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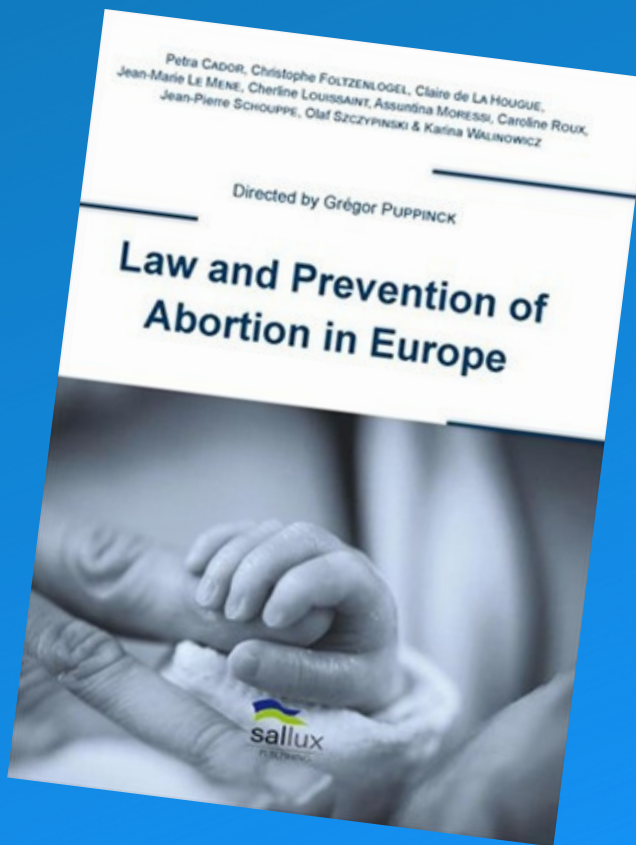
Conscientious Objection in the Medical Field in European & International Law

Claire de La Hougue



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Introduction: Conscience and Objection in International Law

A. Freedom of Conscience, a Cornerstone of Human Rights

Freedom of conscience is at the very core of human rights. It is protected in all human rights instruments, especially in Article 18 of the International Covenant on Civil and Political Rights ('the Covenant', ratified by Sweden in 1971) and Article 9 of the European Convention on Human Rights ('the Convention'), directly and/or through the prohibition of discrimination.

Its importance is underlined by the fact that, according to Article 4 of the Covenant, no derogation can be made to this right even *"in time of public emergency which threatens the life of the nation"*. According to Article 9-2 of the European Convention (and Article 18-3 of the Covenant), limits can be brought only to the *manifestation* of religion or belief, under strict conditions, never on the substance of the right. The Strasbourg Court regularly asserts that, *"As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention"* and insists that "*it is also a precious asset for atheists, agnostics, sceptics and the unconcerned."*[1]

Freedom of conscience has an internal dimension, the freedom to adhere or not to adhere to a belief, and an external dimension, the freedom to act *"in accordance with the dictates of his own conscience"* (Helsinki Final Act, Principle VII). This implies not only freedom *not to be prevented* from acting according to one's conscience (*i.e.* from manifesting one's belief) but also the right *not to be compelled* to act against one's conscience, as the Human Rights Committee recognised: *"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, paragraph 3, against being forced to act against genuinely-held religious belief."*[2]

B. Conscientious objection, a necessary corollary of freedom of conscience

As human beings are endowed with conscience and able to make a moral judgement, conscientious objection is both a duty, enshrined in Principle IV of the Nuremberg Principles,[3] and a right. This is why it was already mentioned in the Convention and the Covenant.

The development of international human rights law has led to recognise objection as an integral part of freedom of conscience.

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[1] ECHR, *Kokkinakis v. Greece*, n° 14307/88, 25 May 1993 § 31.

[2] *Yoon and Choi v. Republic of Korea*, 3rd November 2006, § 8.3.

[3] *"The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him";* on the duty to object, see also ECHR, *Polednova v. the Czech Republic*, 2615/10, June 21st 2011 and *K.-H. W. v Germany,* n° 37201/97, GC March 22nd 2001.

a) The UN mechanism

In General Comment 22 (1993) on Article 18, the Human Rights Committee (HRC) stated 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."*

This led the Committee to find violations of Article 18 of the Covenant in countries that do not recognise conscientious objection: conscientious objection is an essential part of freedom of religion or belief. In the case *Jeong et al v. Republic of Korea,*[4] the Human Rights Committee recognised that conscientious objection is not a mere manifestation of belief, but a constituent element of freedom of conscience:

> *"The Committee recalls its General Comment No 22 where it has considered that the fundamental character of the freedoms enshrined in article 18, paragraph 1 is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4, paragraph 2 of the Covenant. Although the Covenant does not explicitly refer to a right of conscientious objection, the Committee believes that such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience. The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion."*

The same paragraph is found in all subsequent cases on conscientious objection, such as for example the *Atasoy and Sarkut v. Turquie*.[5]

Freedom of conscience is not protected if people are obliged to act against the dictates of their conscience. For the Committee, it is clear that the right of objectors to refuse military service stems directly from the right to freedom of conscience (1st sentence of Art. 18-1) therefore is not subject to limitations under Art. 18-3.

In the case of *Kim v. Republic of Korea,*[6] the Human Rights Committee was even more precise:

> *"The Committee further notes that freedom of thought, conscience and religion embraces the right not to declare, as well as the right to declare, one's conscientiously held beliefs. 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*

[4] *Jeong et al v. Republic of Korea*, communications n° 1642-1741/2007, 24 March 2011, § 7.3.
[5] *Atasoy and Sarkut v. Turquie*, communications n° 1853-1854/2008, 29 March 2012, § 10.4.
[6] *Kim v. Republic of Korea*, communication n° 1786/2008, 25 October 2012, § 7.3-7.4

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."

b) The instruments of the Council of Europe

The European Court of Human Rights (ECHR) also *"considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9."*[7] One can note that, for the Court, it is the objection itself that constitutes the conviction protected by article 9.

The Court concluded Armenia had violated Article 9, especially because the majority should not always impose their view in a democratic society:

> *"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 (see Leyla Şahin, cited above, § 108). 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." (Bayatyan, § 126)*

Through this judgment, the Court rallied to the position of the Parliamentary Assembly of the Council of Europe (PACE), which had advocated conscientious objections for decades, since 1967. The Court expressly relied on the various PACE resolutions and recommendations (§ 51-53), beginning with Resolution 337 (1967):

> *"1. Persons liable to conscription for military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from the obligation to perform such service.*
>
> *2. This right shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9 of the European Convention on Human Rights."*

The Court further mentioned Recommendation 478 (1967), Recommendation 816 (1977) and Recommendation 1518 (2001) – which states that the right to conscientious objection is a *"fundamental aspect of the right to freedom of thought, conscience and religion"* enshrined in

[7] *Bayatyan v. Armenia*, n° 23459/03, GC, 7 July 2011, § 110.

the Convention – and Recommendation 1742 (2006) concerning the human rights of members of the armed forces.

These PACE resolutions and recommendations manifest the consensus in Europe on conscientious objection, confirmed by Recommendations R(87)8 and CM/Rec(2010)4 of the Committee of Ministers, also mentioned in the *Bayatyan* judgment.

Historically, conscientious objection only concerned conscription, because it was the only case in which a person could legally be obliged to kill another one. Nevertheless, during the last decades, laws have been passed, which allow other exceptions to the prohibition to kill, hence putting some people, especially medical staff, in situations where they have to end a human life. This is so in particular for abortion and euthanasia.

I- Conscientious objection in the workplace, especially in the medical area

Although the majority of the case-law and documents on conscientious objection regards military service, objection is not limited to this area. It concerns every "*profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives"* (APCE Resolution 337 (1967)), especially "*inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience*."[8]

In principle, conscientious objection should not have to be invoked in a medical field: the aim of medicine is to cure and no doctor can, in conscience, refuse to treat a patient. Yet, the field of medical activities widened over the last decades, first with contraception, then with non-therapeutic activities such as plastic surgery or sterilisation, and finally with abortion and euthanasia.

Because the nature of medicine changed, law provided for conscience clause, to guarantee the medical staff that they would not be obliged to take part in these non-therapeutic activities. *Stricto sensu*, these clauses do not constitute a conscientious objection for there is no obligation to take part in these activities. Nevertheless, recent developing lead to think that a true conscientious objection is going to spread in Europe. The problem is not in the conscience of the objector, but in the required act, which is outside the range of medicine and contrary to human life and dignity.

When human life, and sometimes human nature, are at stake, conscientious objection can certainly be invoked. It is not only a right, but also a duty to object to the order to kill, whatever the stage pf development of the victim. Human life is a continuum from the moment of fertilisation, as recalled by the Court of Justice of the European Union in the case of *Oliver Brüstle v Greenpeace e.V.*[9]

The European Court of Human Right has also just confirmed that "*human embryos cannot be reduced to 'possessions.'"*[10] Since Roman law, only two categories exist, therefore it can safely be deduced that, if embryos do not belong to the category of things, they necessarily belong to that of persons. The Court had already stated that "*it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of*

[8] Human Rights Committee, Communication No. 2179/2012, *Kim vs Korea*, § 7.3, 112th session (7-31 Oct 2014).
[9] *Oliver Brüstle v Greenpeace e.V* (C-34/10, 18 October 2011, § 35).
[10] *Parrillo c. Italy*, 46470/11, GC 27 August 2015, § 215.

that being and its capacity to become a person … require protection in the name of human dignity."[11]

It cannot be contested that abortion consists in ending a human life, therefore refusal to perform abortion is a case of conscientious objection as protected by international and European law. The same solution is to be applied to euthanasia, which ends a human life.

A- The right to conscientious objection in the medical area is not contested

The most recent general human rights instrument, the Charter of Fundamental Rights of the European Union, expressly recognises the right to conscientious objection, without limiting it to military service (Article 10.2).

In two cases against Poland, the European Court of Human Rights, considering that conscientious objection and the access to legal abortion respectively fall under Articles 9 and 8 of the Convention and are in conflict, judged that "*states are obliged to organise 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 to which they are entitled under the applicable legislation.*"[12]

The Court refused to make one right prevail over the other and imposed the responsibility to create a mechanism reconciling the concurrent rights on the State. The Court insisted on this point, noting that the Polish law "*has acknowledged the need to ensure that doctors are not obliged to carry out services to which they object, and put in place a mechanism by which such a refusal can be expressed. This mechanism also includes elements allowing the right to conscientious objection to be reconciled with the patient's interests*" (*P. and S. v. Poland,* § 107).

The Parliamentary Assembly of the Council of Europe (PACE) has solemnly recalled in Resolution 1763 (2010):

> *"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."*

The importance of conscientious objection in the medical area was recalled in Resolution 1928 (2013) of April 24th 2013 "Safeguarding Human Rights In Relation To Religion And Belief, And Protecting Religious Communities From Violence", the PACE called Member States to "*ensure the right to well-defined conscientious objection in relation to morally sensitive matters, such as military service or other services related to health care and education, in line also with various recommendations already adopted by the Assembly, provided that the rights of others to be free from discrimination are respected and that the access to lawful services is guaranteed".* (§ 9.10)

[11] *Vo v. France*, 53924/00, GC 8 July 2004, § 84.
[12] *R.R. v Poland*, 27617/08, May 26th 2011, §206; *P. and S. v. Poland*, 57375/08, October 30th 2012, § 106.

Various resolutions have also insisted on the right to freedom of conscience, which includes objection, in the workplace. Thus, in Resolution 2036 (2015) of 29 January 2015, entitled "Tackling intolerance and discrimination in Europe with a special focus on Christians", the PACE called on States to "*uphold freedom of conscience in the workplace while ensuring that access to services provided by law is maintained and the right of others to be free from discrimination is protected"* (§ 6.2.2).

These resolutions and recommendations are soft law instruments: though not legally binding, they reflect the consensus existing in Europe on the state of law and its practice, which is very close to the definition of international customary law, namely: "as evidence of a general practice accepted as law" according to the words of article 38 of the statute of the International Court of Justice.
It seems that all European countries except Sweden recognise conscientious objection in the medical area, at least to some extent. The Strasbourg Court regularly relies on APCE resolutions and recommendations when deciding a case, as can be seen again in the most recent case of *Parrillo v. Italy* where it quoted two Recommendations of the Parliamentary Assembly regarding the protection of embryos, namely Rec 1046 (1986) and Rec 1100 (1989).

In the case of *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy* (87/2012, 10 September 2013), the European Social Rights Committee never contested the right to conscientious objection of medical staff but simply repeated that the State was responsible for the organisation of hospitals so as to provide access to legal services: "*adequate measures must be taken to ensure the availability of non-objecting medical practitioners and other health personnel when and where they are required to provide abortion services."* (§ 163)[13]

In the case of *Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden*, (99/2013, 17 March 2015), the right to conscientious objection was not contested either: the Committee merely said it was not covered by Article 11 of the Social Charter on the right to health, which does not affect its protection under the right to freedom of conscience.

B- Reconciliation of concurring rights

Moreover, the Court has ruled that the possibility to change job was not sufficient effectively to protect the right to freedom of conscience:

> *"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." (Eweida and others v. the United Kingdom, 48420/10, 15 January 2013, § 83).*

A very serious reason, such as a grave breach of the rights of others, must exist to justify depriving somebody of their job.

[13] *IPPF EN c. Italie,* n° 87/2012, 10 septembre 2013.

However, the balancing required by the ECHR is not applicable where a right protected by the Convention conflicts with rights not so protected:

> *"It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect 'rights and freedoms' not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right"*[14]

Now, while freedom of conscience is one of the most fundamental human rights, abortion cannot be claimed as a human right at the international or European levels. Not treaty admits abortion as a right; the 1994 Cairo Conference on Population and Development not only affirmed: *"In no case should abortion be promoted as a method of family planning"* (§ 8.25) but also repeatedly called on States to prevent abortion (*e.g.* §§ 7.6 and 8.25) and help women avoid abortion (§ 7.24). The ECHR has also repeated that "*Article 8 cannot be interpreted as conferring a right to abortion.*"[15]

Even the European Social Rights Committee, in the aforementioned case of *IPPF EN v. Italy*, accepted to examine the issue of access to abortion services with regard to the right to health only because "*national legislation has classified* (abortion services) *as a form of medical treatment that relates to the protection of health and individual well-being, and which therefore can be considered to come within the scope of Article 11 of the Charter"* (§ 161), not because the Social Charter encompasses an alleged right to abortion. Hence the right to health does not include a right to abortion.

It is thus quite clear that an alleged right to abortion, with no existence in international law, cannot prevail over one of the most fundamental human rights, namely freedom of conscience. Neither can Sweden hide behind the margin of appreciation: this margin does not concern the *existence* of the right to conscientious objection, but at most its *conditions of implementation*, provided they do not impair the substance of the right.

The balance can hardly be done with the right to health either, as abortion has no therapeutic effect. Pregnancy is not a disease, which would be cured by abortion. Only in the very rare cases where pregnancy directly threatens the life of the mother would this balance be relevant, but then there is no right to objection: all possible measures to save the woman's life must be taken, even if the consequence is the loss of the child.

The Court has accepted that abortion may fall within the scope of the right to private life, in which case concurring rights must be reconciled, keeping in mind the outstanding position of freedom of conscience and religion in a democratic society. In the case of *Tysiac v. Poland*[16], the European Court clearly refused to limit the right to conscientious objection, when the applicant (as well as a third party) complained that *"a gynaecologist could refuse to perform an abortion on grounds of conscience"*, and further complained that *"a patient could not bring a doctor to justice for refusing to perform an abortion"* (§ 100). The Court clearly refused to undermine, at any moment in its decision, the freedom of conscience of medical practitioners. It is the State's responsibility to organise hospitals so as to permit the exercise of concurring rights.

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[14] ECHR, *Chassagnou and others v. France*, 25088/94, 2833/95, and 2844/95, GC 29 April 1999, § 113.
[15] *A. B. C., v. Ireland*, 25579/05, 16 December 2010, § 214; *P. and S. v. Poland*, 57375/08, 30 October 2012, § 96.
[16] *Tysiac v. Poland*, n° 5410/03, 20 March 2007.

C- Discrimination

The protection of freedom of conscience can also be ensured through the prohibition of discrimination, banned both by EU law and Council of Europe standards. If exercising one's right to freedom of conscience causes severe adverse consequences, the freedom is not effectively protected. Losing one's job and being obliged to change occupation is a very grave adverse consequence, with severe effects on private life. It can only be justified by very compelling reasons.

European Union's Council Directive 2000/78/EC of 27 November 2000 Establishing A General Framework For Equal Treatment In Employment And Occupation prohibits direct and indirect discrimination, based upon, inter alia, religion or belief. It applies to:

> *a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;*
>
> *(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;*
>
> *(c) employment and working conditions, including dismissals and pay;*

Article 14 of the European Convention on Human Rights prohibits discrimination based on religion or belief in the exercise of the rights guaranteed in the Convention. The Court has always recognised that people in a different situation must be treated differently, otherwise they would be victims of discrimination:

> *"the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."*[17]

An objector and a non-objector are in radically different situations with regard to abortion: while the latter can do it, the former cannot because it would contradict the dictates of his conscience, his strongest and most intimate convictions based possibly on faith but mainly on rational thinking and scientific evidence that life is a continuum from fertilisation to death and that abortion as well as euthanasia consist in putting an end to a human life. Therefore, the situation of the objector is different and he must be treated differently, which can easily be done, for the services just have to be organised in prevision.

Otherwise, the effect of the refusal to respect the freedom of conscience results in barring people who fully respect life from professions linked with pregnancy, which is both paradoxical and discriminatory. People with all the scientific skills and human qualities for these professions are deterred from them by the systematic discrimination they undergo. In the end, the patients, especially pregnant women, suffer the consequences of this obstinacy. Moreover, the lack of recognition of the right to conscientious objection not only worsens the shortage of midwives and deprives the medical staff of their right but also deprives some patients of midwives and doctors sharing their beliefs and the risk for these women to be

[17] *Thlimmenos v. Greece*, n° 34369/97, GC, 6 April 2000, § 44.

pressured into abortion becomes very high. Therefore, claiming that the right to conscientious objection would jeopardise access to health services is false. On the contrary, it would guarantee a diversified access, corresponding to the diversity of patients.

A very simple solution would eliminate all problems and meet the requirements of a democratic society: recognise the rights of medical staff, and organise hospitals accordingly. This would be in accordance with the ECHR findings in *Bayatyan* and with the consensus reflected in various PACE resolutions, such as Resolution 1846 (2011) "Combating All Forms Of Discrimination Based On Religion" of 25 November 2011 *"abolish outdated legislation and administrative practices causing discrimination against certain religious groups"* and *"when enacting legislation and implementing appropriate policies, 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."*

Similarly, a very recent APCE resolution insists on the necessity to accommodate beliefs to ensure effective freedom of conscience, which is a foundation of a democratic and pluralist society and is necessary for peace and harmony in a pluralist society. Resolution 2036 (2015) "Tackling Intolerance and Discrimination in Europe with a Special Focus on Christians" underlines that acts of hostility against Christians are often overlooked by the national authorities and that:

> *"Expression of faith is sometimes unduly limited by national legislation and policies which do not allow the accommodation of religious beliefs and practices".*

This resolution insists on the fact that:

> *"The reasonable accommodation of religious beliefs and practices constitutes a pragmatic means of ensuring the effective and full enjoyment of freedom of religion. When it is applied in a spirit of tolerance, this concept allows all religious groups to live in harmony in the respect and acceptance of their diversity."*

Intolerance against objectors – who often are Christians, even if the objection is based on conscience, not necessarily religion – is a manifestation of this hostility, overlooked by some States but matter of concern for the European institutions. Once again, *"The role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."*[18]

Organising health services so as to accommodate the needs of conscientious objectors would remedy the present violation of freedom of conscience and eliminate discrimination based on religion or belief.

[18] ECHR, *Holy Synod of the Bulgarian Orthodox Church*, 412/03 and 35677/04, 22 January 2009 § 120.

II- Abortion and freedom of conscience in ethical professional guidelines

The members of medical staff have a general obligation to act in conscience, in the interest of their patients. It is the very basis of medical ethics, which was already part of the Hippocratic Oath, in the Vth century Before Christ. This oath obliges doctors to treat patients according to their judgment, i.e. their conscience. In the original oath, it was prohibited to doctors to give poison or abortive products to their patients. While modern versions of the oath have generally suppressed the mention on abortion, they still oblige doctors to protect and promote health, to follow their judgment or conscience and to not inflict death on purpose.

A- Doctors

The World Medical Association (WMA) created in 1947 to ensure the independence of physicians, and to work for the highest possible standards of ethical behaviour and care by physicians, proposed, in its Geneva declaration[19], a modernised version of the oath:

> *"I will practise my profession with conscience and dignity; The health of my patient will be my first consideration; […] I will maintain the utmost respect for human life"*

The WMA International Code of Medical Ethics[20] adds, *"A physician shall always exercise his/her independent professional judgment and maintain the highest standards of professional conduct" and "always bear in mind the obligation to respect human life"*

Even though the prohibition of abortion has disappeared, all the documents insist on the fact that doctors must always follow their conscience and respect life. The *Medical Ethics Manual*[21] of the WMA lists several controversial questions, the most crucial of which being abortion and euthanasia. As regards the former, it states:

> *"Participation in abortion was forbidden in medical codes of ethics until recently but now is tolerated under certain conditions by the medical profession in many countries." (p.22)*

The manual recognises the diversity of points of view and convictions and concludes that "*This is a matter of individual conviction and conscience that must be respected*." (p. 57) It is then perfectly established that abortion is but tolerated and that no doctor can be obliged to take part in one.

As regards euthanasia, the manual notes:

> *"On euthanasia, for example, there is a significant difference of opinion among national medical associations. Some associations condemn it but others are neutral and at least one, the Royal Dutch Medical Association, accepts it under certain conditions." (p. 23)*

[19] Adopted by the 2nd General Assembly of the World Medical Association, Geneva, Switzerland, September 1948 and amended in 1968, 1983, 1994, 2005 and 2006 http://www.wma.net/en/30publications/10policies/g1/
[20] Adopted by the 3rd General Assembly of the World Medical Association, London, England, October 1949 and amended in 1968, 1983 and 2006 http://www.wma.net/en/30publications/10policies/c8/index.html
[21] WMA, *Medical Ethics Manual*, 2015 http://www.wma.net/en/30publications/30ethicsmanual/index.html

And the World Medical Association concludes:

> *"Physicians are understandably reluctant to implement requests for euthanasia or assistance in suicide because these acts are illegal in most countries and are prohibited in most medical codes of ethics. This prohibition was part of the Hippocratic Oath and has been emphatically restated by the WMA in its 2005 Statement on Physician-Assisted Suicide and its 2005 Declaration on Euthanasia the latter document states:*
>
> *'Euthanasia, that is the act of deliberately ending the life of a patient, even at the patient's own request or at the request of close relatives, is unethical. This does not prevent the physician from respecting the desire of a patient to allow the natural process of death to follow its course in the terminal phase of sickness'." (p.57)*

The World Medical Association here firmly assesses that there can be no obligation for a doctor to take part in an abortion or a euthanasia.

Likewise, the International Federation of Gynecology and Obstetrics (FIGO) regularly recalls the right to conscientious objection of doctors. FIGO Committee for the Ethical Aspects of Human Reproduction gathered many fundamental texts in a book entitled *Ethical Issues in Obstetrics and Gynecology*[22]. It includes *Ethical guidelines on conscientious objection* of 2005 (p. 220), "*practitioners have the rights both to undertake and to object to undertake medical procedures according to their personal conscience*." And that they have "*a right to respect for their conscientious convictions in regard to both undertaking and not undertaking the delivery of lawful procedures, and not to suffer discrimination on the basis of their convictions*". The *Ethical guidelines on conscientious objection in training*, adopted in 2014 in London, also underlined:

> *"Trainees have a right to respect for their conscientious convictions in regard to both undertaking and not undertaking the delivery of lawful procedures, and not to suffer discrimination on the basis of their convictions."*

The Ethical guidelines of the FIGO as regards abortion underline the opposition between abortion and the aim of medicine, and remind the right to refuse to take part in them:

> *"Most people, including physicians, prefer to avoid termination of pregnancy, and it is with regret that they may judge it to be the best course, given a woman's circumstances. Some doctors feel that abortion is not permissible whatever the circumstances. Respect for their autonomy means that no doctor (or other member of the medical team) should be expected to advise or perform an abortion against his or her personal conviction." (p. 155)*

Many other resolutions and documents by the FIGO mention conscientious objection, which is not linked only to abortion and euthanasia. The only duty of the doctor is "*to disclose their objection"* to the patient[23] and to "*make every effort to achieve appropriate referral*."[24] In

[22] 1st edition October 2012, new edition October 2015, http://www.figo.org/sites/default/files/uploads/wg-publications/ethics/FIGO%20Ethical%20Issues%202015.pdf4893.pdf the quotes are from the 2015 edition.
[23] *Id.*, p. 24.

case of emergency, if the life or health of the woman are in danger, the doctor must practice the necessary procedures, even though he usually objects to them.[25]

Finally, the World Health Organisation also recognises that *"Individual health-care providers have a right to conscientious objection to providing abortion."*[26]

B- Midwives

According to the International Confederation of Midwives (ICM) *International Code of Ethics for Midwives*, the aim of the profession is to *"improve the standard of care provided to women, babies and families"*. Abortion is not mentioned and it is obvious that young women who want to become midwives long to help women bring babies into the world, not to abort them.

The Scope of Practice in the Definition of the Profession reads as follows:

> *"The midwife is recognised as a responsible and accountable professional who works in partnership with women to give the necessary support, care and advice during pregnancy, labour and the postpartum period, to conduct births on the midwife's own responsibility and to provide care for the new-born and the infant. This care includes preventative measures, the promotion of normal birth, the detection of complications in mother and child, the accessing of medical care or other appropriate assistance and the carrying out of emergency measures.*
>
> *The midwife has an important task in health counselling and education, not only for the woman, but also within the family and the community. This work should involve antenatal education and preparation for parenthood and may extend to women's health, sexual or reproductive health and child care."*[27]

This profession resolutely aims at promoting life. Abortion is not mentioned. Even if "sexual or reproductive health care" was considered a euphemism for abortion, the text only says that education and counselling *may extend* to this area, not that midwife should perform abortions or participate in them.

Abortion has very little place in the various documents of the ICM. For example, the text on the Essential Competencies of midwives does not mention it in the Key Midwifery Concepts nor in the Scope of Midwifery Practice. Abortion is only mentioned at the very end of the document as a subsidiary topic under the item Facilitation of Abortion-Related Care, which clearly does not mean that a midwife is obliged to perform abortion herself. Abortion is definitely not a constituent part of the work of midwives.

Section III of the *International Code of Ethics for Midwives* specifies:

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[24] Id., p. 22.

[25] Id., p. 39; p. 174.

[26] *Safe Abortion: technical and policy guidance for health systems*, 2012, p. 69 http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf?ua=1

[27] http://www.internationalmidwives.org/assets/uploads/documents/Definition%20of%20the%20Midwife%20-%202011.pdf

c. Midwives may decide not to participate in activities for which they hold deep moral opposition; however, the emphasis on individual conscience should not deprive women of essential health services

d. Midwives with conscientious objection to a given service request will refer the woman to another provider where such a service can be provided.

III- Freedom of conscience in the medical field, comparative law

Freedom of conscience of medical staff is guaranteed in most European States, except for five of them: Bulgaria, Czech Republic, and three Nordic countries (Iceland, Finland and Sweden).

A- A general duty of conscience and independence

Doctors have a general autonomy in the exercise of their profession, so as to be able to exercise their judgment as demanded by the oath they take. French law explains that "*the physician is free in his prescriptions which will be what he believes more appropriate in the circumstances*"[28] and "*has the right to object to undertake medical procedures according to professional or personal reasons.*"[29] A physician takes his decision according to what he thinks is good for the patient. For example, even if the patient insists to have antibiotics, the doctor can refuse to prescribe them if he thinks that they would be useless or harmful. He can also refuse to manage a patient if he believes that he would not be competent to help him or for any other reason, except in case of an emergency.

Pharmacists also have a similar obligation to exercise their profession with conscience, as mentioned in the different deontological codes and some professional oaths, like the Galien Oath: "*I swear […] to exercise, in the interest of public health, my profession with conscience.*"

The first article of the Code of Ethics of Pharmacists underlines:

> *"The pharmacist must ensure to keep the freedom of his professional judgment within the scope of his duty. He cannot alienate his independence in any way." (Article R4235-3 CSP).*

The fundamental principle guiding the conscience of all medical professions is the respect of life. The Code of Medical Ethics reminds that:

> *"The physician must accompany the dying until his last moments, ensuring by proper care and measures the quality of a life that ends, safeguarding the dignity of the sick and comforting those around him. He has no right to deliberately cause death" (Article R4127-38 CSP).*

The Code of Ethics for Midwives specifies that they exercise their "*mission in the respect of life and of the human person*" (Article R4127-302 CSP) and that they must give assistance to

[28] Article R. 4127-8 code de la santé publique (CSP).
[29] Article R. 4127-47 CSP.

women and new-borns in danger (Article R4127-315 CSP). Likewise, the first article of the Code of Ethics of Pharmacists states:

> *"The pharmacist exercises his mission in the respect of life and of the human person" (Article R4235-2 CSP).*

Similar measures regarding conscience and respect of life can also be found in other Codes of Ethics, for example in articles 2 and 3 of the ethical code of the Swiss medical Association (FMH).[30]

B- Abortion and euthanasia: exceptions to the prohibition to kill

As aforesaid, abortion and euthanasia have long been (and still are in many countries) outside the scope of medicine, for they are not therapeutic acts. They frontally contravene to the oath of physicians not to inflict death.

In the European countries were abortion has become legal, it is still an exception. The United Kingdom was the first to accept abortion, in 1967. The permission is but under conditions: abortion is not a crime only if two doctors attest that a certain number of conditions are fulfilled. In every other case, abortion is still criminally sanctioned.[31]

Likewise, in France, where abortion was legalised in 1975, the Public Health Code starts to remind the principle of "*respect of the human being from the start of his life*" and then accepts abortion as an exception only in the conditions allowed by the law.[32] In Belgium as well, the penal code punishes abortion except in restrictive conditions.[33]

The situation is identical in the very few countries where abortion or assisted suicide are allowed. To end the life of a person is a crime, except in restrictive conditions.

Switzerland was the first country to legalise assisted suicide, in the particular case when this assistance does not proceed from selfish motives. Yet, euthanasia (called "murder on request of the victim") is still prohibited.[34] In other words, the last action must always be performed by the patient himself. The Supreme Court underlined the exceptional characteristic of this practise: "*assisted suicide cannot be regarded as part of the activities of doctors, because it is in itself against the goals of medicine.*"[35] The physician must respect the medical deontology expressed in the medico-ethic directives of the Swiss Academy of Medical Science on

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[30] http://www.fmh.ch/files/pdf18/Standesordnung_August_2016_F.pdf

[31] 1967 Abortion Act, section 1: "*Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith*— (…)"

[32] Article L. 2211-1 CSP : *« La loi assure la primauté de la personne, interdit toute atteinte à la dignité de celle-ci et garantit le respect de l'être humain dès le commencement de sa vie »* and Article L. 2211-2 CSP : *« Il ne saurait être porté atteinte au principe mentionné à l'article L. 2211-1 qu'en cas de nécessité et selon les conditions définies par le présent titre ».*

[33] Article 350 of the Belgian penal code : *« Celui qui, par aliments, breuvages, médicaments ou par tout autre moyen aura fait avorter une femme qui y a consenti, sera condamné à un emprisonnement de trois mois à un an et à une amende de cent [euros] à cinq cents [euros]. Toutefois, il n'y aura pas d'infraction lorsque la femme enceinte, que son état place en situation de détresse, a demandé à un médecin d'interrompre sa grossesse et que cette interruption est pratiquée dans les conditions suivantes […] ».*

[34] Articles 114-115 of the Swiss penal code.

[35] Law case of 3 November 2006, § 6.3.4.

managing patients at the end of life.[36] These rules precise under which conditions the patient is allowed to receive this prescription: they related notably to his medical condition, to his information and to the expression of his will.[37] A physician who would not respect this framework would expose himself to civil, criminal and or disciplinary sanctions. The National Committee on Ethics for Human Medicine insisted on the fact that "*Assisted suicide cannot be part of the understanding that the members of the health professions have of their mission.*"[38]

In the Netherlands, assisted suicide and euthanasia are punished by articles 293 and 294 of the penal code.[39] Yet, law of 10 April 2001 established a procedure transforming the crimes of euthanasia and assisted suicide in medical treatments. In Belgium, the law of 28 May 2002, completed by law of 10 November 2005, guarantee that the physician is not outlaw if he respects a number of strict conditions.[40] In both countries, the patient must be conscious and endure an unbearable suffering with no possibility of improvement, the request must be written and repeated and another doctor must be seen. More conditions have been added for underage children, over 12 in the Netherlands, and with no limit of age in Belgium since the law of 28 February 2014.

In Luxembourg, the law of 16 March 2009 on euthanasia and assisted suicide established the same conditions of decriminalisation of these practices.

It is then perfectly clear that abortion and euthanasia are exceptions to the general rule prohibiting to kill and that they can be practised only when respecting strict conditions. As they are normally not part of medical activity, laws which allow them precise that no physician or other medical staff can be forced to take part in them.

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[36] *Problèmes de l'assistance médicale au suicide*, position of the Centrale Éthics Commission (CEC) de l'ASSM, 20 January 2012 : "*ASSM guidelines on "management of patients and end of life patients" limit assisted suicide to a defined space of time. According to these guidelines, a doctor can assume that the end of life is near when, based on clinical signs, he is sure that has started a process that we know from experience that results in death in the within a few days or weeks.*
The CCE is aware that these directives exclude those who wish to end their lives because they are tired of living or they see their poor quality of life, but who are not near the end of life. This is consistent with the fundamental attitude of the ASSM repeatedly emphasized, that the increasing introduction of assisted suicide falls under the responsibility of society as a whole and cannot be delegated to medical staff" (free translation).

[37] http://www.samw.ch/fr/Ethique/Directives/actualite.html

[38] Commission nationale d'éthique pour la médecine humaine, *L'assistance au suicide*, n° 9/2005, p. 72 ; consensus http://www.nek-cne.ch/fileadmin/nek-cne-dateien/Themen/Stellungnahmen/fr/suizidbeihilfe_fr.pdf

[39] Patients Rights Council, "Background about Euthanasia in the Netherlands" http://www.patientsrightscouncil.org/site/holland-background/ and "Holland's Euthanasia Law" http://www.patientsrightscouncil.org/site/hollands-euthanasia-law/

[40] *"The doctor who performs euthanasia does not commit an offense if he is sure that: the patient is of age or an emancipated minor, capable and conscious at the time of application; the request is made voluntarily, carefully and repeatedly, and is not the result of outside pressure; the patient is in a hopeless medical situation and reported a constant and unbearable physical or mental suffering that cannot be relieved and is caused by a serious and incurable injury or pathological condition; and meets the conditions and procedures prescribed by this Act"* (Law of 28 May 2002, completed by law of 10 November 2005, Art. 3, § 1) (free translation).

C- Clause of conscience

Article 4 of the British law on abortion of 1967[41] is dedicated to conscientious objection. It guarantees that no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection.

In France the law on abortion stipulates:

> *"A doctor or midwife is never required to practice an abortion but must inform without delay the applicant of the refusal and immediately communicate the names of practitioners or midwives who may perform this action as provided for in Article L. 2212-2.*
> *No midwife, no nurse, no paramedic, whoever he is, can be required to contribute to an abortion" (Article L2212-8 CSP).*

This also applies in cases of medical termination of pregnancy (art. L. 2213-2 CSP). Codes of ethics for doctors[42] and midwives[43] point out that there is no obligation to participate in an abortion.

Similarly, Article 350-6 of the Belgian penal code states that "*No doctor, no nurse, no paramedic must be required to take part in an abortion*" while Article 13 of the Luxembourg law of 17 December 2014 on abortion states that "*no doctor will be required to perform an abortion. Similarly no health professional will be required to contribute to such an intervention.*"

When abortion was legalized, only the surgical method existed, so that pharmacists have not always been specifically included in the scope of protection. Now that medical abortion is common (about half the cases, the proportion varying across countries), pharmacists may face real problems of conscience. Since they must exercise their profession conscientiously and respect life, protection against forced participation in abortions should be extended to them. In Belgium, Article 32 of the Pharmaceutical Code of Conduct ensures that they are not forced to sell, between others, abortifacients:

> *"Without prejudice to the rights of the patient, continuity of care and implementation of the prescription, the pharmacist has the right to refuse to issue drugs because of his conscientious objections. In this case, he must*

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[41] *Conscientious objection to participation in treatment.*
(1)Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:
Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.
(2)Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.
(3)In any proceedings before a court in Scotland, a statement on oath by any person to the effect that he has a conscientious objection to participating in any treatment authorised by this Act shall be sufficient evidence for the purpose of discharging the burden of proof imposed upon him by subsection (1) of this section.

[42] "*A doctor may not perform abortion in the cases and conditions provided by law; it is always free to reject it and shall notify the applicant under the conditions and time limits in the law*" (Article R4127-18 CSP).

[43] "*In accordance with Articles L. 2212-8 and L. 2213-2, no midwife is required to contribute to an abortion*" (Article R4127-324CSP).

> *refer the patient to a pharmacy where the product in question may well be issued. If it does not, the pharmacist must fill the prescription. During the storage service, the conscience clause must always give way to the patient's right to continuity of care."*

On the contrary, in France they are not guaranteed such protection because they are not regarded as belonging to the medical profession or as paramedics, but as a category *sui generis* not covered by the conscience clause. A young pharmacist who refused to sell abortifacients was recently fired. Yet she always called a colleague so the customer was served. The action brought before the Industrial tribunal was dismissed and the case is currently pending before the Court of Appeal.

The vast majority of European countries protect freedom of conscience of health professionals either by law or by the constitution. Thus, Article 41 of the Constitution of Portugal guarantees the right to conscientious objection, without specifying in what area. The laws that protect medical personnel against forced participation in abortions usually require that they inform the patient on time, and sometimes invite the objector to refer to a colleague who may perform the abortion. In some countries, such as Norway, the referral is mandatory.

In Switzerland, Article 15 of the Constitution protects freedom of conscience and religion in general, and the cantonal law details it. Thus, Article 82 of the Geneva Health Act has (K1 RSGE 03; LS):

> *"1. The healthcare professional cannot be required to provide, directly or indirectly, care inconsistent with his ethical or religious beliefs.*
> *2. The objector must in all cases give the patient the necessary information so that he may receive by other health professionals, care that he is not willing to provide.*
> *3. In case of serious and imminent danger to the patient's health, the health professional must take all necessary measures to avert the danger, even if they are contrary to their ethical and religious convictions."*

This protects all health professionals, including pharmacists, against unwanted participation in abortion or euthanasia.

The Belgian Law of 28 May 2002 (Article 14) guarantees that "*No doctor is required to perform euthanasia. No other person is required to participate in euthanasia.*" Explicit protection of pharmacists was not added because it was already included in this general provision. As about abortion, the objector physician must inform the patient. He has no obligation to refer the patient to a colleague, but only to communicate the file to the physician appointed by the patient.

The same rules apply in Article 15 of the Luxembourg law of 16 May 2009, with one addition: the doctor has 24 hours to inform the patient of his refusal, and the latter has to be motivated.

When recognizing that abortion or euthanasia is contrary to the mission of the health professions or that certain acts are not normally part of medical activity, the law provides consciousness protection provisions, the refusal to take part in these acts is not strictly speaking a conscientious objection, but the use of a possibility offered by the law.

D- Conscientious objection, *stricto sensu*

However, sometimes laws instruct healthcare professionals to perform acts contrary to the purpose of medicine.

Some people consider abortion as a right, not as an exception to the right to life. Although not based on medical ethics in international law or in most national laws, this perspective influences the legislation and its interpretation in some countries.

If abortion and euthanasia are considered as rights and not as exceptions, then it is not legitimate to refuse to perform them. This is the case in Sweden about abortion. Doctors, midwives and other medical or paramedic staff are obliged to perform abortions or to take part in them. Students who refuse cannot graduate or are forced to choose another specialty. Gynecologists who refuse to perform abortions are not allowed to work in hospitals, and are thus excluded from research and academic teaching. Doctors and midwives may lose their jobs for refusing to participate in abortions. In some cases, local agreements are found, but most of the time, those who refuse face severe discrimination and sanctions. Recently, the contract of a midwife was not renewed, and she could not find a job because of her refusal to participate in abortions. The case was dismissed by the Swedish Court. The only choice left to her was either to give up that profession and become a nurse, or leave her country, which she did. She is now a midwife in Norway. Despite the lack of midwives, Sweden refuses to respect freedom of conscience and to make the necessary adjustments. When the Parliamentary Assembly of the Council of Europe adopted Resolution 1763 (2010) on the right to conscientious objection in lawful medical care, Sweden has officially taken a stand against it.

In the five countries which do not respect the freedom of conscience for medical staff, very little cases are brought to Court or known abroad. It may happen, notably in Finland, that local agreements allow the objectors not to take part in abortions. Nevertheless, most of the time, they have to either act against their conscience or chose another job.

Officially, only Sweden, Finland (where the case is being debated), Iceland, Czech Republic and Bulgaria refuse to guarantee freedom of conscience to their medical staff. Yet a worrying tendency can be observed in other countries. Unconfessed pressures and creeping discrimination are developed. For example, in France, while the refusal to take part in an abortion is, in theory, protected, public hospitals or hospitals associated to the public service[44] "*which are allowed beds or spaces in obstetrics and gynecology or surgery services may not refuse to practice abortions*" (article R2212-4 CSP). Objection is therefore very difficult in practice because, as doctors or midwives who wish to practice abortions are rare, all have to "take their turn." In the UK, NHS job opportunities specify that candidates must be prepared to perform all the tasks facing them if they are hired, which implicitly but necessarily includes abortion. Cases of discrimination in recruitment have been reported, like in Scotland in 2000.[45] Although abortion cannot be considered a medical emergency (the only possible emergency regarding the legal deadline) and has no therapeutic effect, physicians are sometimes required to perform an abortion when an adequate service termination of pregnancy is not otherwise available, which is a clear violation of professional ethics and

[44] Article L. 2212-8 provides that "private health institution may refuse that abortions are practiced in its premises", unless it is associated with the public service ("collective interest" or contract concession).
[45] BBC, 7 October 2000, "Abortion views cost job" http://news.bbc.co.uk/2/hi/health/961169.stm

freedom of conscience. This is the job of the state to organize services so that they are accessible without violating the freedom of conscience of individuals.

Until recently, this dangerous slope covered only abortion. A recent case in Belgium, however, suggests that the same pattern may occur with euthanasia. A retirement home in Diest refused to admit a doctor who was coming to perform euthanasia on a boarder. Finally, the patient returned to her home, where she was euthanized. Her children are now suing the nursing home to court, arguing that this refusal aggravated the pain and suffering of their mother.[46]

The issue of assisted suicide in the hospital was discussed in Switzerland, especially in the University Hospitals of Geneva. In the absence of consensus, the decision was taken by the majority: assisted suicide can be practiced in hospital under strict conditions, only for patients who cannot be sent home, and no staff the hospital can participate. This reflection shows the exceptional character of assisted suicide and the fact that it is not part of the mission of a doctor. It is therefore very worrying to see the sometimes treated lightly or as an individual right.

The question of assisted suicide in the hospital was discussed in Switzerland, especially in the University Hospitals of Geneva.[47] In the absence of a consensus, the decision was taken by the majority: assisted suicide can be practiced in hospitals under strict conditions, only for patients who cannot be sent home, and no staff of the hospital can participate. This reflection shows the exceptional character of assisted suicide and the fact that it is not part of the mission of a doctor. It is therefore very worrying to sometimes see it treated lightly or as an individual right.

Conclusion

The interruption of a life is a fact. It is not a question of religious beliefs. Objectors may practice any religion, or none. The first documented history of conscientious objection regarding midwives, when Pharaoh ordered the midwives of the Hebrews to kill new-born males, and they do not obey (Ex 1, 15-21). That was the thirteenth or fourteenth century BC, before the birth of Moses, in other words before the Ten Commandments. Such an event clearly shows that respect of life is part of the moral law etched in human consciousness, regardless of religious beliefs and prescriptions.

Therefore, the right to object is not a manifestation of freedom of religion; it is a constitutive part of freedom of conscience itself, that is to say the ability of human consciousness to adopt moral convictions and judge whether an action is good or evil. This is the right not to commit an act contrary to this judgment, especially when this act has the effect of legally ending a human life, against the dictates of conscience of the person who practices it.

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[46] « Une maison de retraite a refusé l'accès à un médecin pratiquant l'euthanasie », *La Libre*, 2 janvier 2016 http://www.lalibre.be/actu/belgique/une-maison-de-retraite-a-refuse-l-acces-a-un-medecin-pratiquant-l-euthanasie-5687780c3570b38a57ed03d9

[47] University Hospitals of Geneva, Conseil d'éthique Clinique, *Autorisation/interdiction de l'assistance au suicide au sein des HUG* http://www.hug-ge.ch/sites/interhug/files/documents/soigner/ethique/assistanceausuicideaux.pdf

Legalizing abortion or euthanasia is a thing, forcing individuals to perform these acts against their will is another one. Recognizing the right not to be compelled to participate does not affect the legality of such practices nor the ability to access them. Democratic states that claim to protect and promote human rights cannot accept or even require the violation of one of the most fundamental rights, freedom of conscience, of a category of the population - namely health professionals - to satisfy the desire, even understandable, of another person. These States may not endorse discrimination against these people because of their beliefs, based on sound moral reflection.

Rather than questioning the freedom of conscience, it would be wise to consider the causes of objection, hence the nature of the act in question. It is easier to assert a right or to pass a law than being the one who is responsible for ensuring compliance, especially when it comes to ending a human life, whether beginning or ending. It also invites to reflection on the current trivialization of abortion and the weakness of prevention, which ought to be a priority goal of the States.