemption based on their conscientious position face legitimate expectations to explain such a demand to the broader society. They may point to the gravity of their concerns and the existential dilemma they would otherwise face, since these concerns may follow from an identity-shaping profound moral conviction. The idea cannot be that objectors have to be successful in »persuading« others that their position is right or plausible, but they should be willing credibly to declare that their concerns are of a serious, existential nature. On the other hand, the state has a responsibility to try the utmost to avoid situations of an existential moral dilemma, which would tear some people apart, as it were.³² This *inter alia* requires the availability of alternative options whenever and wherever possible. Such options must not be connected with undue burdens, and above all, they should not be based on any disrespectful interrogations. Bearing in mind the criterion of immediacy of involvement, alternative options are particularly important in situations in which people may be forced to get directly involved in practices that would run counter to their deeply held conscientious positions.

Hence, conscientious objection is a morally demanding concept based on the due respect for everyone's human dignity. Above all, it requires sensitivity within society for the moral convictions of fellow-humans whose concerns may substantially differ from one's own moral positions. In other words, it means to take diversity in moral questions seriously and seek for ways to do justice to all parties concerned, to the maximum degree possible. Particular attention must be given to the moral concerns of religious or other minorities who may be particularly vulnerable to manifestations of disrespect or ridicule. Here, the state has a responsibility to promote a climate in which moral pluralism – alongside other forms of pluralism – can unfold without fear and without discrimination.

32 Admittedly, there may be situation in which a tragic conflict cannot be solved. However, this possible experience cannot justify policies of indifference to requests of conscientious objection.

5. THE VOLUNTARY NATURE OF EMPLOYMENT IN HEALTHCARE

International, regional and national jurisdiction on conscientious objection has by and large developed in the context of compulsory military service. It is mainly with regard to the refusal to take arms that the right to objection has taken shape. Many objections within the medical sectors likewise relate to situations where human life is at stake, e.g. issues like abortion or euthanasia. Nonetheless, there is one obvious difference that warrants further analysis: no one is drafted to the medical sector. People working in healthcare usually do so based on their own decision. Doctors or nurses voluntarily undertake obligations stemming from an employment contract that they have signed up to as result of their personal choice. Analogously, this is also applies to pharmacists or other positions in the medical sector.

Obviously, individuals cannot take employment in an institution whose *core functions* they reject on conscientious grounds. A conscientious objector to military service cannot keep his or her employment as a paid soldier.³³ Likewise, a person rejecting stem-cell research on conscientious ground, will not be able work in an institute specialized on exactly that sort of research. It would be utterly absurd for a nurse refusing to being involved in abortions to seek employment in an abortion clinic. In such situations, the only viable solution would be for the concerned person to look for another professional activity. However, in most cases the situation is more complex. Hospitals usually offer a broad variety of services. A doctor or nurse may be able and willing to fulfil the expected professional duties in general with enthusiasm, while at the same time objecting to direct personal involvement concerning a few specific functions. To insist that the person nonetheless carry out the objected functions or, alternatively, leave the employment, may amount to an illegitimate limitation of their freedom of conscience, depending on the specific situation. This is likely the case if there is enough staff available and willing to guarantee the full functioning of the institution, so that pragmatic options to prevent a conflict would be possible and manageable.

33 This does not mean that soldiers are excluded from the right to conscientious objection. For details see Bielefeldt et al. (2016), 277–278.

It is worth emphasizing in this regard that by signing an employment contract, employees do not waive their freedom of thought, conscience, religion or belief. This freedom has the status of an »inalienable« human right, after all, and thus cannot be simply superseded by an employment contract. Moreover, Article 4 of the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (of November 1981) clarifies that freedom of thought, conscience, religion or belief applies to »all fields of civil, economic, political, social and cultural life« – and hence also to professional employment in whatever sector. If limitations and stipulations are deemed necessary, they must thus meet the criteria listed in Article 18 paragraph 3 of the ICCPR, as elaborated above. Although mainly addressing the state, they analogously also apply to limitations or stipulations imposed by an employment contract, which itself fall within the general regulations imposed by labour laws. Limitations of freedom of conscience, as stipulated in employment contracts, must be specific rather than general; they must relate to legitimate purpose and should be proportionate to the pursuance of such a purpose; and they should not discriminate people based on their religion or belief. Whenever there is a reasonable way to avoid conscientious conflicts in the running of an institutions, those in charge have a responsibility to find practical solutions – or at least to try the utmost to do so. The state bears the overarching responsibility to ensure that freedom of thought, conscience, religion or belief receives respect – not only in state institutions but also in the larger society.³⁴

6. ADDITIONAL STIPULATIONS FOR OBJECTIONS IN HEALTHCARE

As previously emphasized, the right to conscientious objection can be limited inter alia in the interest of securing the rights and freedom of others, provided the criteria for justifying limitations are fully satisfied. Obviously, people working in healthcare directly impact on a number of human rights, including the right to life, the right to health, the right to physical, psychological and mental integrity, the right not to suffer unnecessary pain, the

³⁴ See interim report of the Special Rapporteur on freedom of religion or belief to the General Assembly 2014, A/69/261, para. 26–41.

right to reproductive self-determination, the right not to be discriminated against on the basis of sex/gender etc. Given this broad range of human rights issues that may be at stake, there are good reasons to complement the above general criteria for claiming conscience-based exemptions from lawful obligations by adding some further stipulations. Beside the criteria already mentioned for conscientious objection in general (gravity of the concern, situation of a direct conscientious veto, connectedness to an identity-shaping principled conviction, immediacy of requested involvement, willingness to offer some alternative) the following additional stipulations seem reasonable and indeed necessary.

6.1 Primacy of Professional Duties in Risk Situations

No health professional can invoke conscientious objection in situations when they are needed to save another person from serious risks of life or physical integrity. Of course, whenever possible, such functions should be performed by a colleague who has no conscientious objection to tackling the task ahead. But maybe this will not be possible in all circumstances. Although legislators or those administering the respective institutions should do the utmost to prevent moral dilemma situations and avoid existential conflicts of that nature, there can be no ultimate guarantee of success in all cases. Tragic predicaments remain a possibility. In such situations, the right to health of patients must prevail.

6.2 No Imposition on One's Moral Convictions on Others, in Particular Patients

Accommodating conscientious objection can provide a way out of a situation of an existential dilemma. However, conscientious objection can never become an excuse for medical professionals to impose their views on others, in particular patients, by exploiting their vulnerable situation. In its judgment on *P. and S. versus Poland*, the European Court of Human Rights dealt with the case of a teenage girl who had been raped and was effectively denied an abortion by the personnel of a hospital. The Court found that the behaviour of the health professionals in that case, whatever their motivation, led to a violation of the patient's human rights, including the prohibi-

tion of cruel and inhumane treatment.³⁵ Generally speaking, conscientious objectors should inform patients from early on clearly about the objections and about possible consequences arising from that situation so that patients have time to find alternative solutions.

6.3 In-advance Information of Employers or Other Relevant Institutions

As part of their positive cooperation duties, conscientious objectors must furthermore notify in advance their employers or health institutions about possible conflicts. This may help to provide alternatives, before complicated situations arise. The various parties involved – objectors, healthcare institution, oversight bodies and ultimately the state – have a shared responsibility to seek for adequate ways of preventing dilemma situations. This presupposes an active communication not least by objectors in order to facilitate timely activities.

6.4 Cooperation in Finding Alternatives

Conscientious objectors must actively support patients in finding alternative solutions, including by referring them to colleagues willing to perform the requested treatment. Refusal to refer to colleagues would amount to active obstruction, which cannot be acceptable. In its General Recommendation on women and health (1999), the Committee on the Elimination of Discrimination Against Women (CEDAW) pointed out that whenever health service providers refuse to perform certain functions based on conscientious objection, »measures should be introduced to ensure that women are referred to alternative health providers«³⁶ Conscientious objectors working in healthcare institutions can be legitimately requested to generally cooperate within such a referral system.

35 See P. and S. versus Poland, Application No. 57375/08, 30 October 2012. Grégor Puppink (2017) correctly points out that having an abortion is not in itself a human right (see *ibid.*, 62).

36 CEDAW, General Recommendation No. 24 (1999) on Article 12, para. 11.

7. CONCLUSION: THE NEED TO UPHOLD A HOLISTIC HUMAN RIGHTS APPROACH

Conscientious objection is a right with a number of qualifications. Although originating from the person's forum internum, conscientious objection nonetheless falls within the forum externum dimension of freedom of thought, conscience, religion or belief, since it amounts to an external »manifestation« of a conscientious position that may impact on other people's rights as well. This is particularly obvious in the medical sector where a number of other rights – right to life, right to physical integrity, right to health, including access to reproductive health services etc. – may be at stake. Hence, the general criteria for exempting objectors from lawful obligations on conscientious grounds must be complemented by a number of specific stipulations that aim to secure the rights of other people, in particular patients.

In light of numerous complications that may arise, some commentators have proposed generally to dismiss claims of conscientious objection in healthcare. For example, Julian Savulescu opines: »If people are not prepared to offer legally permitted, efficient and beneficial care to a patient because it conflicts with their values, they should not be doctors.«³⁷ However, not only would such a simple take-it-or-leave-it-position be at odds with the right to freedom of conscience; it would also undermine a holistic understanding of human rights in general, as proclaimed in the formula coined by the Vienna World Conference that all human rights are »universal, indivisible and interrelated and interdependent«.

What worries me more is that even some UN human rights bodies have at times employed a wording that does not seem to acknowledge the human rights dimension of conscientious objection. When referring to conscientious objection concerning reproductive health care, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) seems to consciously avoid the term »right«. For example, in its concluding observations on Hungary, the CEDAW Committee recommends to the state party:

37 Julian Savulescu, quoted in Winclair (2010), 33.

»Establish and adequate regulatory framework and a mechanism for monitoring the *practice of conscientious objection* by health professionals and ensure that conscientious objection is accompanied by information to women about existing alternatives and that it remains a personal decision rather than an institutionalized practice.«³⁸ [emphasis added, H.B.]

A similar tendency exists in the Committee on Economic, Social and Cultural Rights. In its concluding observations on Poland, the Committee

»calls upon the State party to take all effective measures to ensure that women enjoy their right to sexual and reproductive health, including by [...] implementing a mechanism of timely and systematic referral *in the event of conscientious objection*.«³⁹ [emphasis added, H.B.]

In its recently adopted General Comment on the right to sexual and reproductive health, the same Committee points out:

»Where health care providers *are allowed* to invoke conscientious objection, States must appropriately regulate this practice to ensure that it does not inhibit anyone's access to sexual and reproductive health care, including by requiring referrals to an accessible provider capable of and willing to provide the services being sought, and the performance of services or emergency situations.«⁴⁰ [emphasis added, H.B.]

The various formulations just cited merely acknowledge conscientious objection as a reality – i.e. as a »practice«, an »event« to be taken into account or something »allowed« by the state – without clearly appreciating its status as a human right. While the Human Rights Committee, tasked with the monitoring of the ICCPR, does acknowledge the human rights dimension of conscientious objection, it so far has limited its jurisdiction on cases concerning objection to military service.

Anand Grover, former Special Rapporteur on the right to the highest attainable standard of health (2008–2014), went a step farther by acknowl-

38 CEDAW/C/HUN/CO/7-8, 26 March 2013, para. 31(d).

39 E/C.12/POL/CO/5, 2 December 2009, para. 28.

40 E/C.12/GC/22, 2 May 2016, para. 43.

edging »legitimate concerns« on both sides. For example, in his mission report on Poland, he pointed out

»that there is a need for decisive action in this regard: such action should reconcile the legitimate concerns of health providers exercising their *right to conscientious objection* with the legitimate and pressing interests of patients«. ⁴¹ [emphasis added, H.B.]

Unlike the CEDAW Committee and the Committee on Economic, Social and Cultural Rights, the former Rapporteur on the right to health remarkably used the language of »right« when referring to conscientious objection. Some years ago, the former E.U. Network of Independent Experts on Fundamental Rights likewise used the term »right« when requesting member states to issue clear and comprehensive legislative regulations in order to reconcile the various human rights at issue in healthcare. The Experts postulated:

»Such a regulation should thus accommodate the right to religious conscientious objection, which is derived from the freedom of religion, while ensuring that the exercise of this right will not lead to others either being deprived of access to certain services in principle available to all in the State concerned, or being treated in a discriminatory fashion.« ⁴²

According to the Experts of the Network, what remains to be done is the tiresome business of searching for adequate solutions in view of all the human rights at issue. With specific regard to reproductive health Christina Zampa and Ximena Andión-Ibanez, too, see a lot of work ahead in Europe: »The law and practice in European countries is peppered with differences, indicating a great need to develop comprehensive standards in this area.« ⁴³ The two authors refer to Norway as a positive example demonstrating that

41 A/HRC/14/20/Add.3, 20 May 2010, para. 55.

42 E.U. Network of Independent Experts on Fundamental Rights (2005), 20.

43 Zampa/Andión-Ibanez (2012), 232.

viable solutions, including systematic oversight with a view to guaranteeing transparent and efficient referral, can successfully be elaborated.⁴⁴

Admittedly, conscientious objection in the medical sector is a thorny issue and can lead to numerous complications, especially in morally pluralistic societies. Simplistic slogans cannot do justice to the various human rights at stake in this area. Whereas I have so far argued from the specific angle of freedom of thought, conscience, religion or belief, I would like to conclude by claiming that respect for the right to conscientious objection may also strengthen the human rights nature of the right to health. Like other human rights, the right to health facilitates and shapes human interaction. While obviously strengthening the position of patients, the right to health also presupposes responsible agency on the side of doctors and nurses. This responsibility, however, is never only a professional one; it is at the same time a moral one, deriving from moral concerns, positions and ultimately convictions. Healthcare is not a service we would like to delegate to robots without moral convictions. Thus, the right to health would cease to make sense without recognizing that all those interacting in healthcare are human beings who deserve respect for their moral convictions – even at the price of complications that may arise from such respect.

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44 See Zampa/Andión-Ibanez (2012), 247: »Norway is one of the few countries in Europe with a comprehensive regulatory and oversight framework on conscientious objection to abortion that includes ensuring the availability of providers willing and able to perform abortions.«

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