

FREEDOM OF CONSCIENCE

Are We Free to Live with Ourselves?

What is Conscience?

A common appeal to conscience is the phrase 'I couldn't live with myself if I...!' It shows the strength of conscientious conviction. It is a concept which has crossed between the religious and secular divide through the ages and is understood by some as a moral constraint upon behaviour which might implore someone to act (or not act) in a particular way.

It is clear that conscience is much more than mere preference or whim. Immanuel Kant understood conscience as 'an internal court in man', and it is this understanding of conscience as a moral constraint that best explains the force it exerts and the public good in affording it respect. This also means that conscience is not a purely subjective or individual construct. This is one response to those who might argue that conscience is a shortcut to anarchy. It is not simply about allowing individuals to do whatever they want, but rather protecting the moral integrity of individuals by preventing the State from forcing them to do something to which they have a deep moral objection.

Areas of challenge

It is only rarely that conscience conflicts with the law; but where it does, the conflict is serious, requiring a person to choose between their own moral integrity, and abiding by the law of the land.

Conscientious convictions generally affect weighty areas of human existence. Classic examples relate to life and death and the most commonly accepted form of conscientious objection is to compulsory military service. If we accept that it is wrong for the State to compel an individual to participate in military activity which he or she believes tantamount to murder, then similar issues arise in the medical profession.

For example, many religious and non-religious individuals may object to participation in abortion and related procedures ('contraceptives' with abortifacient effect, for example) as well as to embryo-destructive research. And convictions grounded in human dignity—for a Christian, the belief that people are made in God's image—may prevent a doctor from prescribing cross-sex hormones.

The International Legal Framework

Freedom of conscience is recognized as a fundamental freedom in all major human rights treaties. The Universal Declaration of Human Rights (UDHR)¹ states in its very first article that 'all human beings are ... endowed with reason and *conscience*', in addition to a specific provision protecting conscience in Article 18. It is significant that the Declaration puts conscience at the heart of the hopes of the rebirth of Europe after the atrocities of the Second World War.

The International Covenant on Civil and Political Rights (ICCPR), which entered into force on 23 March 1976 and has 168 State Parties, has a similar provision in Article 18 (1), protecting thought, conscience, and religion.² In Europe, the European Convention on Human Rights provides that 'everyone has the right to freedom of thought, conscience and religion'.³

The Grand Chamber of the European Court of Human Rights has ruled in favour of the right to conscientious objection in the military context in the case of *Bayatyan v. Armenia*:⁴

*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.*⁵

The logic of this was applied by Judges Vučinić and De Gaetano in their dissenting opinion in *Eweida and Others v. the United Kingdom*. In a case concerning a marriage registrar, dismissed for refusing to conduct same-sex marriages, they said,

*[O]nce that a genuine and serious case of conscientious objection is established, the State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector) and negatively (by refraining from actions which punish the objector or discriminate against him or her). Freedom of conscience has in the past all too often been paid for in acts of heroism, whether at the hands of the Spanish Inquisition or of a Nazi firing squad.*⁶

Turning specifically to the question of conscientious objection in the health sector, the ECtHR has yet to rule specifically on the matter, but has clearly anticipated the existence of such rights of conscientious objection in holding:

*States are obliged to organize the health services system in such a way as to ensure that an **effective exercise of the freedom of conscience of health professionals in the professional context** does not prevent patients from obtaining access to services.*⁷

Moreover, the Parliamentary Assembly of the Council of Europe (PACE) adopted unequivocal language in **Resolution 1763 (2010)**, entitled 'The right to conscientious objection in lawful medical care':

*No 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 a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason.*⁸

1 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)).

2 See, for example, the position in favour of conscientious objection adopted by the Human Rights Committee in 1993: Human Rights Committee, General Comment No. 22, para. 11.

3 European Convention on Human Rights, Article 9.

4 *Bayatyan v. Armenia* [GC], App No 23459/03, 7 July 2009.

5 *Ibid.*, § 110.

6 *Eweida and Others v. the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013, joint partly dissenting opinion of Judges Vučinić and De Gaetano, § 3.

7 *RR v. Poland*, no 27617/04, 26 May 2011, § 83 (emphasis added).

8 Council of Europe Parliamentary Assembly, 'The right to conscientious objection in lawful medical care' (Resolution 1763, 2010)

IMMANUEL KANT UNDERSTOOD CONSCIENCE AS 'AN INTERNAL COURT IN MAN', AND IT IS THIS UNDERSTANDING OF CONSCIENCE AS A MORAL CONSTRAINT THAT BEST EXPLAINS THE FORCE IT EXERTS AND THE PUBLIC GOOD IN AFFORDING IT RESPECT.

Addressing the Counter-Arguments

Despite being recognized by every major international human rights treaty, freedom of conscience is one of the least understood rights. This is largely because the related rights of freedom of thought, freedom of belief, and freedom of religion are often considered together, sometimes without any further comment or delineation. Yet there are cases which fall most clearly under conscience rather than these other related rights. Common objections to freedom of conscience include:

'Freedom of conscience would result in anarchy'

While the areas in which people may have conscientious convictions may differ, the nature of those convictions is what makes them stand apart. As the US Supreme Court put it, it must occupy 'a place in the life of its possessor parallel to the orthodox belief in God.'⁹ Even where they are accommodated, people often pay a price for living in accordance with their conscience. Allowing people to live in accordance with the deepest part of what makes them human is not anarchistic – it's the very sort of diverse pluralistic society that most countries claim to be.

'There is no way of distinguishing between conscience-based claims and others'

Although many conscientious convictions *are* informed by religion, that is not necessarily the case and one can clearly anticipate religious beliefs which are not conscientious in nature, and non-religious beliefs which are. For example, a request for permission to build a religious structure may well fall under freedom of religion, but perhaps not conscience. Courts have been able to make this distinction in the case of conscientious objection to military service and there is no reason why similar criteria could not be applied in other areas.

'Protection for freedom of conscience would make no difference to the outcome of any cases'

If we are better able to identify cases of conscience with specificity then we can respond to them more appropriately. For example, conscience claimants are generally not seeking to be treated the same as others, but rather, to be treated differently. Canadian, American, and EU law all have doctrines which place a duty on employers to reasonably accommodate certain needs of employees which could readily be applied in conscience cases.

'Protecting freedom of conscience would undermine other human rights'

This argument assumes the wrong starting point. The first question should be whether freedom of conscience is a fundamental right. The fact this may result in a 'clash' of rights does not undermine the fundamental nature of the right. Moreover, in many alleged cases of 'clash' there is no real clash as there is generally no individualized right to obtain a specific service from a specific individual. And while some argue that any individual conscience-based objection causes 'harm' to the individual refused, it could equally be said that the provider being compelled to serve is at least equally 'harmed' at the hands of the State.

Conclusion

Freedom of conscience is a fundamental human right which protects the moral integrity of every human being. Throughout history, the groups depending on conscientious protections have changed but are often minority groups facing down powerful State actors. Both the powerful and the powerless should unite in support of conscience which reflects the reality of human existence, rather than a heavy-handed 'one size fits all' approach.

9 *United States v Seeger* 380 US 163 (1965).



ADF INTERNATIONAL

What You Can Do

Raise awareness

Raise awareness in your own country about the need for robust protections for freedom of conscience. Be aware of the latest developments and support laws which protect medical professionals and others from conscientious compromise.

Build an alliance

Identify a list of political actors, NGOs, academics, and journalists who share a proper understanding of freedom of conscience. Medical practitioners often find themselves on the front line of this issue given their involvement in life and death situations, but so too can public officials, service providers, business owners and others.

Organize a hearing

Organize a hearing at your national Parliament together with Members of Parliament to inform them about the importance of freedom of conscience. Identify any deficits in conscience protections in your country and highlight these.

Organize an event

Organize an event or a conference on the topic. Feel free to reach out to ADF International experts for assistance with arguments to be presented or speakers to invite.

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