



## ***Brief presentation on Conscientious Objection***

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Conscientious objection is a complex and debated notion. It is more and more claimed for under the effect of increasing pluralism of society and of the disconnection between law and moral. It can only be fully understood by getting detached from its link to positive law. I shall try to give a presentation of the existing law while explaining the internal logic of objection.

I will develop my presentation through five themes:

- I will first explain two fundamental distinctions which allow to understand what conscientious objection is;
- I will then present the recognition of conscientious objections in positive law both on European and international levels;
- I will further state criteria of identification of objection;
- Finally, I will describe the States obligations regarding conscientious objections.

## I. Conscientious objection is about refusing to act positively

To understand conscientious objection, one must first seize the fundamental difference between on the one side “**to be detained to act according to one’s conviction**” and on the other hand “**to be forced to act against one’s conviction**”. This difference, very simple, is correlated to that, fundamental, which differentiates good and evil.

“*Do good, avoid evil*”, this is the fundamental and universal moral norm.

*To do good* is to accomplish positively an act that your conscience prescribes.

*To avoid evil* is to abstain from accomplishing an act that your conscience forbids.

To do this good or to avoid that evil are the expression of a conviction, that is to say of a reasoned judgment of conscience in light of moral and/or religious norms. A *conviction* is a “*dictamen rationis*”.

To do a good is an action. To avoid an evil is an abstention.

If being an action, doing good is a positive manifestation of a conviction which realizes itself in the *forum externum*.

If being an abstraction, on the contrary, avoiding an evil is not a positive manifestation of a conviction, and naturally is kept within the *forum internum*.

The negative freedom aims at preserving not the positive manifestation of the conviction, but the integrity of conscience itself, i.e. the unity between intelligence and will, which is proper to human nature. While there exists a difference between a conviction and its positive manifestation, for the manifestation is a *material* realization of an *ideal* conviction, on the contrary, such a difference does not exist between a conviction and its negative manifestation: it is the same refusal to act.

There is no symmetry between good and evil: to do good is a positive obligation, the extent of which can vary according to circumstances, while avoiding evil is a negative obligation which applies always and under any circumstances. Good is a matter of proportion, while evil is a matter of principle.

There are two main consequences to that:

- On the one hand: contrary to a positive manifestation, it is materially impossible to “restrain” or limit an abstention. A positive manifestation, because it is a concrete action, may be controlled and restrained by the legitimate authorities. On the contrary, an abstention, by nature, cannot be restrained without being immediately destroyed. If it is not respected, an abstention can be but sanctioned or coerced, not limited.

- On the other hand, and this derives from the first consequence, it is worse to be forced to do an evil refused by your conscience or to be sanctioned for refusing to do it than it is to be prevented from accomplishing part of the good that your conscience prescribes.

As an example; it is worse to force an atheist to wear a religious clothing than to prevent a religious person to wear it in some places and times.

This distinction allows confining conscientious objections to the sole circumstances where a person is forced to accomplish an act which they deem bad or is sanctioned for refusing to comply. In law, conscientious objection specifically applies to a refusal to act positively against one's convictions: it constitutes freedom of conscience in its negative dimension. It does not apply to a refusal not to act which constitutes freedom of conscience in its positive dimension and enters within the usual regime of limitation of the positive manifestations of convictions.

Because of its specificity, conscientious objection deserves a higher degree of protection than positive manifestation of convictions. Without it being explicitly expressed to this day, one can see in the case law that conscientious objection is better protected than positive manifestation. We will get back to this at the end of this presentation, when we will examine the obligations of public authorities.

Another fundamental distinction must be made to distinguish whether the conviction underlying the objection is of a moral or of a religious nature.

## II. Objection can be Moral or Religious

As there is a difference of nature between faith and reason, there is a difference too between moral convictions and religious beliefs, and consequently between 'moral objection' and 'religious objection' depending on whether the objection obeys to prescriptions dictated by morality or by religion (cult-related prescriptions). However, this distinction is not always perceptible by someone who has doubts about rationality or who does not clearly conceive the difference between faith and reason.<sup>1</sup>

### 1. Distinction

**Moral objection** (which is rational *stricto sensu*) is motivated by a prescription based on reason, a '*dictamen rationis*', excluding any religious prescription. It is the consequence of a judgment by conscience upon the very nature of the act objected to, in the light of the basic moral standard (doing good, avoiding evil) from which originates the innate sense of justice.<sup>2</sup>

**Religious objection**, on the other hand, is the result of a religious or cult-related prescription which acceptance by the personal conscience requires an act of faith and

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<sup>1</sup> Faith and reason are two modes of knowledge of a same reality; their contradictions are therefore symptoms of error or ignorance.

<sup>2</sup> The objection is about an objectively knowable situation to which the subject applies this basic moral standard: it results from a moral judgment.

hence does not impose itself on reason. From this objection one can deduce the religion of the objector and it has a direct, necessary and sufficient link from it. Some religions impose numerous prescriptions ruling the everyday life of their believers.

## 2. Important consequence of this distinction

An objection, either moral or religious, always constitutes a conscientious objection as we only have one conscience. The difference between moral and religious objections concerns its very object: **a moral objection concerns justice, whereas a religious objection concerns freedom.**

Whereas a moral conviction not to commit an evil, such as killing, relies ultimately on justice, a religious objection does not directly question the justice of the act objected to. For example, working during Shabbat is not unjust, it's impious. The claim of a religious objection challenges the *subjective freedom* of the person to conform to his religious beliefs, whereas the claim of a moral objection challenges the *objective justice* of the act it is objected to.

Undoubtedly, public authorities must, insofar as possible, tolerate this religious freedom. However, if the refusal opposed to a religious objection can cause violence, it may not necessarily be unjust in itself. On the contrary, faced with a **genuine** moral objection, -based on justice-, the authorities cannot infringe upon it without committing not only violence, but also an injustice. We will develop this question in the fifth point.

The difficulty is found in recognising a **genuine** moral objection. The main criterion stands with the final aim of the objection: the conviction must aim at respecting justice and good, and opposing evil. Concretely, a jurist can identify such a genuine moral objection insofar as it aims at respecting a fundamental freedom or right and that it is opposed to an order that contravenes this right or freedom. It is the case for example with war, abortion and euthanasia, the practise of which is only possible as an exception to the well-established fundamental principle of respect of life.

Another criterion, following Kant, consists in wondering whether the specific conscientious objection may be made universal, whether all people could adopt the same objection.

## III. Conscientious objection in positive law

In Human Rights law, the right to conscientious objection is implicitly guaranteed as a component of freedom of conscience and religion in its negative dimension.<sup>3</sup>

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<sup>3</sup> Like every freedom, freedom of conscience and religion has two sides –positive and negative– which guarantee the freedom to act and not to act. In European and international law, it is guaranteed in particular by article 18 of the International Covenant on Civil and Political Rights and article 9 of the European Convention on Human Rights. These instruments guarantee “*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*”. More fundamentally, the right to freedom of conscience is based directly on article 1 of the Universal Declaration of Human Rights which states that all human beings are “*endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*” The

Historically, the regime of conscientious objection was first apprehended as a “duty” before being recognized as a “right”.

## 1. Conscientious objection may be a duty

Conscientious objection was recognised as a duty at the Nuremberg trials,<sup>4</sup> and then after the fall of communism<sup>5</sup> by the ECtHR, in cases where Nazi and Communist agents were condemned for not having objected to legal orders. Faced with a seriously unjust order, the subordinate must refuse to obey: conscientious objection is for him a duty, assuredly a heroic one, but a duty towards humankind (to which he belongs), and the non-respect of which justifies his condemnation. The International Law Commission<sup>6</sup> expressed this principle in the following terms: “*The fact that a person acted pursuant to [an] order of his Government and of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.*”<sup>7</sup> This possibility of “moral choice” is precisely the faculty exercised by conscience.

Nazi and Soviet agents were condemned for obeying to orders rather than to their conscience. These are authentic situations where conscientious objection is a moral and legal duty, beyond and despite the absence, in the national legal order, of an explicit right to objection.

The recognition of objection as a duty relies on an objective understanding of moral conscience. This objective understanding of moral conscience is a condition to the very existence of universal justice.

## 2. Conscientious objection may also be a right

One must distinguish between national and international laws.<sup>8</sup>

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final Act of the Helsinki Conference (1975) stipulates that “*The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. (...) Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.*”

<sup>4</sup> *United States v. Ohlendorf and others.* (“Einsatzgruppen Trial”), (1948) 4 LRTWC. 470.

<sup>5</sup> ECHR, *Polednová v. Tzeck Republic*, n° 2615/10, 21 June 2011. The case was about the condemnation of a woman for taking part, as an attorney, in a mock trial which had led to sentencing to death four opponents to the Communist regime.

<sup>6</sup> The Charter of the International Military tribunal at Nuremberg, commonly referred to as Charter of Nuremberg, stated: “*The fact that the Defendant acted pursuant to [an] order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.*” Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. UNTS, vol. 82, p. 279, art. 8.

<sup>7</sup> International Law Commission Yearbook, 1950, vol. II, pp. 374-378.

<sup>8</sup> Recognition of a right to conscientious objection is a problem within a same and unique legal order, for it implies an inner contradiction. It is the case in national legal order, but not in international right, which can guarantee this rights against national orders.

### a. In the national legal order

The recognition of a right to conscientious objection in the national legal order implies a contradiction: a single legal order imposes an obligation and simultaneously allows the refusal to comply to it.

This phenomenon is recent and appeared with the liberal society, for it accepts the coexistence of two levels of morality: a social level and a private one. Indeed, liberal societies are characterized by tolerance, that is to say by the affirmation of illegitimacy of all moral judgement *ad extra*: the morality of an individual action may only be judged by the concerned party, and not by society nor other individuals. This results in a differentiation between a public morality and a private morality which leads people to publicly tolerate practices which they disapprove of in private.

Yet, if this tolerance is trouble-free for the majority of citizens, it is not so for the minority directly concerned by the carrying out of the practice in question; because, to use a concrete example, it is one thing to tolerate euthanasia, but it is another to have to practice it oneself. If it is possible to make two moralities coexist within a society, it is not possible within a single person. In this way, the “freedom” that liberal society offers to individuals with regard to practices which are morally debatable and have often long been prohibited can only be fair if the society guarantees those who morally disapprove the practice at stake the right to not be forced to take part in it. The “conscience clause” guarantees precisely this right, it avoids the “dictatorship of the majority” and facilitates the smooth functioning of the pluralist and liberal society.

The recognition of the right to conscientious objection in the national legal order is not a result of a higher consideration for conscience as an instrument able to recognise what is good or evil, but more a lack of trust in individual conscience and in the capacity of society to recognise what is good or evil. Hence, through what looks like a paradox, the promotion of the right to conscientious objection can also participate in the discredit of the social comprehension of human conscience.<sup>9</sup>

### b. In the supranational legal order

Because of the coexistence of two hierarchized legal orders, the recognition of conscientious objection in the supranational legal order is not paradoxical; it is a mode of guarantee of freedom of conscience towards national legal orders.

Freedom of conscience and religion applies to refusals to take part, between others, to military service, to abortion, to euthanasia, to hunting, to celebrating homosexual unions, to religious teachings and practises, as well as to refuse to take on oath on the Bible, to be vaccinated, to shave one’s beard, or to reveal one’s religious convictions.

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<sup>9</sup> Valorization of conscientious objection in the name of a transcendence of personal consciousness to the social order implies affirming a fundamental and principle doubt about the capacity of society to recognize the good and the fair. However, the reasons for doubting the capacity of society should have the same effect on personal consciousness, with a greater effect since it is more difficult for a single person than for a group to gather the necessary information to judge and to correct themselves.

The right to conscientious objection is the most recognised when facing the obligation to kill, to the point that a “right not to kill” may exist.

(As underlined by Sir Nigel Rodley, President of the Human Rights Committee, it is because of the “*the sanctity of human life*” that “the right to refuse to kill must be *accepted completely*”.<sup>10</sup> This right is recognised, and was never questioned by European and international instances.<sup>11</sup> In 2010, this right was firmly reaffirmed by the Assembly of the Council of Europe in the medical field. In Europe I do not know of a contemporary Court decision condemning a doctor for refusing to perform euthanasia or an abortion. This right is in principle guaranteed in every European country, except Sweden.<sup>12</sup> There is an interesting debate on the nature of conscientious objection and its criteria.)<sup>13</sup>

#### IV. Appreciation criteria

How can one distinguish between refusals to obey, those which are a conscientious objection and hence deserve the protection of freedom of conscience and religion?

Criteria can be established from the very concept of conscientious objection and jurisprudence.<sup>14</sup> They are logical and classic:

- a) You must have a conscience
- b) You must have conviction
- c) You must have an objection
- d) there must be a close and direct nexus between the conviction and the objection

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<sup>10</sup> Individual concurring opinion of Sir Nigel Rodley, Mr Krister Thelin and Mr Cornelis Flinterman in the *Cenk Atasoy and Arda Sarkut v. Turkey* CHR case.

<sup>11</sup> Whether it be the ECHR, the Committee of the European Social Charter or the Committee of Human Rights.

<sup>12</sup> The situation of pharmacists varies according to the countries, but there is no reason, as regards conscientious objection, that they should be treated differently than doctors and midwives. It would be an unfair discrimination.

<sup>13</sup> An interesting debate concerns the nature of conscientious objection and its criteria.

The majority of the members of the Human Rights Committee consider that the objection concerns directly the *forum internum*, and that it was therefore not a “*manifestation*” of belief capable of limitation. Applied in matters of military service, this consideration makes the right to conscientious objection a subjective and absolute right, for this right would find its source in the individual. The members of the Committee recognized the need, and their inability, to determine criteria for distinguishing between the various objections.

Within the European Court, a majority of the members considered that the objection was a manifestation of freedom of conscience and that it could therefore be restricted.

Two approaches coexist:

A subjective approach that sees in the respect for the individual conscience the motive to respect the objection - whatever the conviction;

An objective approach that sees in the object of conviction the motive to respect the objection, whatever the person.

In reality, the two approaches are not exclusive and coexist, even if the subjective approach tends to absorb the objective approach.

The subjective approach is adapted to objections that are not based on morality, on justice, especially on objections based on religious belief. By respecting the religious objection, society does not respect religion but the religious attitude of the person, his religious freedom.

The objective approach, on the other hand, is adapted to objections based on morality and justice, for it is the act itself which is condemned as unjust or immoral, whatever the religious or other convictions of the objector.

<sup>14</sup> In their recent book (*Freedom of Religion*, pp. 296 and foll.) Messrs. Bielefeldt, Weiner and Ms Ghanea briefly suggest a combination of five criteria: 1) whether it is a gravity of the moral concern, 2) that the consciousness of the person is categorically opposed to any personal participation (“situation of a consciousness veto”), (3) that the question relates to a constituent aspect of the identity of the person, 4) that the objector be constrained to cooperate closely with the object-oriented action, and finally, 5) that the objector shows willingness to perform an alternative service. These criteria are in part consistent with what we are proposing. The third criterion seems redundant with the second, as for the fifth it seems not to qualify the objection itself, but the attitude of the objector.

## 1. There must be a conscience

Given its nature, conscientious objection necessarily involves the personal behaviour of an individual who has the use of reason. A person who has not yet acquired (e.g. a child) or no more enjoys (e.g. a madman) the use of reason would be strictly unable to exercise a true conscientious objection.

Conscientious objection, therefore, cannot be asserted by an association of persons, because a community does not have reason. However, the possibility for associations to conform to their convictions is protected by the “right to autonomy” of institutions founded on moral or religious beliefs.<sup>15</sup> A hospital may then refuse to accomplish practices which are contrary to the convictions for which it was created.

## 2. There must be a conviction

The origin of objection is to be found in a prescription of conscience and not in mere personal convenience.

The Strasbourg Court explains that “*The term “conviction”, taken on its own, is not synonymous with the words “opinions” and “ideas”. It denotes views that attain a certain level of cogency, seriousness, cohesion and importance*”.<sup>16</sup> Convictions and opinions are both the fruit of conscience, but opinion is not a definitive judgement, the person is not convinced of it. It can be an “ethic”<sup>17</sup> conviction, that is to say moral, or a “religious”<sup>18</sup> one.

The ECtHR also explains that “*the expression ‘philosophical convictions’ (...) denotes (...) such convictions [that] are worthy of respect in a ‘democratic society’ (...) and are not incompatible with human dignity*”.<sup>19</sup> It means here that « unworthy » opinions do not deserve the protection of the Convention.

## 3. There must be an objection

It is not enough that the objection be based on conviction, it must also in itself have the characteristics of a conviction.<sup>20</sup> A person objecting only intermittently or out of opportunism would not deserve the protection of this provision.

The objection should result from a “*serious and insurmountable conflict*”<sup>21</sup> “*between the obligation (...) and a person’s conscience or his deeply and genuinely held religious*

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<sup>15</sup> This right stems from the combination of freedom of conscience and religion and freedom of association.

<sup>16</sup> ECHR, *Folgero and others v. Norway*, GC, n° 15472/02, 29 June 2007, § 84, see also ECHR, *Valsamis v. Grèce*, n° 21787/93, 18 December 1996, §§ 25 and 27, and ECHR, *Campbell and Cosans, v. United-Kingdom*, n° 7511/76, 7743/76, 25 February 1982, §§ 36-37.

<sup>17</sup> ECHR, *Chassagnou v. France* § 114, et *Schneider c. Luxembourg*, § 80, art. cit. supra.

<sup>18</sup> ECHR, *Eweida and others v. UK*, § 108.

<sup>19</sup> ECHR, *Campbell and Cosans v. United Kingdom*, § 36.

<sup>20</sup> *Bayatyan v. Armenia*, § 110. Referring to the case *Campbell and Cosans v. United-Kingdom*, § 36, and, a contrario to the case *Pretty v. United-Kingdom*, § 82. Objection must in itself constitute a “conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9”

<sup>21</sup> *Batyatyan v. Armenia*, § 110.



or other beliefs”.<sup>22</sup> The objector must be forced to refusal, on a serious matter with no way-out.

Regarding objections in the professional framework, since the *Ladele v. United-Kingdom* case<sup>23</sup>, the European Court reckons that the possibility for an employee to resign does not take out the unavoidable nature to his objection<sup>24</sup>. (As underlined by the former UN Rapporteur on freedom of religion or belief, Heiner Bielefeldt, “*by signing an employment contract employees do not waive their freedom of thought, conscience, religion, or belief.*”<sup>25</sup> Likewise, the Parliamentary Assembly of the Council of Europe called on the member States to “*uphold freedom of conscience in the workplace (...)*”.<sup>26</sup>)

#### **4. There must be a close and direct nexus between the conviction and the objection.**

The ECtHR specifies that “*the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case.*”<sup>27</sup> For objection to be serious, there must be a nexus, “close and direct” enough, between the motive of the objection and its object,<sup>28</sup> so that the person is morally engaged by the action.<sup>29</sup> To contribute to funding the war through paying one’s taxes is further and more indirect than doing it oneself.

### **V. The obligations of the State**

From what precedes, one must distinguish from the obligations of the State depending on whether conscientious objection obeys moral or religious prescriptions.

#### **1. When the objection is moral**

Because it aims at a good and opposes derogating to a right or a freedom, society must respect it in an absolute way.

When a liberal society tolerates or legalizes an individual practice which until then was considered immoral or unjust, then the public authorities must organize its availability without forcing individuals to take part in it.

Hence, concerning the refusal to practice an abortion, neither the ECHR nor the European Committee of Social Rights nor the HR Committee<sup>30</sup> have ever condemned objecting doctors. On the contrary, these instances recognise their right, at least implicitly. The recent condemnation of Poland and Italy aimed the governments, not

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<sup>22</sup> *Idem.*

<sup>23</sup> ECHR, *Eweida and others v. UK.*

<sup>24</sup> ECHR, *Eweida and others v. UK*, § 83.

<sup>25</sup> H. Bielefeldt and others, *op. cit.*, p. 304.

<sup>26</sup> PACE, Resolution 2036 (2015), *Tackling intolerance and discrimination in Europe with a special focus on Christians*, §6.2.2.

<sup>27</sup> ECHR, *Eweida and others v. UK*, § 82.

<sup>28</sup> EComHR, *Borre Arnold Knudsen v. Norvège*, dec., n° 11045/84, 8 March 1985.

<sup>29</sup> These are the criteria developed in moral philosophy to measure “cooperation with evil”. These criteria distinguish whether cooperation is direct or indirect, formal or material, close or distant.

<sup>30</sup> CDH, *V. D. A. v. Argentine*, Communication n° 1608/2007, 29 March 2011.

because they guarantee the right to objection, but because they would not have properly organised the access to abortion which they freely chose to legalise.

## 2. When the objection is religious

One must remember here that conscientious objection, because of its specificity, deserves a higher degree of protection than positive manifestation of convictions, for it is worse to force somebody to do evil (refused by one's conscience) or to sanction them for refusing to do it than it is to stop them from doing good.

The result from these considerations is that, when the refusal to act harms a third-party, public authorities should not oppose them, but try to **conciliate** competing rights so that they could coexist and be, both of them, entirely respected.<sup>31</sup> The duty of the judge should then not be to check whether the State had legitimate motives to constrain or sanction the objector, but to check whether the State positively took proportionate measures allowing reconciling the respect of freedom of conscience of the objector with the other competing rights and interests.

This approach of *conciliation* was adopted by several decisions of the European Court, as “*The verb ‘respect’ means more than ‘acknowledge’ or ‘take into account’. (...), it implies some positive obligation on the part of the State.*”<sup>32</sup>

This approach is based on the principle of equality which implies that a person, only because his convictions are in minority, be not treated unequally in the effective enjoyment of HR.<sup>33</sup>

### One last remark to conclude

Conscientious objection is not just an aspect of freedom of conscience; it is also a warning for the whole society. If many people refuse to perform an act, public authorities should not try to force them to perform that act, but should question the reasons for this refusal, because it is not the law, but the personal conscience that is the ultimate witness of justice.

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<sup>31</sup> I.e. as regards food in prison: ECHR CEDH, *Vartic c. Roumanie* (no 2), n° 14150/08, 17 December 2013.

<sup>32</sup> ECHR, *Folgerø and others v. Norway*, § 84.

<sup>33</sup> The corollary of this approach is the principle of non-discrimination. It is for minorities not to be indirectly discriminated by the choices of the majority that the State must take measures to protect the minorities. It is a way, for society, to self-limit its collective hold on individuals and to remain liberal.