

ADF International White Paper

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# Freedom of Conscience:

## Protecting our moral compass

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Robert Clarke



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# Summary

The right to freedom of conscience protects the right to live in accordance with our deeply held beliefs. Despite being protected by every major human rights treaty, this right is poorly understood and undermined.

This white paper has six main parts: Chapter 1 highlights what conscience is and why it must be protected. Chapter 2 outlines the robust protections found in law for rights of conscience, while Chapter 3 presents how to recognize conscience claims. Chapter 4 puts forward three options for protecting conscience claims in practice, once recognized, ranging from protecting conscience as a mirror image of freedom of religion or belief to absolute protection. Chapter 5 demonstrates the need for a better approach by highlighting areas in which freedom of conscience is under attack. The paper concludes with recommendations on strengthening conscience protections.

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## 1) What is Conscience and Why Protect It?

Over time, understanding of conscience has crossed between the religious and secular divide and has developed as one which challenges wrongful conduct, and which could be understood in both a moral and a religious sense.

For example, Immanuel Kant understood conscience to be 'an internal court in man'. He identified the counterargument that such a fusion of judge, jury and executioner could be open to attacks of impartiality, and he asserted:

[A]ll duties of a man's conscience will, accordingly, have to think of someone other than himself...as the judge of his action, if conscience is not to be in contradiction with itself.<sup>1</sup>

Conscience does not comprise 'any and every intellectual opinion inspired by personal views but the ensemble of supreme personal rules of conduct, rooted in religious or non-religious beliefs, which leave for the individual a compelling force higher than any other normative reference.'<sup>2</sup>

Moral beliefs, either religious or non-religious, have a central place in the individual's moral identity and, for this very reason, must be distinguished from other personal preferences or options. They are 'core or meaning-giving convictions and commitments' that 'allow people to structure their moral identity and to exercise their faculty of judgment.'<sup>3</sup> Consequently, the more a belief is linked to the moral identity of the person, the stronger the legal protection afforded to it must be.

If the law requires behaviour that would contradict the values underpinning the moral identity of a person, then the person finds himself or herself in a conflicting situation that challenges his or her moral integrity. There is a clear difference between a) a person who refuses to participate in abortion procedures because he or she deeply believes that abortion is the taking of innocent life, and b) a person who refuses to participate in abortion procedures because he or she has an aversion to blood. This example reflects the fact that beliefs which are related to conscience, and

which have an essential role in structuring the moral identity of a person, should be distinguished from preferences, tastes, options and desires. If someone has to participate in an abortion despite his or her opposition to blood, such participation may cause feelings of uneasiness or discomfort. By contrast, if a person is forced to participate in an abortion despite his conscience-based objection, that would create a sense of moral betrayal and harm the values and beliefs which fundamentally define that person. This is precisely why such core beliefs (whether religious or non-religious) 'play the role of a compass and criteria of judgment in an individual's life.'<sup>4</sup> If they are transgressed, then the person violates his or her deepest moral structure.

Conscience is therefore not a purely subjective or individual construct. Convictions of conscience have powerful moral force, and cannot simply be dismissed as a whim or personal opinion. Conscience acts as an external constraint on human behaviour. In view of the importance of conscience claims, and the role they play in the moral identity of the individual, they should be afforded a high degree of legal protection. While few would take issue with the protection of the inner realm (*forum internum*) of conscience as being absolute,<sup>5</sup> it is where they motivate public behaviour that the analysis becomes more complex and difficult. In other words, while it is undisputed that the inner realm of conscience should benefit from maximum protection in law, there is debate as to whether such protection should extend to the individual's refusal to comply with a legally mandated duty which appears on its face to be neutral. Even if such a right is recognized, there are still difficult issues to clarify: the test as to how to determine conscience claims, how to draw a line between genuine conscientious objections and eccentric or frivolous claims, and the manner in which conscience should be legally protected.

Conscience is more than just a moral code or a set of beliefs—it is a belief bound up in action. Thomas Aquinas drew the line between conscience and a mere belief by stating that conscience is 'the application of knowledge to what we do'.<sup>6</sup> Therefore, the concept of conscientious objection refers to the refusal, grounded in deeply held religious, moral, ethical, or philosophical

beliefs, to fulfil certain legal obligations. The refusal is hence based on the fact that performing the legal obligation in question would lead to a serious conflict with genuinely held beliefs, so as to force the person to act against the dictates of conscience. The concept of conscientious objection does not include conduct motivated by merely political or psychological reasons.

A proper approach to conscience claims cannot be criticized as providing *carte blanche* for generally disobeying the law or for an absolutist view of individual autonomy. Conscientious objection is distinct from an alleged unreasonable behaviour which goes against the law (*contra legem*), since it is grounded in ethical reasons that are of utmost importance for the individual. They do not usually extend to a wide number of legal obligations, but rather to precise, well-defined moral values that play a structural role in the moral identity of the individual. The inextricable link between conscience and action is an important and foundational point and the very reason why any robust protection of conscience must embrace a right to conscientious objection.

State limitations on the exercise of freedom of conscience amount to an attempt by the State to abnegate citizens' freedom to object to and refrain from certain actions that they believe are fundamentally wrong and are incompatible with their deeply held beliefs. Such violations of freedom of conscience on matters of fundamental belief assert the paternalistic premise that individuals may be subjected to penalties and other significant consequences, either personal or professional, for not performing acts which directly violate his or her deeply held beliefs. Expressions of conscientious belief are of fundamental importance and represent one of the cornerstones of a democratic, broad-minded, and pluralistic society, which safeguards respect for diversity of opinion:

Freedom of thought and conscience is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>7</sup>

Inherent in the concept of a pluralistic, inclusive, and democratic society is the idea that the public square must be populated by people holding diverse viewpoints, beliefs, and moral convictions regarding what conduct ought to be permitted or proscribed.<sup>8</sup> Frans Timmermans, then First Vice-President of the European Commission in charge of fundamental rights, outlined that such differences need to be managed well. He stated, in the context of the ongoing dialogue with churches, religions, and philosophical and non-confessional organizations,<sup>9</sup> that 'living together means being able to manage differences, even when we fundamentally disagree.'<sup>10</sup> In order to maintain a vibrant public square, the international human rights system has explicitly recognized and secured freedom of conscience in international conventions, jurisprudence and soft law documents.

## 2) Freedom of Conscience in International Law

**The Universal Declaration of Human Rights** (UDHR),<sup>11</sup> the constitution of the entire human rights movement,<sup>12</sup> states in its very first article that 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience.'<sup>13</sup> 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 UDHR also contains a specific provision protecting conscience, Article 18, which states:

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

This language was later replicated in Article 1 of the **UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief** (the 1981 Declaration).<sup>14</sup> The preamble to the Declaration also emphasizes what happens when the right to conscience is not respected:

Disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind ...<sup>15</sup>

Subsequently, in the **Resolution on the Elimination of All Forms of Religious Intolerance**, adopted by the General Assembly in 1993, the UN reaffirmed that 'freedom of thought, conscience, religion and belief is a human right derived from the inherent dignity of the human person and guaranteed to all without discrimination.'<sup>16</sup> The Resolution also urges States to 'ensure that their constitutional and legal systems provide full guarantees of freedom of thought, conscience, religion and belief.'<sup>17</sup>

The **International Covenant on Civil and Political Rights** (ICCPR), which entered into force on 23 March 1976 and has 116 State Parties,<sup>18</sup> has a similar provision, Article 18 (1), according to which:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

**General Comment No. 22**,<sup>19</sup> issued by the UN Human Rights Committee (HRC) in 1993, colours the reading of Article 18 (1). The HRC has urged States repeatedly to view General Comment No. 22 as forming a common body with Article 18 of the ICCPR and to comply with it accordingly.<sup>20</sup> In General Comment No. 22, the HRC stresses the ‘far reaching and profound’ nature of this right and:

[D]raws the attention of State Parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The *fundamental character* of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency.<sup>21</sup>

Article 18 (3) stresses that the freedom at issue ‘may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.’

The HRC has outlined a narrow approach to limitations by stating that these restrictions shall be ‘strictly interpreted’ and applied:

[O]nly 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.<sup>22</sup>

Moreover, the HRC has stressed that limitations cannot vitiate or nullify the right with which they interfere; likewise, limitations cannot go so far as to attack the very essence of the right under discussion or, in principle, other rights regulated by the ICCPR.<sup>23</sup>

Freedom of conscience is also recognized and protected by the **European Convention on Human Rights** (ECHR). Article 9 (1) states that '[e]veryone has the right to freedom of thought, conscience and religion,' which also includes the right to manifest religion or belief 'in practice and observance'. The right to manifest one's religion or belief can be subject to limitations which are, as in the case of limitations under the ICCPR, narrow in scope. In relation to the very limited grounds for legitimate limitations on these rights, it was noted when the Convention was drafted that 'the final draft of Article 9 (2) was the narrowest of the proposed articles.'<sup>24</sup>

Article 10 of the **Charter of Fundamental Rights of the European Union** (EU Charter) repeats language from Article 9 (1) of the ECHR. Article 10 (1) states:

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or private, to manifest religion or belief, in worship, teaching, practice and observance.

The second paragraph of Article 10 goes further than the ECHR and explicitly recognizes the right to conscientious objection: 'The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right.'<sup>25</sup> Two points must be made with regard to this provision. Firstly, while Article 10 is aimed at the area in which conscience protections were first codified (military service), the text is not so limited. Secondly, the reference to national laws does not subject the existence of the right to conscientious objection to the specific acceptance of a particular type of conscientious objection by domestic law. The right to conscientious objection flows directly from the right to freedom of conscience. In the same vein, it would contradict the basic hierarchy of norms and principles of law

to make the existence of an international and fundamental human right contingent on the will of national legislators. If that were the case, then the EU Charter's provision would be deprived of legal value and effectiveness.

The sentence 'in accordance with the national laws' has been interpreted as referring only to the limitations placed by national laws on manifestations of conscience. Commentators have emphasized that it 'refers to the fact that national legislatures are naturally competent to regulate the most frequent cases of conscientious objection as well as to establish appropriate limitations on such [a] right.'<sup>26</sup>

Therefore, by virtue of Article 18 ICCPR, Article 9 ECHR and Article 10 (1) of the EU Charter, State Parties are bound by the obligation to ensure and protect the right to conscientious objection in their territories. The **EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief** confirm this by identifying the role of States in ensuring freedom of conscience:

States must ensure that their legal systems provide adequate and effective guarantees of freedom of thought, conscience, religion or belief to all, which are applicable to their entire territory without exclusion or discrimination, and that these provisions are properly enforced.<sup>27</sup>

Article 10 of the Charter of Fundamental Rights of the European Union is not the only EU source that recognizes the right to conscientious objection and the need for a robust protection of conscience. The Council of the European Union also has underlined that freedom of conscience is a universal human right that needs to be protected everywhere, for everyone:

Freedom of thought, conscience, religion or belief, applies equally to all persons. It is a fundamental freedom that includes all religions or beliefs, including those that have not been traditionally practiced in a particular country, the beliefs of persons belonging to religious minorities, as well as non-theistic and atheistic beliefs. The freedom also covers the right to adopt, change or abandon one's religion or belief, of one's own free will.<sup>28</sup>

Within the EU's constitutional order, Member States bear a responsibility to ensure respect for freedom of conscience not only in their own territories, but also to facilitate and assist in this area abroad. This is highlighted by, *inter alia*, Regulations and Resolutions establishing financing instruments for democracy and human rights worldwide. For example, **Regulation (EU) No. 235/2014 of the European Parliament and of the Council of 11 March 2014** says:

Democracy and human rights are inextricably linked and mutually reinforcing ... The fundamental freedoms of thought, conscience and religion or belief, expression, assembly and association are the preconditions for political pluralism, democratic process and an open society.<sup>29</sup>

The same document, when speaking about EU assistance, underscores the need for more stringent involvement and protection of:

[F]reedom of thought, conscience and religion or belief, including by means of measures to eliminate all forms of hatred, intolerance and discrimination based on religion or belief and by fostering tolerance and respect for religious and cultural diversity within and among societies.<sup>30</sup>

Furthermore, the **European Parliament's Resolution of 20 January 2011 on the situation of Christians in the context of freedom of religion** emphasizes the commitment of the EU to freedom of religion, freedom of conscience and freedom of thought, and stresses that governments 'have a duty to guarantee these freedoms all over the world.'<sup>31</sup> The Resolution rightly identifies, among its recitals, two important issues: 1) that the number of attacks on Christian communities has risen, and 2) that Europe is not exempt from cases of 'violation of freedom of religion, attacks on members of religious minorities on the basis of their beliefs, and religiously motivated discrimination.'<sup>32</sup>

With regard to the issue of the rights of medical professionals, 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.<sup>33</sup>

The Resolution passed by a majority of votes (representing a majority of countries), which indicates strong support for protecting the right of conscientious objection for medical professionals who are often confronted with difficult moral situations.

PACE **Resolution 2036 (2015)**, entitled 'Tackling intolerance and discrimination in Europe with a special focus on Christians', similarly protects conscience both within but also outside the medical profession, indicating that States should:

[P]romote reasonable accommodation within the principle of indirect discrimination so as to ... *uphold freedom of conscience in the workplace* while ensuring the access to services provided by law is maintained and the right of others to be free from discrimination is provided.<sup>34</sup>

In **Resolution 1846 (2011)** on 'Combating all forms of discrimination based on religion', PACE put forward a number of recommendations, including:

[W]hen enacting legislation and implementing appropriate policies, [Member States should] strive to accommodate the needs of different religions and beliefs in a pluralist society, provided that any such measures do not infringe the rights of others.<sup>35</sup>

Similarly, the **Official Guidelines of the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights** (OSCE/ODIHR) state that national legislators should pay due attention and

try to find well-suited solutions to address the 'many circumstances where individuals and groups, as a matter of conscience, find it difficult or morally objectionable to comply with laws of general applicability.'<sup>36</sup>

### **A. Jurisprudence in the area of freedom of conscience**

As outlined above, freedom of conscience is explicitly recognized in international and regional human rights documents having both binding and non-binding effect. Furthermore, this right has been interpreted by numerous international and regional human rights bodies, either alone or in connection with religion or belief. Given that conscience claims can be religious or non-religious and that there is usually a significant interplay between religion, belief and conscience, it is important to briefly outline how religion and belief have been interpreted judicially.

The European Court of Human Rights (ECtHR) and previously the European Commission on Human Rights generously interpreted the concept of religion as including mainstream or traditional religions, such as Christianity, Islam, Judaism and Hinduism, in addition to other beliefs, such as Druidism,<sup>37</sup> and recent religions or systems of faith, such as Scientology.<sup>38</sup> They interpreted protected beliefs to include pacifism,<sup>39</sup> communism,<sup>40</sup> atheism,<sup>41</sup> veganism,<sup>42</sup> pro-life stances,<sup>43</sup> and skepticism.<sup>44</sup>

The HRC adopted a similarly broad position in the interpretation of protected beliefs under Article 18 of the ICCPR. The HRC is the body of independent experts who monitor the implementation of the ICCPR by its State Parties.<sup>45</sup> Pursuant to Article 40 of the ICCPR, the HRC is empowered to monitor, receive, study, and respond to State reports, which must contain an evaluation of State compliance with the ICCPR.<sup>46</sup> Furthermore, the HRC can issue General Comments, which can be influential interpretations of the articles the HRC is charged with monitoring in abstracto.<sup>47</sup> Besides reporting, the Optional Protocol to the ICCPR puts in place a complaint mechanism, which allows individuals who were victims of a human rights violation to address written communications to the HRC. The proceedings end with the HRC's adoption of its 'Views', which represent its (non-binding) findings on the facts.<sup>48</sup>

The HRC Communications under the Optional Protocol to the ICCPR outline that fascist beliefs<sup>49</sup> and anti-Semitic views<sup>50</sup> could qualify for legal protection under Article 18. Conversely, a 'strong personal motivation' not to be buried in a cemetery, but to have the ashes scattered at home, does not meet the threshold for the protection of belief.<sup>51</sup>

### **1. European Court of Human Rights**

The Grand Chamber of the ECtHR has unambiguously affirmed rights of conscience for deeply and sincerely held beliefs as falling within the ambit of Article 9 of the ECHR.

In the landmark case of *Bayatyan v. Armenia*,<sup>52</sup> the Grand Chamber for the first time expressly upheld the right to conscientious objection. The ECtHR held:

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.<sup>53</sup>

This passage is significant for two reasons. Firstly, it clearly distinguishes conscience as a separate ground for objecting to an obligation, moving away from the ECtHR's habit of quoting the entire phrase 'thought, conscience, religion or belief' when assessing a violation of Article 9. Secondly, the language used by the Court offers a wider scope of protection to instances of 'serious' and 'genuine' conscientious objection, rather than constraining it to objections raised in the context of military conscription. The reasoning of the ECtHR, amounting to a recognition that requiring someone to use lethal force can conflict with the dictates of their conscience, could be readily applicable in other fields (such as healthcare).

The ECtHR explained precisely why the applicant's objection should be safeguarded by the Convention:

The Court cannot overlook the fact that, in the present case, the applicant, as a member of Jehovah's Witnesses, sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious convictions. ... Thus, the system existing at the material time imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalizing those who, like the applicant, refused to perform military service. In the Court's opinion, such a system failed to strike a fair balance between the interests of society as a whole and those of the applicant. It therefore considers that the imposition of a penalty on the applicant, in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society. Still less can it be seen as necessary taking into account that there existed viable and effective alternatives capable of accommodating the competing interests, as demonstrated by the experience of the overwhelming majority of the European States...

The Court further reiterates that pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position ... Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.<sup>54</sup>

*Bayatyan v. Armenia* was a landmark decision since it explicitly overruled previous decisions of the ECtHR and of the European Commission on Human Rights (the Commission). In *G.Z. v. Austria*,<sup>55</sup> the Commission had

stated that it was up to the Member States as to whether or not to permit conscientious objection. The Commission came to this conclusion by reading Article 9 together with Article 4 (3), which provided that forced or compulsory labour should not include 'any service of a military character or, in cases of conscientious objectors, in cases where they are recognized, service exacted instead of compulsory military service.'<sup>56</sup> Although the Commission held the position that Member States were not obliged to make special arrangements for those who might object to compulsory military service, it was certainly cognizant of this kind of conflict. For example, in *Arrowsmith v. the United Kingdom*, a dissenting Judge emphasized that Article 9 should be applicable to a larger sphere of manifestations:

This is important where such acts cannot readily be seen as protected by other provisions of the Convention. Such is the case as regards, e.g. religious or conscientious objection to civil or professional duties.<sup>57</sup>

The ECtHR had dealt with the issue of conscientious objectors only twice before *Bayatyan v. Armenia*: in *Ülke v. Turkey*<sup>58</sup> and *Thlimmenos v. Greece*.<sup>59</sup> In both cases it considered that it was not necessary to examine the applicability of Article 9 and followed the cautious approach of the Commission—settled in *Tsirlis and Kouloumpas v. Greece*<sup>60</sup>—by resorting to other articles, such as Article 14 (prohibition of discrimination), and Article 3 (prohibition of torture).<sup>61</sup> However, an early indication of the Court's view can be seen in *Ülke v. Turkey* where the Court stressed that repeated imprisonment imposed in respect of refusals to serve in the military were unacceptable and in no way proportionate to the aim pursued, amounting even to a 'civil death'.<sup>62</sup> Commentators have stated:

By placing limitations on the punishments that States can mete out to those who refuse to be compelled to perform military service for reasons of conscience, the Court has begun to involve itself in governing the manner in which States can and cannot treat conscientious objectors.<sup>63</sup>

The reasoning of the Grand Chamber in *Bayatyan v. Armenia* was subsequently applied in a number of cases dealing with conscientious objection: *Erçep v. Turkey*,<sup>64</sup> *Bukharatyan v. Armenia*,<sup>65</sup> *Tsaturyan v. Armenia*,<sup>66</sup> *Fethi Demirtaş v. Turkey*,<sup>67</sup> *Savda v. Turkey*,<sup>68</sup> *Tarhan v. Turkey*,<sup>69</sup> *Buldu and Others v. Turkey*.<sup>70</sup> *Savda v. Turkey* and *Tarhan v. Turkey* dealt with refusals to perform military service based on pacifist and antimilitarist beliefs, while the rest concerned conscientious objections expressed by Jehovah's Witnesses. In these cases, the ECtHR a) strengthened its protection of conscientious objection under Article 9 (2) for both religiously and non-religiously motivated beliefs,<sup>71</sup> b) took an even firmer stance regarding the impact that criminal convictions might have on conscientious objectors, and c) referred to how criminal prosecutions harm the personality of the individual and ultimately lead to a de facto exclusion from civil life.<sup>72</sup>

In *Eweida and Others v. the United Kingdom*,<sup>73</sup> the ECtHR clarified that manifestation (of a religion or belief) is not limited to acts which are a mandatory part of the practice of the religion or belief in question. Rather:

[T]he existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement to establish that he or she [the applicant] acted in fulfilment of a duty mandated by the religion in question.<sup>74</sup>

The ECtHR also overruled previous case law which had concluded that the ability to resign from a job would generally prevent any violation of Article 9. The Court stated:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.<sup>75</sup>

Turning specifically to the question of conscientious objection in the health sector, the ECtHR has clearly anticipated the existence of such rights 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.<sup>76</sup>

The ECtHR has thus recognized that health professionals can and do actually exercise ‘freedom of conscience in the professional context’.<sup>77</sup> This is qualified only by the access argument, meaning that the ECtHR takes for granted a system securing ‘the *effective* exercise of the freedom of conscience of health professionals’.<sup>78</sup> Freedom of conscience cannot be exercised if States do not put into place a system accommodating its citizens’ deeply held beliefs.

Similarly, the ECtHR has also spoken precisely about States’ responsibility to put into place a system that ‘includes elements allowing the right to conscientious objection to be reconciled with the patient’s interests.’<sup>79</sup>

In conclusion, the ECtHR has shown an increasing respect for conscientious convictions as a category distinct from religion and belief claims under Article 9. While this has principally happened in the context of conscientious objections to military service, the ECtHR’s reasoning is by no means limited to this area.

## **2. UN Human Rights Committee**

The HRC has stated, in General Comment No. 22, that:

The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief.<sup>80</sup>

The general reasoning here, amounting to a recognition that requiring someone to use lethal force can conflict with the dictates of their conscience, is as readily applicable in other fields (such as healthcare) as is the jurisprudence of the ECtHR outlined above. The essential element, common in both the jurisprudence of the ECtHR and in the HRC's decisions, is the insurmountable moral conflict created by the clash between deeply held moral beliefs, on the one hand, and a legal requirement, on the other.

Additionally, the HRC has developed its interpretation of conscientious objection in a number of communications under the Optional Protocol and in its Concluding Observations. For example, in *Westerman v. the Netherlands*, the HRC reiterated that 'the right to conscientious objection to military service can be derived from Article 18.'<sup>81</sup> The case of *Frédéric Foin v. France* concerned a French citizen who challenged a French law which required compulsory military service for all except those with a conscientious objection. The law required conscientious objectors to serve in a civilian post for twice as long as those completing military service. The HRC held that there had been a violation of the ICCPR since the person 'was discriminated against on the basis of his conviction of conscience.'<sup>82</sup>

In a collection of communications regarding the Republic of Korea – for example, *Yoon et al. v. Republic of Korea*,<sup>83</sup> *Jung et al. v. Republic of Korea*,<sup>84</sup> *Jeong et al. v. Republic of Korea*<sup>85</sup> and *Jong-nam Kim et al. v. Republic of Korea*<sup>86</sup> – the HRC has solidified that position and developed its reasoning regarding the protection that should be afforded in the case of conscientious objections:

The Committee therefore reiterates that the right to conscientious objection to military service is *inherent* to the right to freedom of thought, conscience and religion. It entitles any individual to exemption from compulsory military service if the latter cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion. ... In the present case, the Committee considers that the authors' refusal to be drafted for compulsory military service derives from their religious beliefs which, it is uncontested, were genuinely held, and that the authors' subsequent conviction and sentence amounted to an infringement

of their freedom of conscience, in breach of Article 18 (1) of the Covenant.<sup>87</sup>

The HRC was very precise in stating that:

Compulsory military service without possibility of alternative civilian service implies that a person may be put in a position in which he or she is deprived of the right to choose whether or not to declare his or her conscientiously held beliefs *by being under a legal obligation, either to break the law or to act against those beliefs within a context in which it may be necessary to deprive another human being of life.*<sup>88</sup>

One member of the HRC went further, arguing that the issue of the conscientious objection to military service should be examined under Article 18 (1), *forum internum*, and not 18 (3), as mere manifestation and reasoned:

[E]ven if it were wrongly supposed that the present Communication does not concern recognition of the objector's right, but merely its public manifestation, the statement that public manifestations may be subject only 'to such limitations as are prescribed by law' in no way implies that the existence of the right itself is a matter for the discretion of State Parties.<sup>89</sup>

In summary, the HRC, much like the ECtHR, concluded that the right to conscientious objection can be derived from Article 18, but, more than that, is an inherent component of freedom of thought, conscience and religion. Similar to the ECtHR, the HRC clearly put forward a wider principle, according to which States should accommodate citizens' deeply and sincerely held convictions:

While the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with Article 18 (3), against being forced to act against genuinely held religious belief.<sup>90</sup>

### **3. *The Court of Justice of the European Union***

In joined cases *Y and Z*,<sup>91</sup> the Court of Justice of the European Union (CJEU) considered the scope of protection for freedom of thought, conscience, and religion under European Union law. The Advocate General gave an opinion on the understanding of Article 9 of the European Convention and outlined that it is of the utmost importance that believers can *manifest* religious belief and that if the so-called 'core area' of religious belief were comprised only of 'private conscience', it would render any protections for 'the external manifestation of that freedom' effectively 'meaningless'.<sup>92</sup> In its final ruling, the CJEU held that the right to act upon sincerely held religious or moral beliefs clearly includes public manifestations of those beliefs.

Furthermore, the CJEU reaffirmed that there is no need for the belief constituting the basis of a conscientious objection to be a religiously mandated act:

In determining that issue [the qualification of the applicant as a conscientious objector to military service] they should have regard to whether Mr Shepherd [the applicant] holds a conviction of *sufficient cogency, seriousness, cohesion and importance* regarding the conflict in question.<sup>93</sup>

## **B. Conclusion**

It is therefore clear that freedom of conscience is recognized as a fundamental freedom in all major human rights treaties and is relied upon by judicial and quasi-judicial tribunals at both the European and international level. Since 'exercising freedom of conscience is part of the normal reality in a democratic society',<sup>94</sup> the essential question, from a legal point of view, is how to evaluate conscience claims in practice.

In the following section, this paper will a) synthesize the various elements of the established law on conscientious objection into a rational test which acts as a threshold to identify conscience claims in practice, and b) outline three possible options that judicial and quasi-judicial bodies

have in order to afford protection to conscience claims, once they have been qualified as such.

### 3) Threshold to Identify Conscience Claims

One of the major reasons why courts have approached conscience claims with caution is the difficulty of assessing whether a claim is genuine or it has been advanced as a smokescreen in pursuit of personal benefit or convenience. This concern may be even more significant when the objection is to a duty imposed by law.

Given the nature of conscientious objection, it will inevitably be difficult for judicial bodies or other State authorities to determine with absolute certainty whether or not an individual's objection is grounded in his or her deeply held moral beliefs. This raises the concern that, by allowing and accommodating conscientious objections in practice, frivolous and eccentric claims would also be welcomed in through the floodgates.

However, such criticism is misguided. Firstly, the fact that some might seek to abuse the right to conscientious objection can under no circumstances be a legitimate reason to deny or weaken the protection of the fundamental right to freedom of conscience. Furthermore, conscience cannot be used as *carte blanche* for disobeying the law, or to promote anarchy, because the category of claim is necessarily a narrow one, more specific than the broader protection afforded to 'beliefs'. The refusal to perform a legal obligation stems from a moral obligation derived from a religious or non-religious belief. When talking about beliefs that underpin conscientious objections, it is not the simple understanding of belief, derived from the jurisprudence of the ECtHR. Rather, it deals with 'those convictions that have for a certain person, an axiological intensity equivalent to that of a religion': they involve clear moral elements of a high order.<sup>95</sup> For a Christian, it is a command of God.

Therefore, the moral value of the obligation invoked by the objector is the essential element that qualifies something as a conscience claim. For the objector, the moral duty is considered superior because it is grounded in fundamental moral values that are entitled to strong legal protection.

Consequently, it is essential that such claims should be properly identified and protected in practice.

Courts are well-accustomed to conducting appropriate enquiries into the existence and coherence of beliefs without unduly enquiring as to their validity. Judges Vučinić and De Gaetano reasoned in *Eweida and Others v. the United Kingdom* that conscience ‘enjoins a person at the appropriate moment to do good and to avoid evil’, concluding that:

[O]nce 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).<sup>96</sup>

State authorities should accept ‘the ideology of the persons concerned once such ideology has been clearly made out’,<sup>97</sup> provided that the beliefs represent ‘views that attain a certain level of cogency, seriousness, cohesion and importance’.<sup>98</sup>

The ECtHR has made it clear that it is not for the courts to rule on the validity of beliefs that underpin conscientious objections given the inherent dangers of giving a State the power to deem which religions or creeds are acceptable, and which are not:

It is ill-equipped to delve into discussion about the nature and importance of individual beliefs, for what one person holds as sacred may be absurd or anathema to another and no legal or logical argument can be invoked to challenge a believer’s assertion that a particular belief or practice is an important element of religious duty.<sup>99</sup>

Courts should not make value judgments about the appropriateness or reasonableness of a particular belief because determining what is reasonable or not actually means making value judgments about how a person chooses his religion or belief, about his or her *forum internum*. A conviction of conscience is linked to the subjective sphere to a great extent, in the sense that each person attaches a particular value to a specific belief.

As John Locke said: 'No man can, if he would, conform his faith to the dictates of another.'<sup>100</sup>

What is considered reasonable is also more likely to equate with what is socially acceptable by the standards of the majority. Consequently, not allowing conscientious objections would represent the imposition of majoritarian views.

Courts should strike a balance between not sitting in improper judgment over a person's religion or belief, and in nevertheless needing to carry out the judicial task, namely assessment of the existence and coherence of beliefs, without unduly enquiring as to their validity:

[B]ut for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.<sup>101</sup>

Furthermore:

While the notion of the State sitting in judgment on the state of the citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions, the Court observes that this is a case where the applicant sought to enjoy a special right bestowed by [domestic] law.<sup>102</sup>

That tension is the challenge this Chapter seeks to address. Taking together the treaties, soft law documents, and judicial decisions outlined above, it is possible to distil these into a legal test which asks: has an individual been compelled to engage in an activity that is in serious conflict with his or her genuinely held religious or other convictions, so as to force him or her to act against the dictates of his or her conscience? This acts as a threshold test to identify conscience claims in practice.

### **A. A serious conflict**

The first prong of the test is essentially one of threshold. Since conscience claims are founded on deep moral values and deserving of specific protection, there is a threshold which must be passed. This will usually be met when the objectors claim that they are acting on the basis of their conscience, but would exclude a claim based on frivolous beliefs. It is not necessary that the claim be mandated by a religion—a point which has been emphasized by the ECtHR.<sup>103</sup>

The HRC has rightly held that ‘a belief consisting primarily or exclusively in the worship and distribution of narcotic drugs cannot conceivably be brought within the scope of Article 18 of the Covenant,’<sup>104</sup> and concluded that the situation raises doubts about ‘the seriousness of the authors’ claims’. Likewise, the claims of the Church of the Flying Spaghetti Monster or, as it is also known, Pastafarianism,<sup>105</sup> should not qualify for the heightened protection that should be afforded to conscience claims.<sup>106</sup> According to Pastafarianism, the intelligent designer of the universe is the ‘noodly creator’, the Flying Spaghetti Monster. Its followers object to appearing bareheaded in official photographs and ask for the right to be photographed wearing a strainer generally used to drain water from spaghetti.<sup>107</sup>

What these examples have in common is the lack of a serious conflict, based on deeply held convictions that form the moral identity of the objector. While some of these might qualify as ‘beliefs’ that could be assessed by courts, they are arguably not conscience claims as would be, for example, a doctor’s refusal to perform abortion, because he or she believes that abortion is the taking of innocent unborn life.

The objectors in the mentioned cases do not face a serious internal conflict: either stay true to their consciences or adhere to the norm dictated by the State. They might indeed suffer a feeling of uneasiness or discomfort if their beliefs are not protected by State authorities, but the harm is not of a moral nature.

## B. Genuinely held beliefs

The second prong of the test refers to the sincerity of the belief(s) in question.

Courts cannot determine what a correct or reasonable interpretation of a religious or non-religious belief is, but what they can do is evaluate the claimant's sincerity. Courts are accustomed to this task, as they must undertake an assessment of the sincerity of testimony, for example:

The test of sincerity must not be too intrusive and must not interpret each shift in an individual's religious practice as indubitable proof of insincerity. Freedom of conscience includes the freedom to reconsider one's choices.<sup>108</sup>

The fact that a conscientious objection stems from an institutional religious doctrine makes it easier to prove the sincerity of beliefs compared to conscientious objection grounded in non-religious beliefs, for example. The common point between religious and non-religious beliefs that are the basis of conscientious objection is the fact that both underpin the moral structure of a person—they are held with an intensity of commitment that connects religious and non-religious beliefs. This was highlighted by the US Supreme Court in *United States v. Seeger*, when it stated that it should analyze whether a belief 'that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.'<sup>109</sup> If the belief were not required by God, the US Supreme Court sought to evaluate whether it occupies a similarly fundamental place in the moral understanding of the individual. This is consistent with Kant's view of conscience as an external force, and the common understanding of the 'voice of conscience' directing action.

In accordance with the jurisprudence of the ECtHR, those beliefs must be of sufficient cogency, seriousness, cohesion, and importance to attract protection.<sup>110</sup> This is the stage at which the requisite connection between individual conscience and a shared moral code or framework is relevant. An individual conscience claim finds its strength and coherence in its attachment to a shared belief.<sup>111</sup> Although it is not essential to be part of

a majority group or even a recognized group, the asserted convictions must be rooted in *an identifiable set of values*, whether religious or not.

As an integral part of the sincerity test, the person must show, besides the genuineness of belief, that the conviction is connected with this moral framework. While courts should rightly be concerned with the cohesiveness and adequate identification of the rights and interests at stake, any inquiry into the *validity* (as opposed to the coherence and specification) of those beliefs would be inappropriate.

### **C. Forced to act against the dictates of conscience**

After the court establishes the seriousness of the conflict and the sincerity of conviction grounded in a shared code, the final enquiry is into the nature of the conflict: does the conflict have a moral value? This assessment cannot be entirely objective since 'what is moral' may vary from person to person. Diversity, pluralism, and broad-mindedness are values which are constantly referred to by the ECtHR and EU institutions as necessary elements for living together, fostering mutual understanding of each other and disagreeing well,<sup>112</sup> and any test must respect these essential differences.

Although the enquiry is necessarily subjective, courts should approach it to evaluate whether there is any moral value in the ability to abstain from the mandatory action, specifically examining what is being demanded of the individual claiming conscientious objection.

If the values underpinning the moral identity of a person are contradicted by behaviour required by law, then the person finds himself or herself in a critical situation that challenges his or her moral integrity. For example, a person who does not want to work on Pentecost should be distinguished from somebody who does not want to work that day because of simple convenience (for example, he wants to take piano lessons). The same can be held with regard to a person's refusal to be photographed bareheaded for a driving licence because he or she has a bad hair day and another person's opposition to appear bareheaded because her religion requires married female adherents not to show their bare heads in public. It follows that beliefs which are deeply related to conscience and which

have an essential role in structuring the moral identity of a person should be distinguished from preferences, tastes, opinions, and desires. Not taking piano lessons or having a bad picture in an official document certainly could cause one uneasiness or discomfort but would not harm the moral values and beliefs that fundamentally define the person concerned, and thus would not trigger a feeling of moral betrayal. Violations of core moral beliefs cause great harm to a person's deepest moral identity.

The fact that beliefs may change over an individual's lifetime does not undermine this value. As Judges Vučinić and De Gaetano reasoned in *Eweida and Others v. the United Kingdom*, conscience 'enjoins a person at the *appropriate moment* to do good and to avoid evil'. Therefore, the reference point for assessing conscientious objections is the refusal to perform an obligation, based on beliefs deeply and sincerely held at that moment in time. Courts should also look into the cogency, seriousness, and cohesion of the beliefs held at that moment in time and the moral value of the conflict created by the clash between these values and the legal obligation.

## 4) Options for Protecting Conscience in Practice

Once a conscience claim has been properly identified, the judicial or quasi-judicial bodies should proceed to analyze it. Since the ECtHR and the HRC have generally been unclear in their legal approach to conscience claims, this section sets out three options for protecting conscience claims in practice.

### A. Protecting conscience as a mirror image of freedom of religion or belief (Option 1)

Under this option, judicial or quasi-judicial bodies should assess conscience in the same manner in which they assess religion or belief. This generally means that once a conscience claim has been identified, then the bodies shall proceed to a three-pronged analysis. Firstly, it must be established whether there was an interference with freedom of conscience. Once an interference is identified, judicial or quasi-judicial bodies must establish whether it was prescribed by law (the legality condition) and aimed at the protection of public safety, order, health, morals, or the rights and freedoms of others (the legitimate aim condition). Lastly, judicial or quasi-judicial bodies should engage in a complex balancing test which involves an analysis of less restrictive means, necessity, proportionality, and the margin of appreciation.

#### 1. Establish the interference with freedom of conscience

The analysis would follow the model used for establishing an interference with freedom of religion or belief. This stage of the analysis has proven rather unproblematic in the jurisprudence of the ECtHR and the works of the HRC. The ECtHR and the HRC have identified, *inter alia*, an interference with freedom of religion or belief in the refusal to provide a meat-free diet to a Buddhist in prison,<sup>113</sup> the prohibition of wearing a cross openly at work,<sup>114</sup> and the obligation imposed on a Sikh to appear bareheaded in an official photograph.<sup>115</sup>

## 2. *Prescribed by law*

A precondition of any State action limiting the enjoyment of a legal right is that the action must have a basis in domestic law. This basis can represent regular laws and decrees, including enactments of lower-ranking statutes,<sup>116</sup> measures taken by professional regulatory bodies, pursuant to independent rule-making powers delegated to them by the Parliament,<sup>117</sup> judge-made law,<sup>118</sup> unwritten law,<sup>119</sup> and secondary sources<sup>120</sup> as long as it provides its subjects with an indication of what is adequate in the circumstances regulated by the legal rules and of the consequences entailed by their behaviour.<sup>121</sup>

This condition of legality does not refer only to the mere existence or enactment of the relevant legislation, but also to the quality of the law, 'requiring it to be compatible with the rule of law'.<sup>122</sup> The ECtHR has stated that legality requires, *inter alia*, that the law in question must be 'both adequately accessible to the individual and formulated with sufficient precision to enable him to regulate his conduct' (foreseeability).<sup>123</sup> Naturally, it would be impossible for laws to be absolutely clear and precise, to regulate all imaginable situations, because then they would become excessively rigid and long. In this regard, the ECtHR has noted that 'many laws are inevitably couched in terms which, to a greater or lesser extent, are vague.'<sup>124</sup>

The level of clarity and precision that domestic laws must have, and which, once again, cannot provide for every eventuality, depends on many factors, such as the specific type of legal instrument, the area that it regulates and also its addressees,<sup>125</sup> leaving it to the courts to interpret, clarify, and dissipate any remaining doubts concerning the content and application of a specific provision, in accordance with everyday practice.<sup>126</sup>

Another important feature of legality, besides accessibility and foreseeability, is the protection that must be afforded against arbitrary interference by public authorities.<sup>127</sup>

**3. *The measure restricting freedom of conscience must be aimed at the protection of public safety, order, health, morals, or the rights and freedoms of others***

Manifestations of conscience can be limited in the same manner in which religion or belief can be limited, namely by measures aimed at the protection of (public) order, safety, health, morals, or the rights and freedoms of others.<sup>128</sup> The limitations are designed to offer the legal framework under which the balance between State interests and individual rights can be properly struck.

Importantly, the limiting grounds must be assessed narrowly. Restrictions are not allowed on grounds other than the ones set out in Articles 18 (3) ICCPR and 9 (2) ECHR. Likewise, it is not sufficient if States simply indicate one of these grounds for limiting conscience claims: they must show that the danger to public safety, order, health, morals or the rights and freedoms of others is 'a real and not only hypothetical danger'.<sup>129</sup> The claim should be substantiated and should show precisely how the measure limiting freedom of conscience contributes to the protection of public safety, order, health, morals, or the rights and freedoms of others.

**4. *The balancing test***

If the measure allegedly constituting an interference is indeed prescribed by law and has a legitimate aim, courts engage in a balancing test. The ECtHR stated that 'it is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society"'.<sup>130</sup>

This is the most complex stage of the legal analysis, comprising different sub-tests, such as: proportionality, necessity (in a democratic society), pressing social need, margin of appreciation, and a consideration of possible less restrictive means. All these aspects 'are so interdependent, none ... can be examined convincingly in isolation.'<sup>131</sup>

Proportionality is the overarching principle at this stage, and consists of a three-prong test that assesses a) whether the measure is suitable to

achieve its objective, b) whether it is necessary, and c) whether “it excessively burdens the individual compared with the benefits it aims to secure.”<sup>132</sup>

The ECtHR authoritatively interpreted the condition of necessity in the context of Article 10, freedom of expression, in *Handyside v. the United Kingdom*, when it set out principles and guidelines that are common to a number of Convention rights, including freedom of thought, conscience, and religion. Necessity is, according to the Strasbourg Court, ‘not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”, and that rather it implies the existence of a “pressing social need” for the interference in question.’<sup>133</sup> However, national authorities make the initial assessment of the necessity of a measure.<sup>134</sup>

The ECtHR confirmed its holistic approach in *Dudgeon v. the United Kingdom*, when it analyzed the issue of necessity under Article 8, protecting private and family life. It concluded that the notion of ‘necessity’ is linked to that of a ‘democratic society’. It also stated that the limitation of a right cannot be considered “necessary in a democratic society”—two hallmarks of which are tolerance and broadmindedness—unless it is proportionate to the legitimate aim pursued.<sup>135</sup> In *Dudgeon v. the United Kingdom* the ECtHR linked the margin of appreciation given to national authorities with the democratic character of legislation.<sup>136</sup>

There have been arguments that conscientious objection (which, some argue, represents a private interest)<sup>137</sup> would actually endanger the greater public interest, if allowed. However, the correct analysis of the interests at stake is between the ‘part of the aim pursued by a law that would be affected if a legal exemption is recognized to objectors’, and the fundamental interest of protecting freedom of conscience.<sup>138</sup> Human rights, by their very nature, are anti-majoritarian in that they protect minorities from oppression by the majority. It is therefore entirely consistent with this framework to allow individuals to act in accordance with their conscience as against a duty otherwise mandated by law.

The balancing stage under this test would take into consideration the fundamental right of freedom of conscience, the rights and interests of

others and, in the case of institutions, their ability to pursue and realize their aims.

An interference with conscience rights should not be considered necessary or proportionate if it is only remotely connected to one of the legitimate aims mentioned by Article 9 (2) and 18 (3). For example, while the obligation to appear bareheaded in identity photographs might pursue the legitimate aim of public safety, State authorities should substantiate a) how this measure would facilitate the identification of persons who would always appear in public with their heads covered, and b) why certain religious headgear, such as a turban, would make the identification more difficult.<sup>139</sup>

Although this option is a mirror image of freedom of religion or belief, it does have the advantage of treating conscience claims separately from religion or belief. Naming conscience claims for what they are would improve the legal reasoning, by creating a distinct jurisprudence on the very specific topic of conscience rights. Applying a common approach to conscience, religion, and belief cannot bring legal precision.

Options 2 and 3 offer heightened attention to protecting the specificity of conscience claims in practice.

### **B. Protecting conscience by placing a presumption in favour of the objector and an obligation on the State to accommodate (Option 2)**

This option for approaching conscience claims closely resembles option 1, with the difference that the proportionality test is modified, in view of the high moral value of conscience-based claims.<sup>140</sup> Practically, this means that the framework for the evaluation of conscientious objection would be the same as regards the legality and the legitimate aim pursued by the conscience-limiting measure.

However, the proportionality assessment would differ, given a) the high moral value of conscience claims and their vital importance to the moral identity of the individual, and b) that the protection of conscience is not just an individual or private interest—citizens' freedom to live according

to their deeply held beliefs and to act in accordance with their conscience is of public interest to plural and democratic societies.

The way in which the proportionality test would differ is by placing a) a presumption in favour of the applicant that the State has interfered in a disproportionate way, and b) an obligation on the State to accommodate the objection. This affords conscience claims stronger legal protection than claims grounded in religion or belief. The interest is heightened for the applicant and, in practice, makes conscience claims more likely to succeed. A couple of notions are key to the proportionality test under this proposal.

The first one is the concept of reasonable accommodation. This has been developed under employment law (originally in the US and Canada) and provides that the employer has the duty to accommodate the religious employee as long as the accommodation does not cause the employer 'undue hardship' (US model)<sup>141</sup> or unless to do so would be impossible (Canadian model).<sup>142</sup> The concept has been developed because, despite the appearance of neutrality of certain rules or laws, they have a discriminatory effect to members of a given group:

It is precisely to reestablish equity that exemptions or adjustments are sometimes necessary (adjusting the work schedule or work space, granting time off for religious holidays, allowing people to wear conspicuous religious symbols).<sup>143</sup>

In assessing what 'undue hardship' means, courts have taken into account a variety of elements, such as financial cost, disruption of collective agreements, the size of the employer, safety issues, and morale problems for other employees.<sup>144</sup>

[T]he State should be bound to provide a *specific* reason for rejecting the accommodation of conscience claims, instead of assuming axiomatically that denying legal exemptions to objectors is always necessary to preserve the public interest embodied in the relevant law.<sup>145</sup>

Applying the concept to conscientious objection, it is important to determine whether the relevant legal obligation is *fungible*, i.e. when the act required from the objector could easily be performed by another person without negatively affecting the public interest involved.

This shows that the general arguments of ‘maintaining access’ or ‘all public servants should perform all tasks’ are inadequate to shift the heavy burden placed on the State to justify the interference with the fundamental right to freedom of conscience.

Furthermore, it is essential to assess whether there are less restrictive means available.<sup>146</sup> As the ECtHR has emphasized:

[F]or a measure to be regarded as proportionate and as necessary in a democratic society, the possibility of recourse to an alternative measure that would cause less damage to the fundamental right at issue whilst fulfilling the same aim must be ruled out.<sup>147</sup>

There are clear benefits of the examination of less restrictive means. Firstly, the analysis pays proper attention to ‘the importance of the right and the effect of the interference’.<sup>148</sup> Secondly, it tackles the problem of overly broad governmental measures. Overall, this reflects a more appropriate approach to safeguarding the high moral values on which conscience claims are grounded. By placing a presumption in favour of the conscientious objector that there was an interference with his or her fundamental right to freedom of conscience, the interest at stake is heightened. By so doing, the test reflects the high importance that the values at issue have for the applicant. This would not ordinarily be the case under Article 9 ECHR and Article 18 ICCPR.

### **C. Protecting conscience in a strengthened manner: Once qualified as conscience, absolute protection (Option 3)**

Given that conscience claims are a narrow category deserving of the highest possible legal protection, it could be argued that any limitations on conscience would inflict unlawful moral harm. Consequently, once a claim has been properly identified as a conscience claim, it deserves absolute protection. The legal analysis does not engage in the balancing process

(necessity, proportionality, less restrictive means), since conscience claims have an absolute character, as opposed to the relative character of other rights and interests with which they may clash.

The advantage of this option is that it offers conscience claims the strongest degree of protection. It also pays due attention to the fact that limitations on conscience claims, as opposed to 'belief' or 'religion' claims that have not met the threshold of conscience, necessarily cause irreparable moral damage. If deeply held moral beliefs were conflicted by an act required by law, then that would bring about a sense of moral betrayal. This would harm the values and beliefs that fundamentally define the person concerned. Given that the transgression of such core beliefs (either religious or non-religious) violates the deepest moral structure of the individual, they should be more stringently protected.

The practical difference between a belief that is 'accommodated' under option 2 and one that is protected absolutely under option 3 is that, under the latter, the State cannot merely argue that it *tried to accommodate* or that it *attempted to balance* the rights and interests concerned. Since conscience claims are absolute, they prevail over other rights and interests. In case of a conflict of rights, conscience claims must be protected.

The problem with this approach appears when conscience claims are advanced based upon a flawed understanding of conscience. For example, destructive actions (the killing of persons, the destruction of cultural or religious sites) cannot be performed and legitimized in the name of conscience. In view of such challenges and possible misrepresentation of conscience claims, a conceptual framework and legal test for the identification of conscientious objections are greatly needed in practice.

## 5) Areas Where Freedom of Conscience Is Under Attack

Despite its fundamental value, freedom of conscience is under attack around the world. The three examples on which this paper will focus are anti-conversion laws, legislation in the provision of goods and services, and employment. It will firstly highlight clear violations of conscience in the form of anti-conversion laws and secondly it will show that attacks on conscience rights are not a 'far away' issue as they also occur in Europe. The protection of the fundamental right to freedom of conscience varies to a significant degree in Europe, and is undermined especially in the areas of the provision of goods and services and employment.

### A. Anti-conversion laws

Anti-conversion laws (i.e. laws that make religious conversion and peaceful dissemination of religion or belief a criminal offence) are rapidly spreading in South Asia. They are a direct and grave encroachment upon both freedom of religion and freedom of conscience as they prohibit people from acting according to their deeply held convictions by choosing a new religion. The following examines the anti-conversion laws in India and Nepal and their effects on freedom of conscience.

The Comprehensive Peace Agreement of 2006, which ended hostilities between the Government and the Communist Party (Maoist) in **Nepal**,<sup>149</sup> led to the election of the first and second Constituent Assemblies (April 2008 and November 2013). These were responsible for creating a political system that fully complies with universally accepted fundamental rights.

In July 2015 the Constituent Assembly agreed on a text for the Constitution of Nepal and submitted it for public consultation. The text, which was adopted shortly thereafter, included controversial language in section 26:

- (1) Each person shall be free to profess, practice, and preserve his/her religion according to his/her faith.

...

(3) While exercising the right as provided for by this Article [freedom of thought, conscience and religion], no person shall act or make others act in a manner which is contrary to public health, decency and morality, or behave or act or make others act to disturb public law and order situation, or convert a person of one religion to another religion, or disturb the religion of other people. Such an act shall be punishable by law.<sup>150</sup>

Section 26 (1) only makes reference to the right to profess, practice, and preserve religion but not to *choose*, to *change*, or to *renounce* religion. While this has an obvious and direct effect on freedom of religion, it also materially impacts the narrower subcategory of freedom of conscience, as it aims to prevent people from freely choosing a set of beliefs (either religious or non-religious); this obviously hinders their ability to make a decision in accordance with their conscience as to what is right and what is wrong.

Since citizens are not allowed to freely choose, change or leave their religion altogether, they are 'trapped' within a religion or set of beliefs that may not be the one embraced by their conscience. The impairment of a person's freedom to maintain or change his or her religion or belief in accordance with his or her conscience equates to coercion. In this case, the freedom to profess, practice, and preserve religion is illusory. As the UN Special Rapporteur on freedom of religion or belief has stated:

[T]here is a clear prohibition under international human rights law of coercion to change or maintain one's religion ... the term 'coercion' ... is to be broadly interpreted and includes ... prohibition of conversions. Since the choice of religion or belief is part of the *forum internum*, which allows for no limitations, a general prohibition of conversion by a State necessarily enters into conflict with applicable international standards. A law prohibiting conversion would constitute a State policy aiming at influencing individual's desire to have or adopt a religion or belief and is therefore not acceptable under human rights law.<sup>151</sup>

Nine States in **India** have 'Freedom of Religion' Acts which regulate religious conversions.<sup>152</sup> Although these laws are deceptively called 'Freedom of Religion' Acts, they are in fact anti-conversion laws that closely resemble each other.<sup>153</sup>

These laws are built on the assumption that a) all religious conversions are questionable and must be scrutinized by the State, and b) that minority Christians and Muslims use duress, deception or coercion to convert Hindus and threaten public order.<sup>154</sup>

The 'Freedom of Religion' Acts give the domestic administration wide powers to regulate conversions, which can gut freedom of conscience and freedom of religion completely at the direction of the State. Those who wish to convert must announce their intention and the reasons for conversion to the district magistrate (the representative of the government). By virtue of this, the State is empowered as an arbiter of conscience who decides whether conversions are valid or not.

In the report of her 2008 mission to India, the UN Special Rapporteur on freedom of religion or belief noted that all of these laws include in the definition of the use of force any 'threat of divine displeasure or social excommunication'.<sup>155</sup> She was 'deeply concerned that laws and bills on religious conversion in several Indian States are being used to vilify Christians and Muslims.'<sup>156</sup>

If the 'Freedom of Religion' Acts are repealed, there is a fear that many Dalits would embrace Christianity or Islam, in exercise of their freedom of conscience.

The anti-conversion laws in India lead to infringements of conscience, discrimination, and hostility against and isolation of adherents of minority religions. They amount to de facto coercion, as understood by the HRC General Comment No. 22, which refers, in relation to coercion, to 'policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment.'<sup>157</sup>

The case of anti-conversion laws in Nepal and India shows the overlap between freedom of conscience and freedom of religion in a profound way: freedom to adopt a religion and to act according to one's deeply held beliefs.

Anti-conversion laws fundamentally impinge upon both of them, to the extent that it makes illusory the freedom to profess and practice religion and to act according to the most fundamental moral and religious beliefs.

## **B. Provision of goods and services**

Freedom of contract constitutes the basis of civil law. It means that individuals and groups are free to enter into contracts – or refuse to do so – with whomever they choose, without governmental interference. While the general freedom to contract (or not) should be the starting point in any commercial setting, there are interactions where a heightened degree of protection may also be found given the respect which should be afforded to freedom of conscience. Citizens should enjoy their freedom of conscience, which may, sometimes, be the motivation for refusing to enter into a contract. In other words, citizens should not be forced by law to choose between their conscience on the one hand and personal or professional ruin on the other.

With the expansion of so-called equality legislation, the provision of goods and services has been put under ever closer governmental control. It is counterproductive for such legislation to condemn a provider of goods or services for not entering into a contract with someone and not performing acts which directly violate his or her deeply held beliefs. Somewhat incomprehensibly, while there may be dozens of legitimate reasons for exercising the freedom not to contract with someone, such as lack of time and lack of competence, 'equality' legislation concerning the provision of goods and services can go so far as to rob business owners of that freedom in situations involving serious moral conflicts.

The Equal Treatment Directive<sup>158</sup> demonstrates the negative effects that such legislation has on freedom of conscience. The Directive has been under negotiation by the Council of the EU for more than ten years, and has failed to achieve the required unanimity of Member States. If it is adopted, it will become binding in all 27 EU Member States as a 'minimum standard'.<sup>159</sup> This proposal is emblematic of the threats posed to freedom of conscience. It closely resembles national laws already in place in the United Kingdom,

under which many cases dealing with violations of the consciences of providers of goods and service have been brought to trial.<sup>160</sup>

The proposed Directive seeks to eradicate discrimination on the grounds of religion or belief, disability, age, and sexual orientation, which on its face seems to be a laudable effort. However, in so doing, it endangers fundamental rights including freedom of conscience in a number of ways.

Firstly, the Directive lacks guarantees to protect freedom of conscience as a fundamental human right and does not provide for accommodation of religion or belief, in cases where the apparently neutral provisions of the Directive would in fact produce effects detrimental to freedom of conscience. Consequently, the Directive would open the door to citizens being forced to promote and endorse messages and to participate in acts which would violate their deeply held beliefs (that form an essential part of their moral identity). In the artistic sector, for example, service providers could be forced to promote and endorse messages with which they profoundly disagree,<sup>161</sup> and to participate in acts that directly contradict their sincerely held beliefs. Under the law, they would be left with a binary choice: either face professional ruin or violate deeply held beliefs.

In order to illustrate this, two cases which have occurred as a result of this kind of equality legislation will be briefly outlined.

### **1. Case of Hall and Preddy v. Bull and Bull<sup>162</sup>**

This case concerned a British couple who were found guilty of discrimination. Peter and Hazelmary Bull ran a guesthouse in their own home in Cornwall, UK. Although they welcomed all to their home, they had a longstanding policy, based on their deeply held beliefs about marriage, of offering double rooms only to married couples.

The hotel website explained the policy:

Here at Chymorvah we have few rules, but please note that as Christians we have a deep regard for marriage (being the union of one man to one woman for life to the exclusion of all others). Therefore, although we extend to all a warm welcome to our home, our double bedded accommodation is not available to unmarried couples. Thank you.

In accordance with their longstanding policy, Mr and Mrs Bull told an unmarried same-sex couple in a civil partnership that they could not accommodate them in a double room but instead offered them two single rooms. The couple accused Mr and Mrs Bull of discrimination on the grounds of sexual orientation, with the support of the government-funded Equality and Human Rights Commission. The case ended up at the Supreme Court, which ordered Mr and Mrs Bull to pay the couple £3,600 in compensation.<sup>163</sup> The court found Mr and Mrs Bull's actions amounted to direct discrimination. Mr and Mrs Bull were subject to penalties, faced professional ruin, and ultimately lost their case because they decided to act in accordance with the mandates of their conscience in relation to two guests whom they offered alternative accommodation. Although their actions stemmed from sincerely and deeply held moral beliefs, which were reflected in their longstanding policy, the court did not properly evaluate freedom of conscience.

## **2. Case of Lee v. Ashers Baking Company Ltd and Others**

Ashers, a family-run bakery in Northern Ireland, was asked to make a cake with a message which read 'Support Gay Marriage'. The McArthur family, who owns the bakery, said that they would make the cake but that they could not write this phrase on it because doing so would compromise their religious beliefs. The family was later found guilty of discrimination on the grounds of sexual orientation.<sup>164</sup>

The family said that their refusal was not based on the customer's sexual orientation, of which they were not aware. It was instead based on the message conveyed by the cake, which conflicted with their deeply held beliefs. As the family's lawyer outlined, 'it would be the antithesis of democracy'<sup>165</sup> if people were compelled to promote a cause which would violate their conscience.

In October 2016, the Court of Appeal in Northern Ireland, upholding an earlier decision by the District Court,<sup>166</sup> ruled that the family-owned bakery company in Northern Ireland was required to decorate the cake with the slogan, despite claims of conscience.<sup>167</sup> This decision was appealed to the UK Supreme Court, which unanimously reversed the Northern Ireland Court

of Appeal's finding and held that there was no discrimination on grounds of sexual orientation.<sup>168</sup> The Supreme Court reasoned that while the refusal to express the message 'Support Gay Marriage' on the cake had something to do with the sexual orientation of some people, this did not amount to less favourable treatment on grounds of sexual orientation.<sup>169</sup>

In view of the above, it is clear that so-called equality legislation may create intricate conflicts of conscience with even courts at the highest levels disagreeing on the correct approach. Citizens should not be forced by law to choose between their business and their conscience. States should not embrace the premise that individuals may be subjected to penalties and other significant consequences, either personal or professional, if they refuse to act in violation of their conscience and thus do what they believe to be morally wrong. The government's role is not to regulate or validate the beliefs and worldviews of its citizens—be they religious or secular—but to guarantee that there can be free exchange and even confrontation within the boundaries of public order, safety, morals, and public health. A democratic society must accommodate different worldviews, religions and beliefs and make sure they can live according to their convictions:

The legal guarantee of conscientious objection cannot discriminate in principle between the diverse moral values that inspire each individual conscience—just as the State's protection of freedom of expression cannot depend on the agreement or disagreement with the ideas of each person.<sup>170</sup>

Freedom of expression covers a multitude of opinions, expressions that the State must guarantee by virtue of the international human right of freedom of expression. The guarantee of fundamental rights is not intended to legitimize and endorse certain beliefs, opinions, or expressions, but to protect and preserve vital spheres of autonomy for the individual. Any State interference with personal autonomy and the moral values that underpin individual conscience should be justified. This is the cornerstone of a democratic and pluralistic society.

This paper suggests that, by using the options for addressing conscience claims outlined above, the legal approach to these cases would have provided a more specialized and appropriate treatment of the issues. Firstly, judges in *Hall and Preddy v. Bull and Bull* and in *Lee v. Ashers Baking Company Ltd and Others* (District Court and Court of Appeal in Northern Ireland) should have asked the following question: have the Bulls and the McArthurs been compelled to engage in activity that is in serious conflict with their genuinely held religious or other convictions, so as to force them to act against the dictates of conscience? If this question had been answered in the affirmative, then authorities could have either:

- Treated conscience claims in the same manner as religion or belief claims (option 1)—though having acknowledged that it is a conscience claim and thereby increasing the quality of the legal reasoning. In so doing, authorities would engage in the usual balancing exercise of the rights and freedoms at stake, including a consideration of the necessity, proportionality and less restrictive means; or
- Placed a) a presumption in favour of the Bulls and the McArthurs that the State interfered in a disproportionate way, and b) an obligation on the State to accommodate their conscience rights (option 2). Given the other options available, both at the Bulls' home and other accommodations, the court did not strike a fair balance between the interests at stake. This is along similar lines to the approach advocated, with regard to *Preddy v. Bull*, by Baroness Hale in her address on 'Religion and Sexual Orientation: The Clash of Equality Rights':

[I]nstead of all the technicalities which EU law has produced, would it not be a great deal simpler if we required the providers of employment, goods and services to make reasonable accommodation for the religious beliefs of others?<sup>171</sup>

- Assuming that the Bulls and McArthurs could demonstrate the moral nature of their claim, concluded that any interference would be unlawful under the absolute model (option 3).

Therefore, 'equality' legislation should be amended by at least including provisions regulating reasonable accommodation for religion or belief. This is necessary in order to offer protection for the rights of conscience of providers of goods and services. Such an approach ultimately respects and preserves diversity in society by allowing goods and service providers to be free to have differing convictions and worldviews.

### C. Employment

The protection afforded to conscience rights appears to be equally problematic in the employment arena. As opposed to commercial professionals and entrepreneurs (such as the Bulls and the McArthurs), employees are in a subordinate position, in which they must comply with the employers' corporate strategies, vision, and overall policies, within the boundaries of public safety, order, health, morals, and the fundamental rights and freedoms of others.

Should a registrar's refusal, on conscience grounds, to carry out same-sex civil partnerships be granted by the employer? If so, does the employer have the *obligation* (and not only the flexibility) to seek appropriate means to accommodate the conscience claims of his or her employees?<sup>172</sup> And how hard does an employer have to try? Would the answers be the same if the employer decided to pursue a so-called 'secular' policy that disallowed all religious manifestation?

In this area, the degree of protection varies considerably across European countries. For the purposes of this section, we focus on freedom of conscience in the health sector, namely the right to conscientious objection to a number of medical procedures that have deep moral implications, such as abortion and euthanasia.

Professional freedom is one of the cornerstones of the medical profession. This entails being able to employ one's professional knowledge

and abilities and, on this basis, to reach a professional judgment and to put it into practice. Professional judgments are not reached in a vacuum, in total isolation from moral judgment. Judgments of conscience are also involved in medical decision making. They are expressed through the concrete determination of how to proceed in a particular situation, of what one ought to do: to perform a specific procedure, to refer the case, to provide specific medication, etc. This argument is even more compelling with regard to life-ending procedures, to which medical staff might conscientiously object, where conscience claims are based on religious or non-religious beliefs.

PACE Resolution 1763 (2010), set out above,<sup>173</sup> reflects the situation in many countries that have already explicitly recognized the right to conscientious objection from abortion procedures. Twenty out of 27 EU Member States have *specific* conscience laws for medical professionals,<sup>174</sup> and almost all protect it in practice.

In life-ending cases, there is no fundamental right that opposes the right to conscientiously object. For example, there is no international right to abortion. Abortion is not mentioned in any international human rights treaty. Furthermore, both the 1994 International Conference on Population and Development in Cairo and the 1995 Fourth World Conference on Women in Beijing affirmed that governments have an obligation to eliminate and reduce abortions and to help women avoid repeated abortions.<sup>175</sup>

Although conscience is protected in the ICCPR and other international human rights treaties, while abortion is not even mentioned, the right to conscientiously object in the health sector is not always upheld. The ECtHR held that not providing for conscientious objection in the military field 'imposed on citizens an obligation which had serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who ... refused to perform military service,'<sup>176</sup> and, in so doing, the national authorities failed to strike a fair balance between the interests of society and the interests of the applicant. *A fortiori* in the context of medical staff and the performance of abortions or euthanasia, the failure of a State actor to recognize conscientious objection runs contrary to the obligation to strike a fair balance between the interests of

society and those of the medical staff, given that their objection is grounded in the same respect for the dignity of all human life as the military objectors have. Furthermore, the existence of schemes of accommodation makes this argument even more compelling.

The need for such protections—at the national, regional and international levels—is increasingly important. In recent years a growing number of medical professionals have been given an ultimatum: either violate your deeply held convictions about not taking human life, or risk your livelihood and careers by staying true to your convictions. The following three cases represent this problem in European countries that have failed to protect the right of conscientious objection adequately.

### ***1. Case of Concepta Ward and Mary Teresa Doogan***

In 2012 two highly experienced midwives, Ms Concepta Ward and Ms Mary Teresa Doogan, were required by their employer, NHS Greater Glasgow and Clyde Hospital, to supervise abortion procedures as part of their duties. As devout Roman Catholics who believe abortion is the taking of innocent unborn life, the women could not violate their conscience; therefore, they refused to participate in abortion procedures in any way. Despite very clear and explicit language excusing medical staff from performing abortions for reasons of conscience under paragraph 4 of the Abortion Act of 1967, nurses Ward and Doogan lost their lower court case. The case was reversed on appeal when the appellate judges held: 'In our view the right of conscientious objection extends not only to the actual medical or surgical termination but to the whole process of treatment given for that purpose.'<sup>177</sup> However, the case went to the UK Supreme Court, where Ms Ward and Ms Doogan again lost. The court based its decision on the understanding of 'participation' in abortion procedures, which excluded, in the Supreme Court's reasoning, 'supervision' of abortion. While conscientious objection to participation in abortion procedures was recognized and protected, the same was not extended to supervision of abortion.<sup>178</sup>

At least the latter two options proposed above would allow for conscientious objection in supervisory cases, just as they would for direct

participation. Both cases involve serious moral conflict and courts should not be able to decide which moral conflicts deserve protection.

## **2. Case of Dr Bogdan Chazan**

Dr Bogdan Chazan, a preeminent Polish obstetrician and gynaecologist recognized throughout Poland for his medical expertise, was fined and fired from his position as Director of Obstetrics and Gynaecology at the Holy Family Hospital in Warsaw for refusing to perform an abortion on a child diagnosed with potentially severe brain damage. Dr Chazan, also a Professor at Warsaw University Medical School and a former National Consultant in Obstetrics and Gynaecology, is a devout Roman Catholic who sincerely believes that abortion is the intentional killing of an innocent human child.

Despite Dr Chazan's impeccable medical record, the Mayor of Warsaw, Hanna Gronkiewicz-Waltz, called for the cancellation of Dr Chazan's contract with the hospital because of his refusal, disregarding his right to conscientious objection. Dr Chazan won before the Grand Chamber of the Polish Constitutional Tribunal, which found that the obligation to act contrary to one's conscience in 'urgent situations' (as provided by the Polish law) was too vague and thus unconstitutional. The Grand Chamber also reaffirmed the high value of freedom of conscience for medical staff, which must be respected even if it is not expressly included in a statute.<sup>179</sup>

## **3. Case of midwives Linda Steen and Ellinor Grimmark**

In March 2015, Swedish midwife Linda Steen was denied employment as a midwife because she objected to assisting with abortions for reasons of conscience.<sup>180</sup> After explaining her position to the nursing unit manager, the Women's Clinic of Nyköping refused to hire Ms Steen. She received a letter from the management stating: 'It is not our policy or our approach to leave any opening for a conscience clause. We have neither the ability nor the intention to work with such exceptions.' The manager went even further by contacting another potential employer about Ms Steen's convictions, who

consequently cancelled Ms Steen's interview. Ms Steen lost her case before the courts in Sweden.

Ellinor Grimmark was also refused employment by a number of medical clinics in Sweden because of her pro-life views. Ms Grimmark applied for a position as a midwife at Höglandssjukhuset women's clinic in 2013. After initially offering the job, the clinic then rescinded their offer when Ms Grimmark explained she could not, in good conscience, participate in abortions. As a midwife and a Christian, she believed her participation in abortion to be morally wrong. The head of the maternity ward left her a telephone message saying that 'she was no longer welcome to work with them,' and questioned 'whether a person with such views actually can become a midwife.'

A few months later, Ms Grimmark tried to obtain employment with Ryhovs women's clinic, which told her a person who refuses to perform abortions does not belong at a women's clinic. Ms Grimmark eventually found a job at Värnamo Hospital, but before she was able to begin working, the hospital learned she had filed a complaint against the first clinic and withdrew the job offer. Ms Grimmark was back where she started. Recognizing her experiences had raised important questions about the protection of conscience in the medical profession, Ms Grimmark decided to pursue legal action. The district court of Jönköping County Council ruled against her, and to make matters worse, the court ordered that she pay the government costs of more than SKr 1m (EUR 100,000). On 12 April 2017 her appeal to the Swedish Labour Court was denied.

On 14 June 2017, Ellinor Grimmark filed her application with the ECtHR against Sweden.<sup>181</sup> On 12 March 2020, the ECtHR found the applications of Ms Grimmark and Ms Steen inadmissible in a decision standing seemingly at odds with the Court's position in previous cases, including those dealing with military service. While the ECtHR admitted that Sweden had interfered with the rights of the midwives, it failed to take up the case, missing an opportunity to safeguard freedom of conscience in practice.

All these cases highlight the conflict of conscience for medical professionals, who have to choose between violating their moral beliefs and risking their careers.

This paper suggests that, by using the options for addressing conscience claims outlined above, these approaches would have provided a more tailored and appropriate consideration of the issues involved in the cases given the importance of conscience to both the individual and society.

Firstly, to determine whether or not these are cases of conscience, the authorities should have asked the following question: have the medical staff been compelled to engage in activity that is in serious conflict with their genuinely held religious or other convictions, so as to force them to act against the dictates of their consciences? This legal test was met, since a) Dr Bogdan Chazan, Ms Linda Steen, Ms Ellinor Grimmark, Ms Concepta Ward, and Ms Mary Teresa Doogan faced serious conflicts; b) they genuinely held convictions of sufficient cogency, seriousness, cohesion, and importance which were linked in all cases to a code acting as an external check on their behaviour; and c) they were forced to act against the dictates of their consciences, meaning that the conflict had a moral value.

Therefore, employing the options for protection of conscience claims outlined by this paper, the authorities should have either:

- Treated conscience claims in the same manner as religion or belief claims while considering the high value of conscience (option 1). In so doing, authorities should have engaged in the usual exercise; or
- Placed a) a presumption in favour of the medical staff that the State interfered in a disproportionate way, and b) an obligation on the State to accommodate conscience rights (option 2). Dr Chazan's, Ms Ward's and Ms Doogan's conscientious objections were not recognized and protected despite the fact that viable alternatives were available (other medical staff participating in abortion procedures). Indeed, they had worked without problem

for their employers for decades without supervising abortion procedures; or

- Recognized that there had been a violation of conscience, since the request for the medical staff to perform life-ending procedures directly contradicted the dictates of their consciences and, if pursued, would have inflicted excessive moral harm on them (option 3).

By not allowing health professionals to exercise their consciences in morally problematic situations, States not only encroach upon professionals' conscience, but also jeopardize the proper provision of healthcare services. Fewer people will be willing to become healthcare professionals if they cannot also adhere to what their consciences require of them.

## 6) Conclusions

Freedom of conscience is an international human right enshrined in major human rights conventions and interpreted by international tribunals. While tackling conscientious objection to military service, both the ECtHR and the HRC put forward wider principles applicable to other types of conscientious objection, according to which States should protect citizens' deeply and sincerely held convictions, and should not impose penalties on them, particularly when there are viable alternatives available.

Despite its fundamental value and its recognition in the major human rights treaties and subsequent documents, soft law instruments and jurisprudence, the protection given to conscientious objectors *in practice* has proven insufficient and ineffective. One of the main reasons for this is the lack of delineation of conscience rights in practice, as judicial and quasi-judicial bodies have preferred to tackle conscience claims under the all-encompassing phrase 'freedom of thought, conscience, religion, and belief'. This has blurred the lines between different legal categories and failed to properly take into consideration the specificities of conscience claims.

Conscience claims are deeply grounded in 'core or meaning-giving convictions and commitments', which have a central place in the individual's moral identity.<sup>182</sup> The transgression of such core beliefs violates the deepest moral structure of the individual, and, for this very reason, conscience claims must be distinguished from other personal preferences, options or beliefs, and must be afforded higher protection.

Taking this into consideration, this paper has sought to improve the legal reasoning by a) putting forward a legal test for the identification of conscientious objections, and b) advancing three options for protecting conscience claims in practice.

This paper has demonstrated how conscience rights are under attack in a number of areas, such as anti-conversion laws, the provision of goods and services, and employment. Conscientious objectors face a serious internal conflict: follow either the dictates of the State or the dictates of

their consciences. Either way, there is a heavy price to pay: either material punishment by the law, or moral punishment.

Punishing medical staff for their opposition to life-ending procedures or entrepreneurs for establishing commercial policies in accordance with their deeply held moral beliefs is a direct attack on freedom of conscience. It differs only by way of degree from anti-conversion laws in South Asia. In India, once a person chooses Christianity or Islam according to his or her conscience, he or she loses privileges provided by the government to oppressed classes, such as access to education and jobs.

The price exacted for following one's deeply held moral beliefs has been dismissal from employment, high financial penalties, bankruptcy, loss of reputation due to negative media coverage, and social stigma. These are not the hallmarks of a free nor diverse society. This paper has attempted to chart a better course through these complex questions that maximizes the right to freedom of conscience which is enshrined in international human rights law.

## 7) Recommendations

- The threshold for establishing conscience claims should be: has an individual been compelled to engage in activity that is in serious conflict with his or her genuinely held religious or other convictions, so as to force him or her to act against the dictates of conscience?;
- Once a conscience claim has been properly identified, the judicial or quasi-judicial bodies should proceed to analyze it as a self-standing legal category, instead of subsuming it to the general 'freedom of thought, conscience, religion or belief';
- Conscience claims should be recognized as high claims, constituting a narrow category entitled to strong protection;
- States and international organizations should acknowledge that fostering an open, pluralistic, and inclusive society, which is based on the fundamental right of freedom of conscience, is a key priority. Being able to 'disagree well' is an indispensable element of a democratic society;
- Legislators should pay due attention to the plurality of moral views in society and should enact legislation that would avoid such conflicts as much as possible;
- States, national and international courts, and quasi-judicial bodies should refrain from legitimizing certain beliefs to the exclusion of others. Authorities should accept 'the ideology of the persons concerned once such ideology has been clearly made out', provided that the beliefs at issue represent an expression of a 'coherent view on fundamental problems' or 'views that attain a certain level of cogency, seriousness, cohesion and importance';<sup>183</sup>
- States should accommodate citizens' deeply and sincerely held convictions and should not impose penalties on them, particularly where there are viable alternatives available;

- States should ensure that their domestic legislation provides for adequate guarantees and protection of freedom of conscience in all areas, including the provision of goods and services and medical procedures. Likewise, States should put in place measures and strategies to prevent violations of freedom of conscience and to ensure accountability when such violations occur, in particular by carrying out effective investigations;
- Since reasonable accommodation of conscience claims increases respect for fundamental rights and ensures pluralism, tolerance, and intercultural understanding in an ever-increasingly diverse society, lawmakers should recognize the concept of reasonable accommodation and include it in relevant pieces of legislation, especially in the context of anti-discrimination legislation;
- Law-making institutions and governments should ensure that legislation does not impose upon citizens a binary choice—either a violation of their conscience or professional ruin;
- States should ensure robust protection of freedom of conscience in the workplace, in the provision of goods and services and in the medical field;
- To provide particular visibility to the issue, governments and institutions which appoint a Special Envoy (or equivalent) on freedom of religion or belief should ensure their mandates address the issue of freedom of conscience. In particular, the EU should prolong and solidify the position of the Special Envoy for the promotion of freedom of religion or belief outside the EU, as called for in the Resolution on the systematic mass murder by ISIS of 4 February 2016. The institutionalized position would strengthen the effectiveness and protection of freedom of conscience in the EU's external action, notably by deepening Union cooperation, country monitoring and reporting and dialogue with third countries,

relevant partners, civil society, and international and regional organizations and through action in relevant international fora;

- States should comply with their international obligations regarding freedom of thought, conscience, and belief and should therefore repeal anti-conversion provisions. Every person should enjoy the right to adopt, to freely change religion or belief and freedom, either alone, or in community with others, and to peacefully spread religion or belief.

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## Endnotes

- <sup>1</sup> Immanuel Kant, *Metaphysics of Morals* (1797)
- <sup>2</sup> Javier Martínez-Torrón, 'Protecting Freedom of Conscience Beyond Prejudice' in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015) 192
- <sup>3</sup> Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press 2011) 76
- <sup>4</sup> Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press 2011) 90
- <sup>5</sup> The inner realm entails that a person is free to hold whatever beliefs he or she might choose. The external realm comprises of *manifestations* of conscience. For example, a person is free to believe that abortion is the taking of innocent life (inner realm). The refusal to perform abortion is a manifestation of such a belief (external realm).
- <sup>6</sup> Thomas Aquinas, *Summa Theologica* (1265-1274) Article 13
- <sup>7</sup> *Kokkinakis v. Greece* App No 14307/88 (25 May 1993) 31
- <sup>8</sup> Nevertheless, there has to be strong shared understanding of certain conduct that must be permitted or proscribed, for example, murder, free speech. Without shared understanding of these basics, it would be difficult, if not impossible, to have a functioning society.
- <sup>9</sup> The Dialogue is based on Article 17 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. See Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47
- <sup>10</sup> European Commission, 'Commission brings together non-confessional organisations to discuss "Living together and disagreeing well"' (*Press Release Database*, 2 June 2015) <[http://europa.eu/rapid/press-release\\_IP-15-5078\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5078_en.htm)> accessed 3 March 2016
- <sup>11</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)
- <sup>12</sup> Louis Henkin, 'International Law: Politics, Values and Functions' in Henry Steiner et al. (ed), *International Human Rights in Context* (Oxford University Press 2008) 136
- <sup>13</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Article 1 (emphasis added)
- <sup>14</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGA Res 35/55 (25 November 1981)
- <sup>15</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGA Res 36/55 (25 November 1981) preamble (emphasis added)
- <sup>16</sup> UNGA Res on Elimination of all forms of religious intolerance 48/128 (20 Dec 1993) 1
- <sup>17</sup> UNGA Res on Elimination of all forms of religious intolerance 48/128 (20 Dec 1993) 8
- <sup>18</sup> UN, 'Status of the ICCPR as at 8 February 2016' (*United Nations Treaty Collection*) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en)> accessed 3 March 2016
- <sup>19</sup> UN Human Rights Committee, 'General Comment No. 22' in 'Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies' (1993) UN Doc HRI/GEN/1/Rev.1 at 35 Article 18
- <sup>20</sup> UN Human Rights Committee, 'Comments on Tunisia' (1994) UN Doc CCPR/C/79/Add.43 paragraph 20
- <sup>21</sup> UN Human Rights Committee, 'General Comment No. 22' in 'Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies' (1993) UN Doc HRI/GEN/1/Rev.1 at 35 Article 1 (emphasis added)
- <sup>22</sup> UN Human Rights Committee, 'General Comment No. 22' in 'Compilation of General

- Comments and General Recommendations Adopted by the Human Rights Treaty Bodies' (1993) UN Doc HRI/GEN/1/Rev.1 at 35 paragraph 8
- <sup>23</sup> UN Human Rights Committee, 'General Comment No. 22' in 'Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies' (1993) UN Doc HRI/GEN/1/Rev.1 at 35 paragraph 8
- <sup>24</sup> Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001) 137
- <sup>25</sup> While the German and Italian translations of Article 10 (2) EU Charter explicitly limit the scope of conscientious objection to military service, the French translation does not provide for this restriction.
- <sup>26</sup> Javier Martínez-Torrón, 'Protecting Freedom of Conscience Beyond Prejudice' in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015) 195
- <sup>27</sup> Council of the European Union, 'EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief' (Foreign Affairs Council meeting Luxembourg, 24 June 2013) paragraph 21 <[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/137585.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137585.pdf)> accessed 3 March 2016
- <sup>28</sup> Council of the European Union, 'Conclusions on Intolerance, Discrimination and Violence on the Basis of Religion or Belief' (adopted at the 3069th Foreign Affairs Council meeting in Brussels on 21 February 2011) <[http://eu-un.europa.eu/articles/en/article\\_10692\\_en.htm](http://eu-un.europa.eu/articles/en/article_10692_en.htm)> accessed 3 March 2016
- <sup>29</sup> Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide [2014]OJ L77/85-94, recital 11
- <sup>30</sup> Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide [2014]OJ L77/85-94 Article 2 (1) (b) (v)
- <sup>31</sup> European Parliament, 'Resolution of 20 January 2011 on the situation of Christians in the context of freedom of religion' [2012] OJ C136 E/53-56, recital A
- <sup>32</sup> European Parliament, 'Resolution of 20 January 2011 on the situation of Christians in the context of freedom of religion' [2012] OJ C136 E/53-56, recitals D and N
- <sup>33</sup> Council of Europe Parliamentary Assembly, 'The right to conscientious objection in lawful medical care' (Resolution 1763 Final version, 2010)
- <sup>34</sup> Council of Europe Parliamentary Assembly, 'Tackling intolerance and discrimination in Europe with a special focus on Christians' (Resolution 2036 Final version, 2015) paragraph 6 (emphasis added). See also Council of Europe Parliamentary Assembly, 'Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence' (Resolution 1928 Final version, 2013) Articles 2 and 4, that restate the importance of freedom of conscience as a universal human right, which can only be subject to the limitations that are necessary in a democratic society.
- <sup>35</sup> Council of Europe Parliamentary Assembly, 'Combating all forms of discrimination based on religion' (Resolution 1846 Final version, 2011) 5(5)
- <sup>36</sup> OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the European Commission for Democracy through Law, 'Guidelines for Review of Legislation Pertaining to Freedom of Religion or Belief' (Adopted by the Venice Commission at its 59th Plenary Session, 18-19 June 2004)
- <sup>37</sup> *Chappell v. the United Kingdom* App No 12587/86 (14 July 1987)
- <sup>38</sup> *X and Church of Scientology v. Sweden* App No 7805/77 (5 May 1979)
- <sup>39</sup> *Arrowsmith v. the United Kingdom* App No 7050/75 (12 October 1978) 69
- <sup>40</sup> *Hazar and Açık v. Turkey* App Nos 16311/90, 16312/90/16312/90 and 16313/90 (11 October 1991)

- <sup>41</sup> *Angeleni v. Sweden* App No 10491/83 (3 December 1986)
- <sup>42</sup> *W v. the United Kingdom* App No 18187/91 (10 February 1993)
- <sup>43</sup> *Plattform 'Ärtze für das Leben' v. Austria* App No 10126/82 (21 June 1988)
- <sup>44</sup> *Kokkinakis v. Greece* App No 14307/88 (25 May 1993)
- <sup>45</sup> For more information, see generally United Nations, 'Human Rights Committee' (*UN Human Rights Office of the Commissioner*, 21 December 2011) <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>> accessed 3 June 2020
- <sup>46</sup> For a comprehensive overview of the work of the UN Human Rights Committee and its procedures under the First Optional Protocol to the ICCPR, see Christian Tomuschat, *Human Rights between Idealism and Realism* (2nd edn, Oxford University Press 2008) 205-224. For an overview of the European Court of Human Rights and its procedures, see Rhona Smith, *Textbook on International Human Rights* (5th edn, Oxford University Press 2012) 96-117
- <sup>47</sup> Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1994) 471. See also Yogesh Tyagi, *The Work of the Human Rights Committee under the ICCPR* (Cambridge University Press 2010)
- <sup>48</sup> Thomas Buergenthal, 'The UN Human Rights Committee' in J. A. Frowein and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Kluwer Law International 2001) 368. See also Markus G. Schmidt, 'The UN Human Rights Committee: Process and Progress' [1995] 5 (1) *Human Rights Forum Philippines* 31
- <sup>49</sup> Human Rights Committee, 'M.A. v. Italy, Communication No. 117/1981' (21 September 1981) UN Doc Supp. No. 40 (A/39/40) at 190 (1984)
- <sup>50</sup> Human Rights Committee, 'Malcolm Ross v. Canada, Communication No. 736/1997' (1 May 1996) UN Doc CCPR/C/70/D/736/1997 (2000)
- <sup>51</sup> *X v. Germany* App No 8741/79 (10 March 1981)
- <sup>52</sup> *Bayatyan v. Armenia* [GC] App No 23459/03 (7 July 2009)
- <sup>53</sup> *Bayatyan v. Armenia* [GC] App No 23459/03 (7 July 2009) 110
- <sup>54</sup> *Bayatyan v. Armenia* [GC] App No 23459/03 (7 July 2009) 126 (emphasis added)
- <sup>55</sup> *G.Z. v. Austria* App No 5591/72 (2 April 1973)
- <sup>56</sup> See, e.g. *X v. the Federal Republic of Germany* App No 7705/76 (5 July 1977), *Conscientious Objectors v. Denmark* App No 7565/76 (7 March 1977), *A v. Switzerland*, App No 10640/83 (9 May 1984), *N v. Sweden* App No 10410/83 (11 October 1984), *Autio v. Finland* App No 17086/90 (6 December 1991), *Peters v. the Netherlands* App No 22793/93 (30 November 1994), *Heudens v. Belgium* App No 24630/94 (22 May 1995), *G.Z. v. Austria* App No 5591/72 (2 April 1973)
- <sup>57</sup> *Arrowsmith v. the United Kingdom* App No 7050/75 (Dissenting opinion of Judge Opsahl, 12 October 1978) 2 (emphasis added)
- <sup>58</sup> *Ülke v. Turkey* App No 39437/98 (24 January 2006)
- <sup>59</sup> *Thlimmenos v. Greece* [GC] App No 34369/97 (6 April 2000)
- <sup>60</sup> *Tsirlis and Kouloumpas v. Greece* App Nos 19233/91, 19234/91 (29 May 1997)
- <sup>61</sup> *Ülke v. Turkey* App No 39437/98 (24 January 2006) 53-54, 63-64 and *Thlimmenos v. Greece* [GC] App No 34369/97 (6 April 2000) 43, 53
- <sup>62</sup> *Ülke v. Turkey* App No 39437/98 (24 January 2006) 62
- <sup>63</sup> Rachel Brett and Laurel Townhead, 'Conscientious Objection to Military Service' in Gilbert Geoff et al. (ed), *Strategic Visions for Human Rights – Essays in Honour of Professor Kevin Boyle* (Routledge 2010) 97
- <sup>64</sup> *Erçep v. Turkey* App No 43965/04 (22 November 2011)
- <sup>65</sup> *Bukharatyan v. Armenia* App No 37819/03 (10 January 2012)
- <sup>66</sup> *Tsaturyan v. Armenia* App No 37821/03 (10 January 2012)

- <sup>67</sup> *Fethi Demirtaş v. Turkey* App No 5260/07 (17 January 2012)
- <sup>68</sup> *Savda v. Turkey* App No 42730/05 (12 June 2012)
- <sup>69</sup> *Tarhan v. Turkey* App No 9078/06 (17 July 2012)
- <sup>70</sup> *Buldu and Others v. Turkey* App No 14017/08 (3 June 2014)
- <sup>71</sup> *Savda v. Turkey* App No 42730/05 (12 June 2012) 100, *Tarhan v. Turkey* App No 9078/06 (ECtHR, 17 July 2012) 41-62
- <sup>72</sup> *Fethi Demirtaş v. Turkey* App No 5260/07 (17 January 2012) 91 and *Savda v. Turkey* (*Savda v. Turkey* App No 42730/05 (12 June 2012) 80-85
- <sup>73</sup> *Eweida and Others v. the United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10 (15 January 2013)
- <sup>74</sup> *Eweida and Others v. the United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10 (15 January 2013) 82
- <sup>75</sup> *Eweida and Others v. the United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10 (15 January 2013) 83
- <sup>76</sup> *RR v. Poland* App No 27617/04 (26 May 2011) 83 (emphasis added)
- <sup>77</sup> Though of *Grimmark v. Sweden* (dec) and *Steen v. Sweden*, in which a three-judge panel found the applications of two midwives with conscientious objection to abortion inadmissible. It is to be hoped their inconsistent decision will be revisited in the future. *Ellinor Grimmark v. Sweden* App no 43726/17 (11 February 2020) and *Steen v. Sweden* App no 62309/17 (11 February 2020)
- <sup>78</sup> However, the ECtHR should be careful not to prioritize unduly patients' rights, by limiting the right to exercise conscientious objection. That would leave freedom of conscience completely gutted in order to accommodate patients' rights.
- <sup>79</sup> *P. and S. v. Poland* App No 57375/08 (30 October 2012) 106
- <sup>80</sup> UN Human Rights Committee, 'General Comment No. 22' in 'Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies' (1993) UN Doc HRI/GEN/1/Rev.1 at 35 Article 11
- <sup>81</sup> Human Rights Committee, '*Westerman v. the Netherlands*, Communication No. 682/1996' (22 November 1995) UN Doc CCPR/C/67/D/682/1996 (1999), 9 (3)
- <sup>82</sup> Human Rights Committee, '*Frédéric Foin v. France*, Communication No. 666/1995' (20 July 1995) UN Doc CCPR/C/67/D/666/1995 (1999) 10 (3)
- <sup>83</sup> Human Rights Committee, '*Mr Yeo-Bum Yoon and Mr Myung-Jin Choi v. Republic of Korea*, Communication Nos. 1321/2004 and 1322/2004' (18 October 2004) UN Doc CCPR/C/88/D/1321-1322/2004 (2006)
- <sup>84</sup> Human Rights Committee, '*Eu-min Jung et al. v. The Republic of Korea*, Communications Nos. 1593 to 1603/2007' Communication Nos. 1593 to 1603/2007' (15 May 2007) UN Doc CCPR/C/98/D/1593-1603/2007 (2010)
- <sup>85</sup> Human Rights Committee, '*Jeong et al. v. Republic of Korea*, Communication No. 1119/2002' (23 August 2002) UN Doc CCPR/C/84/D/1119/2002 (2005)
- <sup>86</sup> Human Rights Committee, '*Jong-nam Kim et al. v. The Republic of Korea*, Communication No. 1786/2008' (15 October to 2 November 2012) UN Doc CCPR/C/106/D/1786/2008 (2013)
- <sup>87</sup> Human Rights Committee, '*Jong-nam Kim et al. v. The Republic of Korea*, Communication No. 1786/2008' (15 January, 16 January and 25 April 2008) UN Doc CCPR/C/106/D/1786/2008 (2013) 7(4) and 7(5) (emphasis added)
- <sup>88</sup> Human Rights Committee, '*Jong-nam Kim et al. v. The Republic of Korea*, Communication No. 1786/2008' (15 January, 16 January and 25 April 2008) UN Doc CCPR/C/106/D/1786/2008 (2013) 7 (3) (emphasis added)
- <sup>89</sup> Hipólito Solari-Yrigoyen, member of Human Rights Committee, 'Dissenting opinion on *Mr Yeo-Bum Yoon and Mr Myung-Jin Choi v. Republic of Korea*, Communication Nos. 1321/2004

- and 1322/2004' (18 October 2004) UN Doc CCPR/C/88/D/1321-1322/2004 (2006) 8 (2) and 8 (3)
- <sup>90</sup> Human Rights Committee, '*Mr Yeo-Bum Yoon and Mr Myung-Jin Choi v. Republic of Korea*, Communication Nos. 1321/2004 and 1322/2004' (18 October 2004) UN Doc CCPR/C/88/D/1321-1322/2004 (2006) 8 (3)
- <sup>91</sup> Judgment in Joined cases *Y and Z* [GC], C-71/11 and C-99/11, EU:C:2012:518
- <sup>92</sup> Opinion of Advocate General Bot in joined cases *Y and Z*, C-71/11 and C-99/11, EU:C:2012:224, paragraph 46
- <sup>93</sup> Opinion of Advocate General Sharpston in case *Shepherd*, C-472/13, EU:C:2014:2360, paragraph 59 (emphasis added)
- <sup>94</sup> Javier Martínez-Torrón, 'Protecting freedom of conscience beyond prejudice' in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015) 198
- <sup>95</sup> Javier Martínez-Torrón, 'Religión Derecho y Sociedad Antiguos y Nuevos Planteamientos en el Derecho Eclesiástico del Estado' in Comares (ed), *Anuario de Derecho Eclesiástico del Estado* (Granada 2001) 707-712
- <sup>96</sup> Separate opinions of Judges Vučinić and De Gaetano in *Eweida and Others v. the United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECTHR, 15 January 2013) 3 (emphasis added)
- <sup>97</sup> Separate opinion of Judge Verdross in *Kjeldsen, Busk Madsen and Pedersen v. Denmark* App Nos 5095/71, 5920/72 and 5926/72 (7 December 1976)
- <sup>98</sup> *Campbell and Cosans v. the United Kingdom* App Nos 7511/76 and 7743/76 (25 February 1982) 36
- <sup>99</sup> *Skugar v. Russia* App No 40010/04 (3 December 2009)
- <sup>100</sup> John Locke, *A Letter Concerning Toleration* (Huddersfield 1796) 12
- <sup>101</sup> *Hasan and Chaush v. Bulgaria* [GC] App No 30985/96 (26 October 2000) 78
- <sup>102</sup> *Kosteski v. the Former Yugoslav Republic of Macedonia* App No 55170/00 (13 April 2006) 39
- <sup>103</sup> *Eweida and Others v. the United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10 (15 January 2013) 82
- <sup>104</sup> Human Rights Committee, '*M.A.B., W.A.T. and J.-A.Y.T. v. Canada*, Communication No. 570/1993' (14 October 1993) UN Doc CCPR/C/50/D/570/1993 (1994) 4 (2)
- <sup>105</sup> For more, see the Pastafarianism website Venganza, 'New Posts' (*Church of the Flying Spaghetti Monster*, 21 March 2015) <<http://www.venganza.org/>> accessed 7 March 2016
- <sup>106</sup> Pastafarianism was founded as an attempt to mock organized religion. PACE has called Pastafarianism a 'parody on religion created in response to the decision of the Kansas State Board of Education to permit the teaching of intelligent design in science courses on an equal footing with the theory of evolution,' Council of Europe Parliamentary Assembly Report, 'The dangers of creationism in education', Committee on Culture, Science and Education (Doc 11375 2007) 52
- <sup>107</sup> See, e.g. Texas - Taylor Langston, 'Texas Tech student allowed to wear pasta strainer in driver's license photo' (*KLTV*, 2 September 2015) <<http://www.kltv.com/story/23248235/texas-tech-student-allowed-to-wear-pasta-strainer-in-official-dps-photo>> accessed 7 March 2016, in the Czech Republic – Olivia Williams, 'I'm a Pastafarian': Man Who Claims His Religion Forces Him to Wear a Sieve in His Head Given Permission to Wear One on His Official Identity Card Picture' (*The Daily Mail*, 1 August 2013) <<http://www.dailymail.co.uk/news/article-2382465/Im-Pastafarian-Man-claims-religion-forces-wear-sieve-head-given-permission-wear-official-identity-card-picture.html?ito=feeds-newsxml>> accessed 17 March 2020, in Austria – BBC News, 'Austrian driver allowed 'pastafarian' headgear photo' (*BBC*, 14 July 2015) <<http://www.bbc.co.uk/news/world-europe-14135523>> accessed 17 March 2020

- <sup>108</sup> Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press 2011) 98
- <sup>109</sup> *United States v. Seeger*, 380 US 163 (1965) No. 50 Argued November 16-17, 1964 Decided March 8, 1965 380 US 16. The judgment referred to three cases of conscientious objection to military services by people who were not religiously affiliated.
- <sup>110</sup> *Campbell and Cosans v. the United Kingdom* App Nos 7511/76 and 7743/76 (25 February 1982) 36
- <sup>111</sup> See Robert K. Vischer, *Conscience and the Common Good* (Cambridge University Press 2010)
- <sup>112</sup> European Commission, 'Commission brings together non-confessional organisations to discuss "Living together and disagreeing well"' (Press Release Database, 2 June 2015) <[http://europa.eu/rapid/press-release\\_IP-15-5078\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5078_en.htm)> accessed 17 March 2020
- <sup>113</sup> *Jakóbski v. Poland* App No 18429/06 (7 December 2010)
- <sup>114</sup> *Eweida and Others v. the United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10 (15 January 2013)
- <sup>115</sup> Human Rights Committee, '*Ranjit Singh v France*, Communication No. 1876/2000' (22 July 2011)
- <sup>116</sup> *De Wilde, Ooms and Versyp (Vagrancy) v. Belgium* App Nos 2832/66, 2835/66 and 2899/66 (18 June 1971) 93
- <sup>117</sup> *Barthold v. Germany* App No 8734/79 (25 March 1985) 46
- <sup>118</sup> See, *inter alia*, *Kruslin v. France* App No 11801/85 (24 April 1990) 29, *Casado Coca v. Spain* App No 15450/89 (24 February 1994) 43 and *Leyla Şahin v. Turkey* [GC] App No 44774/98 (10 November 2005) 88
- <sup>119</sup> Common law was considered to fulfil the legality condition in *Sunday Times v. the United Kingdom* App No 6538/74 (26 April 1979) 47
- <sup>120</sup> *De Wilde, Ooms and Versyp (Vagrancy) v. Belgium* App Nos 2832/66, 2835/66 and 2899/66 (18 June 1971) 93 and *Barthold v. Germany* App No 8734/79 (25 March 1985) 46
- <sup>121</sup> *Larissis and Others v. Greece* App Nos 23372/94, 26377/94 and 26378/94 (24 February 1998) 40, *Hashman and Harrup v. the United Kingdom* [GC] App No 25594/94 (25 November 1999) 31
- <sup>122</sup> *Malone v. the United Kingdom* App No 8691/79 (2 August 1984) 67
- <sup>123</sup> *Larissis and Others v. Greece* App Nos 23372/94, 26377/94 and 26378/94 (24 February 1998) 40. See, *mutatis mutandis*, *Rotaru v. Romania* [GC] App No 28341/95 (4 May 2000) 52, *Rekvényi v. Hungary* [GC] App No 25390/94 (20 May 1999) 34 and *Ukrainian Media Group v. Ukraine* App No 72713/01 (29 March 2005) 48
- <sup>124</sup> *Kokkinakis v. Greece* App No 14307/88 (25 May 1993) 40. See also the *Müller and Others v. Switzerland* App No 10737/84 (24 May 1988) 29
- <sup>125</sup> See, in this respect, *Hashman and Harrup v. the United Kingdom* App No 25594/94 (25 November 1999) 31 and *Groppera Radio AG and Others v. Switzerland* App No 10890/84 (28 March 1990) 68
- <sup>126</sup> *Gorzelik and Others v. Poland* App No 44158/98 (17 February 2004) 65
- <sup>127</sup> *Malone v. the United Kingdom* App No 8691/79 (2 August 1984) 67 and *Rotaru v. Romania* [GC] App No 28341/95 (4 May 2000) 55
- <sup>128</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 9 (2), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 18 (3) and Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGA Res 35/55 (25 November 1981) Article 1 (3)

- <sup>129</sup> Human Rights Committee, '*Jeong et al. v. Republic of Korea*, Communication No. 1119/2002' (23 August 2002) UN Doc CCPR/C/84/D/1119/2002 (2005) 7 (2)
- <sup>130</sup> *S.A.S. v. France* [GC] App No 43835/11 (1 July 2014) 128. See also *Chassagnou and Others v. France* [GC] App Nos 25088/94, 28331/95 and 28443/95 (29 April 1999) 113
- <sup>131</sup> Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997) 322
- <sup>132</sup> Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2008) Jean Monnet Working Paper 09/08, 8 <<http://jeanmonnetprogram.org/wp-content/uploads/2014/12/080901.pdf>> accessed 17 March 2020
- <sup>133</sup> *Handyside v. the United Kingdom* App No 5493/72 (7 December 1976) 48. See also *Dudgeon v. the United Kingdom* App No 7525/76 (22 October 1981) 51
- <sup>134</sup> *Handyside v. the United Kingdom* App No 5493/72 (7 December 1976) 49-50
- <sup>135</sup> *Dudgeon v. the United Kingdom* App No 7525/76 (22 October 1981) 53. See also *Young, James and Webster v. the United Kingdom* App Nos 7601/76 and 7806/77 (13 August 1981) 63
- <sup>136</sup> *Dudgeon v. the United Kingdom* App No 7525/76 (22 October 1981) 59
- <sup>137</sup> Udo Schuklenk, 'Conscientious objection in medicine: Private ideological convictions must not supercede public service obligations' [2015] 29 (5) *Bioethics* 29 (5), ii-iii
- <sup>138</sup> Javier Martínez-Torrón, 'Protecting Freedom of Conscience Beyond Prejudice' in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015) 200
- <sup>139</sup> This was the approach taken by the Human Rights Committee, '*Shingara Mann Singh v. France*, Communication No. 1928/2010' (15 December 2008) UNDoc. CCPR/C/108/D/1928/2010 9 (2).
- <sup>140</sup> For a further development of this proposal, see Gerald Chipeur QC and Robert Clarke, 'The Art of Living with Ourselves: What Does the Law have to do with Conscience?' in John Adenitire (ed.), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart 2019) 157
- <sup>141</sup> Civil Rights Act 1964, Title VII 42 USCC 21 701 (j)
- <sup>142</sup> *British Columbia (Public Service Employee Relations Comm) v. BCGEU* [1999] 3 SCR 3 para 54
- <sup>143</sup> Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press 2011) 73
- <sup>144</sup> *Central Alberta Dairy Pool v. Alberta* (Human Rights Commission) [1990] 2 SCR 489
- <sup>145</sup> Javier Martínez-Torrón, 'Protecting Freedom of Conscience Beyond Prejudice' in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015) 200
- <sup>146</sup> This concept is explicitly present in the Religious Freedom Restoration Act (US) and the 'minimal impairment' in Canada. See, in this sense, the Supreme Court's judgment in Canada in *Multani v. Commission Scolaire Marguerite Bourgeoys* 2006 SCC 6 JE 2006-508
- <sup>147</sup> *Nada v. Switzerland* [GC] App No 10593/08 (12 September 2012) 183
- <sup>148</sup> Eva Brems and Laurens Lavrysen, 'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' [2015] 15 (1) *Human Rights Law Review* 146
- <sup>149</sup> For more information, see 'Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist) (*UN Peacemaker*)' <<http://peacemaker.un.org/nepal-comprehensiveagreement2006>> accessed 17 March 2020
- <sup>150</sup> Constitution of Nepal (2015), section 26 (1) and 26 (3) (emphasis added), Unofficial translation made by the Constituent Assembly Secretariat, endorsed by Nepal Law Society, the International Institute for Democracy and Electoral Assistance and UN Development Programme, see the International Institute for Democracy and Electoral Assistance, 'Constitution of Nepal 2015: Preliminary Draft' <[http://www.constitutionnet.org/files/draft\\_constitution\\_of\\_nepal\\_2015\\_idea\\_tranlation\\_0.pdf](http://www.constitutionnet.org/files/draft_constitution_of_nepal_2015_idea_tranlation_0.pdf)> accessed 17 March 2020
- <sup>151</sup> Asma Jahangir, Special Rapporteur of the Commission on Human Rights on freedom of

- religion or belief, 'Report to the General Assembly on Elimination of all forms of religious intolerance' (30 September 2005) A/60/399
- <sup>152</sup> The states where these are enacted and implemented are: Odisha, Madhya Pradesh, Chhattisgarh, Jharkhand, Uttarakhand, Himachal Pradesh, and Gujarat. In Arunachal Pradesh, such an act was passed, but rules have not been enacted. Due to a court order, in Rajasthan all conversions need to be registered.
- <sup>153</sup> For instance, the law of Himachal Pradesh, which was the latest to pass an anti-conversion act in 2006, sets out: 'No person shall convert or attempt to convert, either directly or otherwise, any person from one religion to another by the use of force or by inducement or by any other fraudulent means, nor shall any person abet any such conversion.' The anti-conversion provisions in Nepal resemble the 'Freedom of Religion' Acts.
- <sup>154</sup> Tehmina Arora, 'India's defiance of religious freedom: A briefing on "anti-conversion" laws [2012] 5(1) International Journal for Religious Freedom, 59-71
- <sup>155</sup> Asma Jahangir, Special Rapporteur on freedom of religion or belief, 'Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, on her mission to India (3-20 March 2008)' (26 January 2009) A/HRC/10/8/Add.3 47. 1. The 'Freedom of Religion' Acts' employ vague and overtly broad notions, such as 'force', 'fraud', 'inducement', 'allurement'.
- <sup>156</sup> Asma Jahangir, Special Rapporteur on freedom of religion or belief, 'Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, on her mission to India (3-20 March 2008)' (26 January 2009) A/HRC/10/8/Add.3 47. The Pew Research Center's Religious Restrictions Report also rated India 'high' on government restrictions and 'very high' on social hostilities. Pew research center, 'Latest Trends in Religious Restrictions and Hostilities' (*Pewforum*, 26 February 2015) <<http://www.pewforum.org/2015/02/26/religious-hostilities/>> accessed 7 August 2020
- <sup>157</sup> UN Human Rights Committee, 'General Comment No. 22' in 'Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies' (1993) UN Doc HRI/GEN/1/Rev.1 at 35 paragraph 5
- <sup>158</sup> European Commission, 'Proposal for a Council Directive on implementing the principle for equal treatment between persons irrespective of religion or belief, disability, age, sexual orientation' COM (2008) 426 final (Equal Treatment Directive)
- <sup>159</sup> According to Article 6 and recital 22 of the Equal Treatment Directive, the Directive (and generally any Directive) sets up a minimum requirement. Member States may introduce or keep in place provisions which are more favourable than those enshrined in the Directive.
- <sup>160</sup> The United Kingdom passed the Equality Act 2006 and the Equality Act (Sexual Orientation) Regulations 2007, now incorporated into the Equality Act 2010. For more information on the United Kingdom Equality Act, the Equal Treatment Directive and related cases of discrimination, see Paul Coleman and Roger Kiska, 'The proposed EU "equal treatment" directive: How the UK gives other EU Member States a glimpse of the future' [2012] 5(1) International Journal for Religious Freedom 113-128. For cases involving artistic expression, freedom of conscience and the provision of goods and services under the US legislation, see Alliance Defending Freedom, 'State of Washington v. Arlene's Flowers | Ingersoll v. Arlene's Flowers | Arlene's Flowers v. Ferguson' (*Adfmedia.org*, 3 March 2016) <<http://www.adfmedia.org/News/PRDetail/8608>> accessed 17 March 2020
- <sup>161</sup> These could range from separatist slogans, incitement to hatred, and support for radical movements.
- <sup>162</sup> *Preddy v. Bull* [2013] UKSC 73
- <sup>163</sup> *Preddy v. Bull* [2013] UKSC 12

- <sup>164</sup> Gerry Moriarty, 'Ashers Bakery found guilty of discrimination' (The Irish Times, 19 May 2015) <<http://www.irishtimes.com/news/crime-and-law/ashers-bakery-found-guilty-of-discrimination-1.2218032>> accessed 11 March 2020
- <sup>165</sup> Gerry Moriarty, 'Ashers Bakery found guilty of discrimination' (*The Irish Times*, 19 May 2015) <<http://www.irishtimes.com/news/crime-and-law/ashers-bakery-found-guilty-of-discrimination-1.2218032>> accessed 11 March 2020
- <sup>166</sup> *Lee v. Ashers Baking Company Ltd and Others* [2015] NICTy 2
- <sup>167</sup> *Lee v. McArthur and Others* [2016] NICA 3
- <sup>168</sup> *Lee v. Ashers Baking Company Ltd and Others* [2018] UKSC 49. Notably, the Court found that there was arguable case of discrimination on grounds of political opinion, but that no justification has been shown for overriding the appellants Article 10 Convention protections against compelled speech, see *Gillberg v. Sweden* [GC] App no 41723/06 (3 April 2012).
- <sup>169</sup> The customer in this case has now taken the matter to the ECtHR in *Lee v. the United Kingdom* App no 25289/94
- <sup>170</sup> Javier Martínez-Torrón, 'Protecting Freedom of Conscience Beyond Prejudice' in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015) 202
- <sup>171</sup> Lady Hale, 'Religion and Sexual Orientation: The Clash of Equality Rights (Comparative and Administrative Law Conference, Yale Law School, 7 March 2014) <<https://www.supremecourt.uk/docs/speech-140307.pdf>> accessed 11 March 2020
- <sup>172</sup> See *Eweida and Others v. the United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10 (15 January 2013)
- <sup>173</sup> See above paragraph 33
- <sup>174</sup> See, Gerald Chipeur QC and Robert Clarke, 'The Art of Living with Ourselves: What Does the Law have to do with Conscience?' in John Adenitire (ed.), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart 2019) 157
- <sup>175</sup> International Conference on Population and Development, 'Report of the International Conference on Population and Development' (18 October 1994) A/CONF.171/13 8.25
- <sup>176</sup> *Bayatyan v. Armenia* [GC] App No 23459/03 (7 July 2009) 50-70
- <sup>177</sup> BBC News, 'Catholic midwives win appeal over abortion case' (BBC, 24 April 2013) <<http://www.bbc.com/news/uk-scotland-glasgow-west-22279857>> accessed 17 March 2020
- <sup>178</sup> *Greater Glasgow and Clyde Health Board v. Doogan and another* [2014] UKSC 68
- <sup>179</sup> Trybunał konstytucyjny, 'Prawo do odmowy wykonania świadczenia zdrowotnego niezgodnego z sumieniem' (*Trybunał.gov.pl*) <<http://trybunal.gov.pl/rozprawy/komunikaty-prasowe/komunikaty-po/art/8603-prawo-do-odmowy-wykonania-swiadczenia-zdrowotnego-niezgodnego-z-sumieniem/>> accessed 8 March 2016
- <sup>180</sup> For more information on this matter, see ADF International, 'Sweden faces human rights problem' (*ADF International*, 26 January 2016) <<https://adfinternational.org/news/sweden-faces-human-rights-problem/>> accessed 17 March 2020
- <sup>181</sup> ADF International, 'Swedish midwife turns to Human Rights Court' (*ADF International*, 14 June 2017) <<https://adfinternational.org/news/swedish-midwife-turns-to-human-rights-court/>> accessed 18 December 2019
- <sup>182</sup> See above paragraph 7 et seq.
- <sup>183</sup> See above paragraph 72



## ADF INTERNATIONAL

ADF International is a faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people. With headquarters in Vienna, and offices in Brussels, Geneva, Strasbourg, London, New York City, and Washington DC, we are at the forefront of defending religious freedom, the sanctity of life, and marriage and family worldwide.

Working on an international level, we have a full-time presence at all the institutions of strategic international importance. We are accredited by the UN Economic and Social Council (ECOSOC), the European Parliament and Commission, and the Organization of American States (OAS). Additionally, we enjoy participatory status with the EU's Agency for Fundamental Rights (FRA) and engage regularly with the Organization for Security and Co-operation in Europe (OSCE). On a national level, we work with local partners to provide training, funding, and legal advocacy.

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