

THE LIMITS OF CONSCIENTIOUS OBJECTION

*Talk by David Pollock, President of the European Humanist Federation,
at a side meeting at the OSCE HDIM in Warsaw on September 28, 2009*

International human rights instruments endorse the right to freedom of thought, conscience and religion. Manifestation of religion or belief is to be restricted only when necessary “in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”. The OSCE’s Guidelines for Review of Legislation pertaining to Religion or Belief state that;

It is important . . . that specific statutory exemptions be drafted and applied in a way that is fair to those with conscientious objections but without unduly burdening those who do not have such objections.

I want to explore that borderline between being fair to those with conscientious objections and unduly burdening those who do not have such objections.

Now, our consciences are a concomitant of our existence as moral beings - they are of the essence of our being human. Conscientious behaviour is the foundation of society, and in a liberal society under rule of law consciences will generally prick us into cooperative and mutually beneficial behaviour. Only at the margins will they clash with the social norms and laws of the society . But the fundamental importance of conscience to our humanity is such that society should as a rule seek to accommodate the minority whose consciences point in different directions from those of the majority.

Laws dealing with conscientious objection originated with war. No one can be in doubt that recognising the legitimacy of conscientious objection in wartime was an advance in civilised

values. How barbarous it was for the state to force people to kill other human beings against their innermost feelings of moral revulsion. So it must be welcome that we now allow conscientious objectors to appeal to official tribunals that are charged with assessing whether each objection is based on genuine religious or moral principles.

When laws to legalise abortion in defined circumstances were introduced it seemed a logical extension of this principle that a right was usually included for doctors and nurses not to take part if they had conscientious objections.

But in recent years there have been claims that the principle should be extended in many ways that are much less obviously justified. These claims have come almost entirely from religious - mainly Christian - sources. Real or plausible examples - which go far beyond the fairly narrow range of cases cited in the OSCE Guidelines - include the following.

- § In Britain recently a magistrate claimed the right not to preside over cases involving laws of which he disapproved: specifically, dealing with the legal adoption of children by lesbian and gay couples.
- § Some nurses refuse to take part in IVF (in vitro fertilisation) on the grounds that it involves creating and discarding 'spare' embryos, which they regard as the murder of other human beings.
- § Some pharmacists - Christian and Muslim - refuse to dispense the so-called 'morning after' contraceptive pill on the (spurious) grounds that it brings about an abortion (in fact, it prevents implantation).
- § Soon, maybe, some doctors will refuse to provide treatments developed with the use of foetal tissue or embryonic stem cells. (This and much more were proposed for legal recognition in a Bill in the US state of Wisconsin a few years ago - see BMJ 2006; 332;294-297).

- § Plymouth and Exclusive Brethren refuse to allow their children to use computers or the Internet in school on the ground that they are diabolical inventions.
- § Some Muslim parents on grounds of religious conscience refuse to allow their children to take part in art classes at school if they have to draw human figures - or indeed anything from nature, or (similarly) to take part in physical education unless in single-sex groups and unless the girls especially are swathed in modesty-protecting garments.
- § Some people employed as cooks refuse to work with pork, or with non-halal or non-kosher meat or with alcohol.
- § Some people of particular religions refuse to work on Fridays, Saturdays or Sundays.
- § Back in the health field, medical students may refuse to undertake parts of their training - say about contraception or abortion or about embryonic research - on conscientious grounds.
- § Again, in the UK people who let rooms in their own house already have the right to refuse gays as lodgers: they say their consciences would be offended by having homosexual acts happening on their premises. Now there is a religious lobby to extend this right to hotels run as businesses - and then to allow all businesses - "Christian" garages, "Muslim" printers and so on - to pick and choose whom they will and will not do business with.
- § And then - in a further extension of the sensitive religious susceptibility - there are those doctors whose consciences cannot be satisfied merely by refusing to undertake (say) abortions but who claim the right not to reveal the reasons why they are refusing and not to refer their patients to another doctor. Such provisions were written into a recent timid Bill in the UK to allow assisted dying for the terminally ill - a Bill nevertheless massively opposed by religious interests.

The matter is made the more urgent by two factors. One is the drive by many European governments to contract out public services, often to religious organisations that for the first time introduce discrimination and a selective approach to the law into employment and client

relations. The other is the complementary rush by religious organisations to take up these opportunities, in the case of the Roman Catholic church claiming under the rubric of “subsidiarity” that, being closer to them than the government, it has superior knowledge of what is best for people and therefore has the right to decide what services should or should not be provided.

Are all these claims for conscientious objection acceptable? Many of us would think not. In past ages, far less respect was paid to people’s conscientious feelings, and they had unenviable tough decisions to make about the extent to which they took the risk of obeying their own principles. That might seem undesirable to our more tender age, but we need to examine the consequences of allowing unlimited appeal to conscience.

Let me leave aside the question whether it might lead to cynical manipulation of the privilege for personal advantage - although this is a serious risk and was of course the reason for tribunals being brought in to deal with wartime claims of conscientious objection.

The real issue is: what would it mean for other people and for society as a whole? Obviously it usually means that someone else has to do the work - perhaps bear a greater burden. But it is not just co-workers who are involved, for one person’s right to opt out of a duty is too often another’s loss of a right to access a service. Alternatively or in addition it may mean that other people are conspicuously singled out for discriminatory, unfair treatment.

As for society, it depends on people’s behaviour being to a large extent predictable and reliable - the more so when public officials and public services and laws are involved. This could be threatened if conscientious objection became so widespread that the reliability of public services and the fairness of official behaviour became unpredictable. Ultimately, it would be impossible to run reliable public services. Some doctors would not be fully trained. It might be impossible to get some prescriptions dispensed. Courts would fail to administer the law

decided by Parliament. Women seeking abortions would be advised against it by their doctors without being told that the advice was not medical but an expression of the doctor's religious beliefs. Religious organisations would compete to demonstrate their power by pressurising their followers to exercise their rights of conscientious objection. (The Roman Catholic church is organising concerted campaigns in Italy at this moment to persuade pharmacists to refuse to dispense the 'morning after' pill.) And when that happens the question becomes political - conscientious objections are generated artificially.

How to tell the difference between a conscientious objection and a prejudice? Is there in the last analysis a difference? Was it religious principle that led the Christians in the Dutch Reformed Church in apartheid South Africa to treat blacks as an inferior species - or sheer race prejudice? If people's baser instincts or culturally induced hatreds can be dressed up as matters of principle, religion or conscience, where shall we end up? - with a society that offers legitimacy under certain conditions to discrimination that would otherwise be illegal, against gays or divorcees or single mothers (and their children), other ethnic groups, other races (in a current UK case a Jewish school is pleading religious exemption from the laws against race discrimination) or religions (remember how, for example, the Roman Catholics suffered in some countries including England over centuries). A society might result where conscientious objection is accepted as a legitimate reason for people to opt out of fulfilling the duties of their employment or position. Conscientious objection in that case, one might decide, is a luxury that society cannot afford to indulge.

But the other end of this spectrum, opposite this carte blanche for prejudice and dereliction of duty, is an enforced uniformity that does not accommodate deeply held principles of pacifism, or religious duty, or other deep conscientious beliefs.

Lines have to be drawn. But where? Criteria are needed by which we can decide which exercises of conscientious objection are acceptable and should be accommodated in our laws

and procedures - and which not. What would those criteria be? Or at least, without defining them in detail, what would they be about? We need to examine how plausible criteria would work out in practice, what the logic of each would be and how each could be justified and what objections to it might be raised.

So, what criteria should inform our laws? One, of course, is that **the claimed conscientious objections should be genuine, not pretended**. But that does not get us far.

Is the right criterion, then, to do with **the strength of the conscientious feeling itself**? One might well imagine that the revulsion someone feels against being forced to kill might be greater and more compelling than someone else's objection to dispensing a medicine. But the criteria we adopt need to be capable of objective administration. The strength of internal feelings is not in that class. Besides, it would be odd if one person's objection was ruled legitimate and another person's identical objection was rejected because his feelings were judged less profound.

Or is it that **religious objections** should carry more weight since they are based on heavenly commands and immortal souls are at stake? But religious objections are not the only or even the most profound ones at stake: non-religious people have as strong consciences as the religious, albeit usually more aligned to the patterns of liberal democratic societies. But (for example) some non-religious people have very strong ethical objections to euthanasia, some to abortion in some circumstances. Moreover - as mentioned - religious objections are to some extent learnt before being felt - formulated and generated outside the individual's conscience - whereas typically a non-religious conscientious objection is very strictly personal, arising from freestanding deep feelings or principles. Besides, new religions can be created all too easily and might be - to provide 'cover' for prejudiced behaviour.

So religion is not a useful criterion.

One might argue instead that the acceptability of a conscientious objection is to do with comparatively objective criteria: for example -

- whether the person claiming the right of objection is in a public or private role
- the centrality of the principle at stake to a recognised religion or lifestance
- the proximity of the action the person refuses to perform to the matter to which conscientious objection is taken
- the social consequences of the objection being accepted
- the effects on other individuals involved.

Let me look at each of these in turn.

Should the criterion be whether the person claiming the right of conscientious objection is in a **public or private role**? Certainly there is something odd about someone taking on a public official role - as a magistrate, for example - and then objecting to performing the required duties. Should people with objections to carrying out the duties of a public position take it on in the first place - especially if dispensation of the law is involved? In fact, the magistrate in England who wanted to be able to stand down whenever he was asked to oversee an adoption by a gay couple had instead to resign. Otherwise he would have been seen as an agent of the state casting doubt on the laws of the state - an anomalous and basically unacceptable situation. Similarly, in the days of capital punishment, judges with personal objections to the death penalty had to decide either nevertheless to impose it as being part of the law of the land or to direct their careers into areas of the law where the question did not arise.

So we could certainly say that a pick-and-choose attitude to official duties is unacceptable. But does that mean that conscientious objection should be unfettered in the “private” realm? Is discriminatory behaviour based on religion or conscience to be acceptable in commerce and

trade, in social relations? Should we allow hotel chains to proclaim “no unmarried couples” - or “no blacks” - by pleading religious principles - and get away with it? What of the British railway boss who is notoriously anti-gay - should he be allowed, if he wished to risk his commercial interests (which he does not), to ban gays and lesbians from his trains? How different would that be from saying “No Jews”?

So there may be a difference between public and private roles - especially where “private” means domestic private life, not just “not involving public office” - but it does not provide a clear criterion of what is or is not acceptable conscientious objection.

Is it an adequate criterion then to require that the principle at stake should be **central to a recognised religion or lifestance**? This may seem logical at first sight but it raises unresolvable questions.

§ It would require on the face of it that the conscientious objection related to a wider framework of belief. If you simply held as a matter of conscience that vivisection was wrong, without fitting that conviction into a wider explanatory framework of belief, you might find that your conscientious objection was overruled.

§ Again, it would require official or judicial inquiry into what was or was not central to a religion or lifestance. Are judges to be required to become theologians?

§ Anyway, most religions do not have the centrally determined authoritative rules of the Roman Catholic church - one of the subsidiary objections to any official endorsement of sharia law is its uncertainty; and Humanism allows wide personal discretion in the application of its basic principles and shades off on all sides into various non-Humanisms that may be equally moral in nature.

§ Beyond that, it would open the way for religious authorities to become legal authorities, being called in to adjudicate on the authenticity or centrality to their religion or belief of an essentially personal conscientious objection. This would give powerful backing to religious authorities in any attempt they made to regulate the behaviour of their

followers, imposing a group-think on moral and religious matters that would quickly become itself a denial of personal consciences.

My next suggestion was that the criterion might be **the proximity of the action the person refuses to perform to the matter to which conscientious objection is taken**. You might feel more sympathy with a surgeon refusing to carry out an abortion than with a general practitioner refusing to recognise that an abortion is a possibility - and more with the latter than with one who refuses to admit to his patient that his own conscientious objection is involved and to refer her to another doctor. One might be readier to accommodate a doctor who refused to take a post which involved in vitro fertilisation treatment than with a hospital administrator concerned with the efficiency of an IVF department. In such a case the agency involved is very remote and certainly not final or definitive.

So this is a sensible distinction to make - but it still raises big difficulties for those with absolutist principles. After all, the contention that "if you will the means, you will the end" does have some logical force.

Besides, this will never be an adequate criterion in itself, since it would give *carte blanche* to all conscientious objections of any nature that were based on first-hand involvement. Even so, it may have a contributory role to play in our formulation of sensible criteria.

Next on my list was the **social consequences of the objection** being accepted. This would include the practicality of society coping with it - such as the possibility of someone else taking on the role - and the effects on social cohesion of any widespread incidence of such conscientious objections.

With this criterion we begin to find some solid ground. If the conscientious objection is exceptional and rare little damage may be done to society's fabric and arrangements - services

will generally be provided by others taking the place of the conscientious objector. If one nurse will not assist at an abortion or in IVF treatment and another is available to take on the work, then surely this is acceptable? It amounts to something like the “reasonable accommodation” which is found in some legal frameworks for employment. But it too is problematic. The same person with the same conscientious objection may at one time find that he is accommodated, at another not but (instead) liable for disciplinary action, simply because of the extraneous circumstance that at one time a substitute is available, at another not. And this is not just a black and white question - if the substitute can be found only by complex juggling of duties or of work schedules in a large workforce, then there is a cost in making a substitution and it is borne by the employer or institution - and therefore ultimately by the public through prices or taxes - not by the conscientious objector. It also means that the more common a conscientious objection is, the less likely it is that it can be accommodated so that the necessary work can be done. (Of course, sometimes the objective of the conscientious objector may be to bring about that the work cannot be done - but that goes beyond conscientious objection, which is an individual matter, into political action, which may be a defiance of a democratic decision to provide certain services or to guarantee non-discrimination.)

More important even is the effect on the rule of law: if one person’s conscientious objection to obeying a law or fulfilling a lawful duty prevents someone else from exercising a lawful right it is not acceptable: nobody should be above the law.

Moreover, there is likely to be an effect on the cohesion of the whole society - on the commitment of its members to maintaining its institutions - if a group within the society is seen to have arrogated to itself a privileged position, standing apart from the whole and not contributing on the same basis.

Lastly, I suggested the criterion might be **the effects on other individuals involved**. Maybe such people would have problems accessing services to which they were entitled or not receive

them at all; maybe they would suffer discrimination or other demeaning treatment despite legal guarantees of equality. Or maybe - a special case - children are involved because of their parents' conscientious objections.

With this we confront the crux of the matter. We need to have regard not only to the feelings of those with conscientious objections to some duty or obligation but also to those others who will be personally affected if the conscientious objection is indulged. These will variously be:

- patients not receiving treatment they are entitled to - abortion, IVF - or medicines they have been prescribed - the morning-after pill - or having to go to special trouble to obtain such services
- citizens receiving demeaning and discriminatory treatment from public institutions or from individuals in official positions - as with gays seeking to have a marriage or civil partnership registered or to have their adoption of a child formalised by the family court
- patients finding that the health professionals they rely on are not fully competent because they refused to undertake part of their training owing to a conscientious objection that they had at the time but may no longer feel at a later stage in their lives
- fellow employees being expected to take on extra duties or to work more weekend shifts or otherwise suffer some cost as a result of accommodating other people's conscientious objections
- people being subjected by others to demeaning discrimination that would otherwise be illegal but is permitted when in fulfilment of some religious belief or scruple - having some aspect of their identity held up to moral opprobrium as a demonstration of the conscientious feelings of someone whose views neither they nor society at large shares.

The price of accommodating the conscientious objections of the few is paid, in other words, not by the conscientious objector (who may instead receive a moral uplift from his conspicuous virtue) but by random members of society at large who are unhappy enough to encounter such strong upholders of what they consider virtue.

There is a special case where the third parties involved are children, notably the children of parents whose consciences will not allow them to receive the full education that their contemporaries receive (incidentally being made awkwardly “different” from their friends) or (worse) to receive the medical treatment they need. Children of the Amish in the USA all leave school to work on the land before completing statutory education: the authorities condone it or at least do nothing about it, and as a result these children go through life - in which they may well leave their isolated communities and seek a new life in the city - lacking the basic qualifications they need for employment. Some fundamentalist Christians, as mentioned, seek to prevent their children being taught to use computers, which leaves them at a major disadvantage in the modern world. Children of Jehovah’s Witnesses who need blood transfusions may even die unless society steps in and through the courts overrules their parents’ conscientious objection.

Where does all this leave us? It leaves me feeling that there is a need for a lot more hard thinking about the problems and that there is no easy solution. Conscientious objection sounds virtuous but its effects are by no means wholly benign. A free-for-all unregulated endorsement of conscientious objection cannot be allowed, even on the unlikely assumption that all alleged objections are based on genuine beliefs and feelings. If a free-for-all is ruled out, then criteria are needed for deciding what is acceptable. The European Convention on Human Rights gives us some broad pointers when it talks of public safety, protection of public order, health or morals, and (especially) protection of the rights and freedoms of others - but that is too broad a formulation to be sufficient in itself.

Let me venture some tentative and interim suggestions. Conscientious action is the basis of social functioning and conscientious objections arise from the same consciences that produce altruistic and self-sacrificing behaviour based on principles and beliefs. The obligation on society to look indulgently on conscientious objection is therefore strong, but it is not unconditional. Among the conditions placed on it might be the following:

- § the conscientious objection should be deeply felt and preferably the conscientious objector should be able to give a coherent account of it;
- § the conscientious objection should be to a proximate action and not to some remoter or associated matter;
- § society should not in accommodating conscientious objections put at risk the rule of law or its social cohesion by seeming to favour one group over another;
- § holders of public office, representing the state, the law or the community, should have less or no rights to conscientious objection, their acts being not their own but those of the public authorities or the state;

- § the rights of others involved must have at least equal regard - the right not to suffer discrimination, to be able to access facilities and services (especially public services);
- § children in particular must be protected from damage to their education to their health: there must be limits to their parents' power over them;
- § the price of accommodating conscientious objection should be paid or at least shared by the conscientious objector himself. It may mean restricted career options or choosing between overcoming moral objections or accepting penalties such as disciplinary measures or dismissal.

In wartime, after all, conscientious objectors were not let off to continue their normal lives but were assigned to alternative war work - and if they were unwilling to do that, they went to jail.

Conscientious objection is a luxury that society can sometimes afford - but it is also a luxury that must carry a price to the conscientious objector which he may choose sometimes not to pay.

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