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Silvio Ferrari

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Javier Martínez-Torrón
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Conscientious objections
Protecting freedom of conscience beyond prejudice

Javier Martínez-Torrón

Definitional issues

In this chapter I have adopted a broad perspective when trying to define the general notion of conscientious objection. I consider this the most adequate attitude, in view of the very diverse conflicts that may arise between law and individual conscience; and in view also of the different positions that can be found in legal literature, which are partly due to the difficulty to distinguish this concept from other neighbouring, and often ambiguous, concepts – for instance, civil disobedience.

From such perspective, conscientious objection can be defined as the individual’s refusal, grounded on reasons of conscience, to accept a behaviour that is in principle legally required, either by the law directly (legislation, regulations or judicial orders) or by a contract endorsed by the law. This concept of conscientious objection includes every conduct contrary to the law, motivated by axiological – and not merely political or psychological – reasons, inspired in religious or non-religious beliefs, which could be aimed at different purposes: e.g., to elude the behaviour demanded by the law or the punishment established for its contravention, or even to obtain the modification of the law through the example provided by the voluntary and passive acceptance of the state’s repression (see, for further details, Navarro-Valls and Martínez-Torrón 2012: 34–7).

Conscientious objections are directly linked to the human right to freedom of thought, conscience and religion, recognized by international instruments and, with one or other terminology, by most world’s constitutions (see generally Hammer 2001; Taylor 2005). Freedom of conscience does not consist only in the individual’s right to choose the moral principles that guide his life; it entails also the right to maintain behaviour in conformity with the binding rules stemming from those moral choices – both in ordinary and in extraordinary circumstances. Indeed, conscientious objection is not an independent right but a specific type of situation, characterized by a conflict between the imperative dictates of individual conscience – protected by freedom of conscience – and a legal obligation. It is important to note that, properly speaking, the notion of conscience here

utilized does not comprise any and every intellectual option inspired by personal views but the ensemble of supreme personal rules of conduct, rooted in religious or non-religious beliefs, which have for the individual a compelling force higher than any other normative reference (see Greenawalt 1987: 26).

Being an expression of the human right to freedom of conscience, conscientious objection is a normal part of the legal order and not an exception to the legal order that might require an accommodation only when necessary for political reasons. However, while it is undisputed that freedom of conscience enjoys the maximum degree of protection in international law and in national legal systems, there is less consensus about whether such protection covers the individual’s right to obtain an exemption from complying with ordinary legal provisions of general applicability, especially when those provisions are considered neutral, i.e., when they pursue a legitimate secular goal and are aimed at being applied, in principle, in a non-discriminatory fashion. In addition, even when we acknowledge the right to obtain legal exemptions, it is still necessary to face other issues – e.g., to which types of conscientious objections such right would apply and under which conditions it should be appropriate to grant legal exemptions.

It is easy to understand the enormous possible variety of situations implicit in the foregoing concept of conscientious objection. The most widespread case is objection to military service, but comparative law provides many other examples: e.g., conscientious objection to cooperate in abortion or euthanasia procedures, to undergo certain medical treatments, to work on days of religious sabbatical rest, to contribute to the public health insurance system, to remove some personal symbols of religious significance (such as a hijab, yarmulke or kirpan), to pledge allegiance to the national flag for considering it an act of idolatry, to some educational contents or practices at school, to solemnize or register same-sex marriages, etc.³

Conscientious objections are permanently unpredictable and their diversity increases in proportion to society’s religious and ideological pluralism, and also in proportion to the growing legislator’s intervention in new areas of social life. This is a consequence of the fact that conscientious objection, albeit sometimes rooted in institutional religious beliefs, is essentially an individual phenomenon.³ The conscience of each person, affirming its individual autonomy, is the key factor that may generate a conflict with a concrete legal obligation. This is especially true in the context of Western societies, characterized, among other features, by an interventionist and omnipresent state, and often by a cultural climate that is highly permissive with regard to some ethical patterns and significantly rigid with regard to others (without providing always a clear and rational justification for that double standard). Such combination of elements is likely to produce areas of conflict in societies that tend to be more and more multi-religious, and in which individual atheistic and de-institutionalized moral attitudes are increasingly developing.

² For numerous references to recent – and less recent – cases of conscientious objections in comparative and international law, see Navarro-Valls and Martínez-Torrón 2012.
³ Some scholars, however, have treated as conscientious objection the case of certain institutions that refuse to comply with legal provisions that are contrary to their ethos. This has occurred especially in the realm of education and healthcare. In the area of healthcare, some Catholic hospitals with agreements with the public health system have refused to perform abortion procedures authorized by the law; see, with reference to Latin America, Prieto 2013. An interesting case, with respect to education, is the decision Québec (Procureur Général) v. Loyola High School, 2012 QCCA 2139 (2012), concerning the refusal of a Jesuit school to teach the course on ‘Religious Ethics and Culture’ from a neutral – and hence non-Catholic – perspective.
The diversity and unpredictability of conscientious objections – I use the plural intentionally – explains the difficulties to regulate them exclusively through legislation or statutory law, which would be efficient only with regard to the cases of objection that have a substantial spread in society. Often, the legal treatment of the problems derived from conscientious objections is better achieved through the courts. With or without legislative regulation of conscientious objection – even more in the latter case – only the courts can ultimately perform the individualized analysis that cases of conscientious objection demand.

In any event, it is important to emphasize that conscientious objection is a matter not susceptible of simple solutions and requires a careful analysis in situations that are often complex. As explained below in more detail, this is mainly due to the fact that conscientious objections are something very different from an alleged unreasonable behaviour contra legem (against the law) and are rooted in ethical reasons that are essential for the individual – but often without sufficient (or any) relevance for society.

**Two basic approaches to the legal treatment of conscientious objections**

Even at the risk of simplifying such a difficult issue, it is probably accurate to affirm that there are two basic approaches to determine the appropriate legal treatment of conscientious objections. One can be described as **legalism** and the other as **balance of interests**.

The legalist perspective, frequent in the civil law tradition, departs from two premises: the legislator is always right, and the legal system can be ultimately reduced to legislation (D'Agostino 1982: 44). From that angle, every conflict between conscience and law – which is mainly understood as statutory law – must be resolved always in favour of the latter. Any other solution would imply a risk for juridical certainty, a danger of disintegration of the legal order, for the enforceability of general legal rules would be at the expense of each individual conscience’s choices, which are unpredictable and not necessarily reasonable. Freedom of thought, conscience and religion is interpreted in a restrictive way, as protecting only against those laws specifically aimed at obstructing some particular religion or belief, or religion in general. Exemptions from the obligations imposed by a neutral law – i.e. a law that pursues legitimate secular goals – could be granted only by the law itself. In other words, conscientious objection to a legal obligation of general applicability could be alleged legitimately and successfully only when there is an **interpositio legislatoris**, that is, when it has been explicitly accepted by the legislator.

In contrast, the approach of the balance of interests proceeds originally – and probably this is not coincidental – from a conception of the law more distant from the prejudices of legal positivism; in particular, from a judge-made law as North American law. Its centre of gravity is not the intangibility of statutory law but the search for the maximum possible degree of protection for freedom of thought, conscience and religion. Hence, conscientious objection is not deemed as a tolerated exception to the general legislative rule that, according to the positivist mythology, would absorb in itself the entire content of justice. On the contrary, as freedom of conscience is a constitutional value in itself – and therefore a rule, not an exception to a rule – it demands ‘a physiologic, and not a traumatic, recognition of conscientious objection’. Conscience-based objection, accordingly, is

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4 See especially section ‘Some common mistakes …’ of this chapter.
5 Among the immense US legal literature on the subject, see, recently, Sawicki 2011–2012. From a historical perspective, see McConnell 1990b.
6 Bertolino 1994: 93. Unless otherwise indicated, all translations from other languages into English are the responsibility of the author.
not observed with diffidence, as an evasive attitude towards the legal system, but is analysed, in the light of its conflict with other legal interests represented by the objected law, as the result of an attitude that ‘endeavours to affirm great ideals in minor situations’.7

My position is, naturally, favourable to the balance of interests’ approach, among other reasons because it is founded upon a much more precise – more realistic – analysis of facts. In effect, legalism is based, consciously or not, on a certain misrepresentation of reality. As explained below in more detail, neither the so-called neutral laws are actually neutral, nor the interest represented by the objected law is the only public interest involved in these cases. In addition, the position of the balance of interests, correctly understood, in no way entails any danger of disintegration or pulverization of the legal order.8

Conscientious objection in international law

The clearest example of conscientious objection undisputedly recognized in international law is objection to military service,9 although none of the great international treaties explicitly include it among human rights (which is probably due to political pragmatism, for many countries would have opposed such provision in an international treaty). Different organizations, such as the United Nations, the Council of Europe, the European Union or the Organization for the Security and Cooperation in Europe, for a long time now have deployed significant efforts to put political pressure on states to recognize the right to refuse to perform compulsory military service on religious or moral grounds and establish an alternative civil service (see generally Takemura 2009). Thus, for instance, the UN Human Rights Committee, in its General Comment to Art. 18 ICCPR, has declared that, although the ICCPR ‘does not explicitly refer to a right to conscientious objection . . . 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’.10

Naturally, such reasoning, as well as the applicability of Art. 18 ICCPR, are equally valid for other types of conflict between individual conscience and legal rules. Indeed, the same General Comment emphasizes that the notion of manifestation of freedom of religion or belief must be broadly interpreted, including moral duties that are not strictly ceremonial or worship acts.11 This is consistent with the terminology utilized by Art. 18.1 ICCPR, which protects the right to manifest one’s religion or belief ‘in worship, observance, practice and teaching’.12 A contextualized interpretation of the term practice, which takes into account that freedom of

7 Bertolino 1994: 35. From a different perspective, Dworkin has written: ‘The right to disobey the law is not a separate right, having something to do with conscience, additional to other rights against the Government. It is simply a feature of these rights against the Government, and it cannot be denied in principle without denying that any such rights exist’ (Dworkin 1978: 192).

8 See, for further explanation of this idea, sections ‘Conscientious objection should not be recognized, for it is . . . ’, ‘Conscientious objections should not be recognized because it would make . . . ’ and ‘Conscientious objections should not be protected, for it would grant . . . ’ of this chapter.


10 General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/93; CCPR/C/21/Rev.1/Add.4, General Comment No. 22, para. 11.

11 Cf. ibid., para. 4.

12 Art. 9.1 ECHR uses an identical terminology, with a slight change in the order of the words.
Conscientious objections

thought, conscience and religion protects both religious and non-religious beliefs, certainly renders it difficult to understand such term as reduced to ritual or teaching activities. Practice seems to refer to other manifestations of religion or belief not covered by the words worship, observance and teaching, and leads to the conclusion that it includes the citizens’ right to conduct a personal life in accordance with the dictates of their conscience.

In this direction, with explicit reference to conflicts between the exercise of freedom of conscience and legal obligations, official guidelines of OSCE/ODIHR have stressed that national legislations or constitutions should be sensitive and try to adapt to the ‘many circumstances where individuals and groups, as a matter of conscience, find it difficult or morally objectionable to comply with laws of general applicability’. In harmony with such guidelines, the Parliamentary Assembly of the Council of Europe has adopted a number of resolutions or recommendations aimed at urging the recognition and protection of some types of conscientious objection that have acquired social significance – in particular the objection of medical personnel to cooperate in abortion and other lawful procedures performed in medical centres, and the right of Muslim women to wear a headscarf in public places or schools.

Within the European Union, the Charter of Fundamental Rights (CFREU) contains a clear recognition of conscientious objection. Immediately after guaranteeing freedom of thought, conscience and religion in Art. 10.1, and in direct connection with it, Art. 10.2 provides that ‘the right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right’. It must be noted that Art. 10.2 CFREU does not refer to a particular type of objection (for instance, to military service) but to conscientious objection in general.

The interpretation of this provision is not completely clear with respect to the relation between national laws and the right to conscientious objection. However, in my opinion, in no case the reference to national laws can be understood as synonymous with submitting the recognition of conscientious objection to the interpositio legislatoris, i.e., to the specific acceptance of a particular type of conscientious objection by statutory law. On the one hand, it would be overly unreasonable to make the very existence of a European fundamental right dependent on the exclusive will of a national legislator. And on the other hand, if the recognition or not of conscientious objection would be contingent on the sole factor of its recognition by national legislation, it would make no sense to include explicitly such fundamental right in the EU Charter. In my view, Art. 10.2 CFREU is aimed at recognizing that conscientious objection is a protected manifestation of freedom of conscience and that limitations on it can only be imposed by properly approved laws. In other words, the sentence ‘in accordance with the national laws’ refers to the fact that national legislatures are naturally competent to regulate the most frequent cases of conscientious objection as well as to establish appropriate limitations on such right. Moreover, legislation on conscientious objections cannot be conceived in a way that, directly or indirectly, results in a rejection of them.

13 See Guidelines for Review of Legislation Pertaining to Freedom of Religion or Belief, para. II.I. These guidelines were prepared by the OSCE/ODIHR Panel of Experts on Freedom of Religion or Belief, adopted by the Venice Commission, and welcomed by the OSCE Parliamentary Assembly in 2004.
14 See Resolution 1763 (2010): The right to conscientious objection in lawful medical care.
16 The text of Art. 10.1 CFREU follows, word by word, the text of Art. 9.1 ECHR.
In contrast, the Strasbourg jurisdiction has been traditionally reluctant to acknowledge conscientious objection to neutral laws as a protectable manifestation of the freedom of thought, conscience and religion guaranteed by Art. 9 ECHR (see, in more detail, Martínez-Torrón 2012b: 363, 369–74). Such attitude can be observed, for instance, in the cases concerning objection to compulsory military service (see Taylor 2005: 148–53; Takemura, 2009: 95–109; Navarro-Valls and Martínez-Torrón 2012: 97–105), and in the cases regarding the wearing of Islamic headscarves or other garments of religious significance in contravention of national laws or regulations. 18

It looks like in those cases the European Court was afraid of drawing all the consequences from its own general jurisprudential principles, and in particular from its clear statement that ‘the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate’. 19 This has not certainly been the Court’s attitude with respect to other fundamental freedoms. Moreover, to some extent the Court obliterates the fact that refusing to duly protect conscientious objection puts objectors in a situation of, at least, indirect discrimination – in the case of objection against neutral laws – in overt contrast with the sensitivity towards such type of situations shown by other European institutions. 20 It also ignores some judgments in which the European Court itself has required national legal systems to avoid discriminations by omission, i.e., discriminations produced by legislation that neglects to treat differently situations that are factually different. 21

Nevertheless, a 2011 judgment of the Grand Chamber of the European Court may suggest a shift towards a stronger protection of freedom of conscience vis-à-vis state laws that pursue legitimate secular goals. In Bayatyan, the Court used two arguments that are particularly relevant here. First, although Article 9 ECHR does not specifically mention conscientious objection, freedom of conscience is protected by that article when there is ‘a serious and insurmountable conflict’ with legal duties and is based on a ‘conviction or belief of sufficient cogency, seriousness, cohesion and importance’. Second, the penalties imposed on the applicant could not be deemed a measure ‘necessary in a democratic society’ if there were other alternatives to accommodate the competing interests of the state and the conscientious objector. 22

The Court referred those arguments to the particular situation of an objector to military service, but no doubt they are applicable to all other types of conflicts between individual conscience duties and neutral laws. It would be unsustainable to affirm that the European Court’s reasoning is valid only for objection to military service or for other ‘reasonable’ objections – i.e., for those convictions that the Court decides to select in the future as ‘deserving’ a qualified protection by article 9 ECHR – among other reasons because the Court itself has declared

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18 The most well-known is Leyla Şahin v. Turkey (GC), 10 November 2005; but there are many others. See, for references and analysis, Martínez-Torrón 2012a: 19, 49–59.
20 See, e.g., the EU Council Directive 2000/78/EC, of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, Art. 2.2(b); the General Policy Recommendation No. 7 (13 December 2002) of the ECRI (European Commission against Racism and Intolerance), Art. L1(c); and the EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (adopted by the Council of the EU in 2013), para. 35.
21 See, with specific reference to freedom of thought, conscience and religion, Thlimmenos v. Greece, 6 April 2000, especially paras. 44–48.
22 See Bayatyan v. Armenia (GC), 7 July 2011, especially paras. 110, 125.
repeatedly that states are not competent to assess the legitimacy of beliefs and the means to express them.\textsuperscript{23} If the state cannot make such an assessment, even less can the Court. The relevant factor is not to count on the sympathy or acquiescence of the state, or the European Court, but to verify that the conflict of conscience is grounded on beliefs – religious or not – ‘of sufficient cogency, seriousness, cohesion and importance’.

**Some common mistakes about conscientious objections**

As indicated at the beginning of this chapter, the issue of conscientious objection is all but easy, among other reasons because it touches upon the ethical sensitivities of society and involves important questions about when it would be necessary – or legitimate – to grant exemptions from legal obligations of general applicability. It is easy to understand that conscientious objection is a theme that often raises emotional reactions – also among legal scholars or among judges – which are sometimes reflected in a distorted legal analysis of this type of situation. In this section I will briefly refer to some common mistakes about them and explain why I consider them mistakes.

**Conscientious objectors lack solidarity and civic spirit, as demonstrated by their rejection to obey a democratically approved law**

This is normally untrue. Conscientious objectors no doubt refuse to abide by certain legal provisions, but normally they are persons of high moral standards, a characteristic that is a condition to be a good citizen. Their elevated concept of morals is precisely the cause of their scruples of conscience and the origin of their personal drama. Objectors confront a serious internal conflict.\textsuperscript{24} They have to yield either to the legal norm of the state or to the ethical norm invoked by their own individual conscience, which they consider their supreme law. Conscientious objectors find it impossible, in a particular case, to harmonize their double loyalty: to their conscience and to society. This is the reason why they endeavour to be exempted from a particular legal obligation, which would make it possible for them to keep that harmony. Those persons are under a heavy moral burden, for, unless they are recognized the relevant legal exemption, they are destined to choose between either disobeying the secular law or disobeying their supreme ethical rules. The former alternative entails a material punishment; the latter, a moral sanction.

Conscientious objectors are usually good citizens, and want to continue to be deemed as such. Some scholars have affirmed that true conscientious objectors must be prepared to submit to the penalties established by the law if they are not afforded the requested exemption from legal duties (Greenawalt 1987: 313). I am not persuaded by this argument, which would require every conscientious objector to be a sort of ‘social hero’, and would imply that some people – often belonging to religious or belief minorities – must pay a price for the exercise of their freedom of conscience. This is definitely not the best policy for the promotion of fundamental rights.

\textsuperscript{23} See supra note 19 and accompanying text.

\textsuperscript{24} This aspect of conscientious objection has been well understood by Art. 12 of the Portuguese Law on Religious Freedom.
Conscientious objection should not be recognized, for the law must be equal for all, and all citizens must be obliged to comply with legal provisions. Granting the legal exemption requested by objectors would be discriminatory for those who refuse to obey the law on other grounds.

This argument sounds persuasive at first glance but forgets an essential factor, namely that freedom of conscience, being a fundamental right, is part of the law – and certainly a very significant part of it. Exercising freedom of conscience is part of the normality of legal dynamics in a democratic society. As this freedom protects, in principle, the individual’s right to accommodate his personal daily life to the dictates of his conscience, it is not surprising that conflicts between state laws and freedom of conscience may occasionally arise, especially if we consider that all laws have some ethical foundation (near or remote, visible or less visible) and that the activity of legislators tends to affect more and more aspects of social life. Indeed, a sensible legislator should keep in mind the plurality of moral views in society and endeavour to act a priori, enacting legislation in a way that avoids such conflicts as much as possible.

However, if prevention did not work in due course (because the legislator was negligent or merely because legislation cannot foresee every possible circumstance) the fact that the courts, or the legislator, recognize a posteriori the objectors’ right to a legal exemption is not necessarily discriminatory for those who reject the same legal obligation on other grounds – e.g., medical personnel that deny their participation in legal abortions because they prefer a less bloody or more timely medical practice; employees who refuse to work on Saturdays out of mere convenience or preference; women who desire to cover their heads because they may think it is fashionable; or parents who reject some school subjects or practices for their children just because they do not like them or consider them unnecessary or useless. The foregoing examples of refusals to comply with a legal obligation are not the consequence of the exercise of a fundamental right; they may be based on perfectly legitimate choices but cannot be considered equivalent to refusals grounded on a serious, sincere and insurmountable moral duty. Conscientious objections are the result of the exercise of freedom of conscience and are founded on moral conceptions – religious or not – that are not just a matter of unstable or capricious choices. On the contrary, they are imperative for the individual, often more binding than obligations solely derived from state legislation. To put the people that try to elude a legal obligation out of mere preference or convenience on an equal footing with conscientious objectors would imply, to use the expressive description used by a scholar, treating religion or belief as a hobby (see Carter 1987).

Conscientious objection should not be recognized, for it is an expression of a private interest and the state must protect the public interest represented by the law.

Again, this argument seems persuasive at first sight but is in fact based upon an inaccurate analysis of the actual juridical interests that are in the balance. It is an argument typical of the legalist position and can be summarized as follows: freedom to act according to one’s own conscience is naturally a legitimate interest, but it is just a private interest, and therefore it must yield in front of the public interest represented by the law.

See supra section ‘Two basic approaches . . .’ of this chapter.
Conscientious objections

This is a misrepresentation of reality. On the one hand, citizens’ freedom to live according to their conscience is not merely an individual or private interest. From the state’s perspective, being freedom of conscience a fundamental right, its protection is a public interest – and indeed a public interest of the highest rank. This applies to all cases of conscientious objection, independently from their bigger or lesser social significance. Elementary as it may sound, this fact is frequently forgotten. On the other hand, in the situations of conscientious objection what is really at stake is not the public interest represented by a law, for normally the objector does not seek the derogation of a particular legal obligation but only to be exempted from it (see Onida 1982: 229). The real public interest in conflict with freedom of conscience is rather the interest in ensuring the application of a norm in the hundred per cent of cases, without any exception whatsoever. If we measure the public interest by the potential harm it may suffer, the public interest actually ‘endangered’ by a particular conscientious objection is that part of the aim pursued by a law that would be affected if a legal exemption is recognized to objectors. As conscientious objectors are normally a minority, it is easy understandable that the public interest represented by the law is often not seriously harmed by agreeing to the requested legal exemptions.

In other words, the coordinates for the analysis of conflicts between law and conscience are completely different from the ones presented by the legalist approach previously described. We do not face a situation of private interest versus public interest. We are in the presence of two public interests in confrontation; and one of them is of the maximum category, for it is rooted in the exercise of a fundamental right – freedom of conscience – which is universally included in the international documents for the protection of human rights.

Conscientious objections should not be recognized because it would make the enforceability of the law contingent upon the voluntary acceptance of each individual, which would ultimately lead to the disintegration of legal order

This is perhaps one of the most far-fetched arguments against conscientious objection, and nevertheless it has been occasionally used by some constitutional courts. To affirm that protecting conscientious objections against legal obligations – as part of the guarantee of freedom of conscience – entails a danger of disintegration of the legal order is, in the best of cases, a clear overstatement. As indicated above, the position I defend in these pages is the balance of interests, and not an automatic predominance of conscientious objection in front of neutral laws – which would be as inappropriate as the automatic predominance of neutral laws in front of freedom of conscience.

The balancing process is aimed, precisely, at analysing the juridical interests in conflict to determine which of them must prevail in the particular case. As occurs with all fundamental rights, the exercise of freedom of conscience – and hence the right to conscientious objection – is subject to legitimate limitations. In the case of European countries, such limitations are enumerated in Article 9.2 ECHR. No matter how neutral a legal rule appears prima facie, its imposition

26 Such alarmist tone has been used, for instance, by the Spanish Constitutional Court, in a 1987 judgment relating to conscientious objection to military service (STC 161/1987, 27 October 1987, FJ 3); and by the Supreme Court of Philippines, in a case concerning conscientious objection of Jehovah’s Witnesses to the flag salute in school (Gerona v. Secretary of Education, 106 Phil. 2, 1959, overruled by Ebranilag v. Division Superintendent of Schools, G.R. No. 95770 1 March 1993, and Amolo v. The Division Superintendent of Schools of Cebu, G.R. No. 95887 1 March 1993).
27 See supra section ‘Two basic approaches . . .’ of this chapter.
28 On the question of limitation on freedom of thought, conscience and religion, see the essays of different authors collected in (2005) Emory International Law Review, 19.
against the dictates of an individual’s conscience is an interference with a fundamental right. And, according to Article 9.2 ECHR, the only legitimate restrictions on freedom of thought, conscience and religion are those which, being ‘prescribed by law’, can be considered ‘necessary in a democratic society 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’. 29 The term necessary has been interpreted by the Strasbourg Court as responding to a ‘pressing social need’. 30

Freedom of conscience is not an absolute right. Nobody can seriously argue that all types of conscientious objection, in all circumstances, must be protected by the law. That would indeed have a destructive influence on the legal order. The balance of interests approach departs from the premise that freedom of conscience implies the right to keep one’s conscience safe in front of a legal interference – even when such interference proceeds from a neutral law – but in no event affirms that this is an unconditional right. What the balance of interests approach seeks is to compel state authorities to justify, in the particular cases, the necessity of refusing a conscientious objection based on sincerely held beliefs. In other words, to demonstrate that the application of a legal rule without any fissures at all is strictly necessary – not just convenient, useful, or easier than the opposite – and that it is also necessary to deny all exemptions to the people who, in exercise of their freedom of conscience, allege grave moral scruples to abide by that rule. 31

Justifying the refusal to recognize the right to conscientious objection is certainly more difficult in the cases characterized by the fungibility of the relevant legal obligation, i.e., when the activity required from the objector can be easily required from another person without undermining the public interest involved (as, for example, in the objection to be part of a jury or to cooperate in lawful abortion procedures). 32 Other times, however, to find such justification will not be hard. In any event, the state should be bound to provide a specific reason for rejecting the accommodation of conscience claims, instead of assuming axiomatically that denying legal exemptions to objectors is always necessary to preserve the public interest embodied in the relevant law.

It is important to add that, in the balancing process that must characterize the analysis of cases of conscientious objection, the courts must avoid too simple solutions, for instance in terms of a mere response of ‘yes’ or ‘no’ to the objectors’ requests. Sometimes, the crucial point consists in interpreting a legal rule in a way that permits the maximum possible adaptation to the moral duties alleged by objectors. This is the underlying idea in the judicial doctrines of the ‘least restrictive means’ in the

29 The wording of Art. 18.2 ICCPR is very similar but does not contain any explicit reference to a ‘democratic society’.

30 This doctrine has been reiterated by the European Court of Human Rights in numerous decisions since Handyside v. United Kingdom, 7 December 1976 (see especially para. 49). For further details, see Martínez-Torrón 2005.

31 This was indeed the approach of the US Supreme Court’s case law between the 1960s and 1990s – the imposition of burdens on a person’s exercise of religious freedom as a consequence of a rule of general applicability were legitimate only when there was a ‘compelling state interest’. After the Supreme Court changed his criteria in the Smith case, the Congress reacted with the Religious Freedom Restoration Act, a federal law passed in the United States in 1993, which was declared unconstitutional by the Supreme Court, as contrary to the establishment clause of the Constitution, in City of Boerne v. Flores, 521 US 507 (1997). For a clear and summary explanation of the evolution of the Supreme Court’s jurisprudence on this issue, see Durham and Scharffs 2010: 209–31. For some comments on the transcendental Smith decision, from different perspectives, see McConnell 1990a; Laycock 1990; Marshall 1991.

32 This argument was used by an Italian court, in 1981, to decide in favour of the objector in a case of objection to participate in a jury in a criminal trial. See Pretura di Torino, judgment of 16 January 1981; the text can be found in (1981) Foro italiano, 106(II): 317.
Conscientious objections

United States and the ‘minimal impairment’ in Canada. When freedom of conscience must yield to other legal interests, applying the law in the way least prejudicial to objectors should not be an option for the state but rather a strict obligation.

Conscientious objections should not be protected, for it would grant objectors the right to impose their moral opinions on others, against the ethical neutrality of the law

This argument is based on a false premise, for the law is never ethically neutral. Describing conscientious objection as a situation of conflict between conscience and a neutral legal rule may be misleading if we are not attentive to the proper meaning of the words. The use of the term ‘neutral laws’ in this context is accurate as far as we interpret it as referred to laws that pursue a legitimate secular goal, but the so-called ‘neutral laws’ are indeed not characterized by their ethical neutrality. All laws have an ethical foundation, more or less visible, and more or less direct, depending on the case. Laws are grounded on moral values that a society deems necessary to enforce. After all, the law ultimately consists of a series of instruments through which a society endeavours to organize itself around diverse values that are essentially ethical – and of course pre-juridical (see, for further details on this idea, Martínez-Torrón 1999: 225 ff).

Generally, the ethical foundation of a legal norm corresponds to values accepted by the largest part of a given society. As a consequence, legal norms will not usually collide with the morals or the conscience of the majority of the people – which has been moulded, to a large extent, by the most influential religions or beliefs present in that particular society. However, it is not surprising that a legal norm may clash with the conscience of people who maintain religious or belief options that are different from the ones held by the majority. In other words, neutral laws are aimed at realizing – and preserving – ethical values that are socially recognized as civic values and have often a religious origin. To discard a priori, without further consideration, the possibility to argue conscientious objection against neutral legal norms implies, de facto, a potential discrimination against individuals and religious minorities that do not share the underlying values adopted by the majority. The automatic refusal of the legitimacy of conscientious objections against a neutral law is, in reality, a moral imposition of the majority. And, on the contrary, when conscientious objectors request a legal exemption, they do not seek to impose their moral views on anyone but merely to be recognized their right to lead a life in accordance with their conscience, within a society that has opted for other ethical values.

In the best of cases, the recognition of legal exemptions derived from conscientious objection should depend on the ‘reasonableness’ of the relevant moral principles at issue

This argument overlooks something that is crucial to properly understand the role of the state vis-à-vis fundamental rights, including, of course, freedom of conscience. The fact that the protection of freedom of conscience, as all other fundamental rights, is a public interest of the utmost importance does not imply that the state endorses any and every moral conviction of citizens – for the same

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33 The principle of the ‘least restrictive means’ was explicitly present in the provisions of the US Religious Freedom Restoration Act, mentioned in note 31. For an exemplary application of the doctrine of the ‘minimal impairment’ by Canadian courts, see the Supreme Court’s judgment Multani v Commission scolaire Marguerite Bourgeoys, 2006 SCC 6, J.E. 2006–508.
reasons that, for instance, the guarantee of freedom of expression does not imply that the state approves or recommends any and every opinion expressed by people speaking publicly. The state is obliged to protect freedom of conscience, but not to identify with the moral principles held by all individuals (which would be, moreover, impossible, for often the principles held by some people contradict the principles held by others).

As a consequence, the legal guarantee of conscientious objection cannot discriminate in principle between the diverse moral values that inspire each individual conscience – just as the state's protection of freedom of expression cannot depend on the agreement or disagreement with the ideas expressed by each person. The guarantee of fundamental rights is not aimed at defending particular beliefs or opinions but at safeguarding certain vital spheres of autonomy for the individual – and in some cases also for groups – which constitute necessary elements of democratic pluralism, and in which any interference must be carefully justified. Relativizing the protection of freedom of conscience depending on the moral choices of people would be contrary to the state's ethical neutrality.

Conscientious objections are legitimate only when they are explicitly recognized by the legislator. In the absence of a specific legislative provision, judges cannot grant conscientious objectors any exemption from legal obligations of general applicability

From what has been already indicated it is easy to infer that, from the perspective of the balance of interests, an explicit legislative recognition of each type of conscientious objection is not necessary for their juridical protection. As conscientious objections are expressions of the right to freedom of conscience, enshrined by international treaties and other documents on human rights – and usually also by national constitutions in many countries – they are part of the applicable law. The interpositio legislatoris is hence not indispensable and the courts are entitled to provide for the adequate protection of those singular cases of conscientious objection that arrive to their jurisdiction.

However, while the possibility – and the necessity – of judicial protection of conscientious objections seems clear, it is also undeniable that introducing legislative guarantees would be beneficial to this aspect of freedom of conscience, especially in those legal systems still permeated by a tradition of legalist positivism – as occurs, for instance, in most European and Latin American countries. A specific statutory endorsement – either of conscientious objection in general or of some particular types of high social significance – would correct

34 See, in this regard, the European Court of Human Right's decision Kokkinakis v. Greece, 25 May 1993, para. 31.
35 See section ‘Conscientious objections and state neutrality’ of this chapter.
36 In Spain this principle was clearly expressed by the Constitutional Court in 1985: STC 53/1985, 11 April 1985, FJ 14.
37 In addition to the CFREU, mentioned supra, in section ‘Conscientious objection in international law’, this has been the tendency in some countries that have passed statutes recognizing explicitly the right to conscientious objection (Portugal, Peru) or are studying legislative or even constitutional initiatives in that direction (Colombia, Mexico). That was also the position adopted by the Religious Freedom Restoration Act in the US (see supra note 31). See Navarro-Valls and Martínez-Torrón 2012: 54–63.
38 This is, e.g., the case of objection to military service, abortion or working in the day of Sabbath. See the relevant chapters of the book cited in the precedent note.
Conscientious objections

Under Dutch law, for instance, conscientious objectors to the payment of the fees of the mandatory health insurance scheme (such as members of some Mennonite churches) can benefit from a legal exemption, but must pay an equivalent amount as a substitute tax. See: http://www.government.nl/government/documents-and-publications/leaflets/2012/09/26/health-insurance-in-the-netherlands.html (accessed 11 January 2014).

The negative effects of a possible legalist attitude on the part of the courts, by giving judges a ‘sense of security’ that many of them are apparently unable to find either in their respective constitutions or in the international treaties on human rights. Moreover, when drafted adequately, specific legislation can provide definite guidance about the limitations that can be imposed on conscientious objections, and about how the courts must perform the balancing process with respect to the various conflicting legal interests in each particular case.

We must not forget, in any event, that judges’ responsibility in this area cannot be substituted by statutory law, which has its limits. On the one hand, statutes are appropriate to regulate only those types of conscientious objection that have reached a certain level of social significance; the rest of cases will have to be solved by the courts in accordance with the general rules governing freedom of conscience. On the other hand, the legislator tends to ‘be late’— until a particular type of objection gets to be regulated by statute, many conflicts have already arrived to the courts, which must provide a just solution. In fact, judicial experience often is one of the most important factors that persuade the legislator of the necessity of a statute and help determine its basic guidelines. In addition, even when a type of objection has already been the object of a specific legislation, the individualized analysis of each singular case often continues to be necessary, as demonstrated by litigation.

When the legislator decides to recognize a certain type of conscientious objection, it must impose at the same time some kind of substitutive service or activity on objectors

This is an oversimplified statement. Substitutive service is not, as such, essential to the legal acknowledgment and protection of conscientious objection. This is something that belongs to the logic of fundamental rights, which in principle cannot place an extra legal burden on the citizens who choose to exercise them in a certain direction. Substitutive service makes sense when it is necessary to guarantee two objectives that are often in close relationship: the protection of the principle of equality and the prevention of legal fraud.

In other words, a substitutive service or activity may be legitimately required in order to put the juridical positions of objectors and of the rest of citizens on equal footing; and in order to dissuade potential pseudo-objectors from alleging inexistent scruples of conscience to get rid of a legal obligation. Thus, a substitutive service may be appropriate, for example, with respect to conscientious objection to military service or to the payment of public health insurance fees;39 but it seems inappropriate when objectors do not obtain a privileged legal position with regard to non-objectors, as occurs in the objection to cooperate in abortion procedures (see Navarro-Valls 1986: 266–9), or in cases of objection to legal duties imposed in a randomized manner, such as participation in a jury or in commissions that monitor the functioning of polling stations (see, with regard to Spanish law, Martínez-Torrón 2014, paras. 240–7).

39 Under Dutch law, for instance, conscientious objectors to the payment of the fees of the mandatory health insurance scheme (such as members of some Mennonite churches) can benefit from a legal exemption, but must pay an equivalent amount as a substitute tax. See: http://www.government.nl/government/documents-and-publications/leaflets/2012/09/26/health-insurance-in-the-netherlands.html (accessed 11 January 2014).
Balancing Interests, Sincerity, and Moral Nature of the Objector's Principles

From the foregoing pages it is possible to conclude that there are three key issues in the legal analysis of conscientious objections. First, it is important to ascertain the sincerity of the conscience claim. Second, it must be verified that the reluctance of the objector to comply with a legal obligation is actually rooted in a moral obligation derived from a religion or belief. And third, it is necessary to balance the protection of freedom of conscience against other relevant public interests in each particular case.

With regard to the balancing process that the courts – or the legislator – must perform, some indications have already been given above.\(^1\) Verifying the moral nature of the obligation invoked by the objector is of the utmost importance because it allows placing his claim under the protective umbrella of freedom of conscience, which is different from, and stronger than, the protection offered by freedom of expression. Authentic conscientious objections arise when the objector is bound by a moral principle that he considers superior because it stems from a religious or non-religious belief – regardless of whether such belief is part of the institutional tenets of a group or is strictly personal; and regardless of the degree of rational articulation of such belief. Certainly, if defining in the abstract the notion of religion is not easy, even for exclusively legal purposes (see generally Palomino 2007), defining the notion of belief is still more difficult. In the European environment, the Court of Strasbourg, trying to provide some practical guidance, has made clear that the beliefs protected by Art. 9 ECHR (freedom of thought, conscience and religion) are distinguishable from the ‘opinions’ and ‘ideas’ mentioned by Art. 10 ECHR (freedom of expression); and has remarked that the term ‘beliefs’ applies only to ‘views that attain a certain level of cogency, seriousness, cohesion and importance’.\(^2\) These orientations are perhaps too indefinite, but at least underscore that a belief guaranteed by freedom of conscience and a mere opinion guaranteed by freedom of expression are not equivalent, and demand diverse ways of protection. More precise is probably the criterion used by the US Supreme Court long ago, in Seeger: ‘whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.’\(^3\) In other words, beliefs are those convictions that have, for a certain person, an axiological intensity equivalent to that of a religion (see Martínez-Torrón 1999: 134–9).

Sincerity, lastly, differentiates objectors’ claims from the mere interest in eluding compliance with the law. Sincerity can be sometimes difficult to substantiate but objectors must provide at least some evidence of it, which the courts are entitled to scrutinize. The available evidence may vary considerably depending on the cases but, naturally, a well-articulated protection of freedom of conscience should not require objectors to prove their claim through sacrifice, by bearing the negative consequences of breaking a legal rule (see Hammer 2001: 155). Membership of a particular religion or belief group with identifiable moral principles makes things easier but,

\(^1\) See especially section ‘Conscientious objections should not be recognized because it would make…’ of this chapter.


\(^3\) United States v. Seeger, 380 US 163, 173 (1965). This judgment decided three cases of conscientious objection to military service by people not belonging to a particular religion.
naturally, is not indispensable, among other reasons because it is universally recognized that the protection of freedom of conscience extends equally to behaviour grounded on theistic, atheistic or agnostic beliefs. Thus, the fact that a particular conscientious objection is endorsed by an institutional religious doctrine can be taken into account as an element of evidence to prove the sincerity of the objector (i.e., to prove that conscientious objection is not alleged fraudulently with the mere intention to evade a legal duty) but it does not confer per se an extra protection in comparison with atheistic or agnostic objectors driven by strictly personal beliefs.

Conscientious objections and state neutrality

The type of analysis that I propose in this chapter is based upon the notion that the rule of law is at the same time the rule of rights (see Bertolino 1994: 77), with the consequence that public authorities are bound to facilitate a reasonable accommodation of citizens’ duties of conscience, as far as this does not impair a predominant public interest.

Naturally, as indicated above, the state’s responsibility to protect freedom of conscience does not depend on the ‘reasonableness’ of the moral principles asserted by objectors in the context of a given society, nor does it depend either on the sympathy – or fear – that some choices of conscience may raise in public opinion. It is worth emphasizing it, for sometimes the questions posed by freedom of conscience are examined from an emotional rather than from a juridical perspective, with an excessive accent on the affinity, or lack of affinity, that the observer may have with the objector’s position. Even, on occasions, what should be a strictly legal analysis ends up metamorphosing into an ideological or political battlefield. Thus, we may find the paradox that the same people who passionately defend objection to military service, or to pay the taxes corresponding to military expenses, reject, with analogous zeal, the right to object to abortion, euthanasia or certain activities of biogenetic experimentation – despite the fact that all these types of conscientious objection share the characteristic of being intimately related to the protection of human life and dignity.

In my view, the legal analysis of each case of conscientious objection, according to a balancing process of the interests in conflict, must be performed without making value judgments on the beliefs invoked by the objector – i.e. irrespective of whether we consider his beliefs ‘reasonable’ or not, typical or atypical, strictly individual or endorsed by the institutional tenets of a church. This ‘aseptic’ analysis is required by the ethical neutrality of the state, which entails refraining from any judgment on what is morally correct, except in those questions relating to the ethical principles that constitute the foundations of the legal order, especially the constitutional order.

44 See the UN Human Rights Committee’s General Comment on Art. 18 ICCPR (supra note 10), para. 2. In the same direction, the European Courts of Human Rights’ judgment Kokkinakis v. Greece, 25 May 1993, para. 31.
45 This is, for instance, the approach of Sec. 5000A(d)(2) of the US Patient Protection and Affordable Care Act with regard to conscientious objections. The law only grants exemptions when conscientious objections are based on the tenets of some religious groups, as defined in Sec. 1402(g)(1) of the Internal Revenue Code (26 US Code).
47 See supra section ‘In the best of cases . . .’.
48 The ethical neutrality of the state, however, is a notion whose precise meaning and consequences are not easy to define. See Palomino 2011.
The European Court of Human Rights has affirmed this consequence of the state’s ethical neutrality, essential to the maintenance of pluralism: ‘[B]ut for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.’\(^{49}\) This sentence reiterates, in a different wording, what the US Supreme Court had expressed, more broadly, some decades before: ‘If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’\(^{50}\)

The alleged reasonableness or unreasonableness of the moral principles asserted by objectors, therefore, should be irrelevant when trying to resolve if a particular conscientious objection must be legally recognized or not. After all, the concept of reasonableness is relative and changes according to historical and social circumstances. In practice, reasonableness ends up being synonymous with social acceptance or at least tolerance. Taking reasonableness into account, per se, in the legal analysis of conscientious objections would imply an interference with the individual’s right to choose his religion or belief – an aspect of freedom of thought, conscience and religion (\textit{forum internum}) that the Strasbourg Court, with good reason, has declared free from any limitation whatsoever.\(^{51}\)

A state that is ethically and religiously neutral must respect, and actively protect, all conscientious objections, deemed reasonable or not, whenever there is no prevailing public interest at stake in the particular case. And, when such prevailing interest exists, the state should attempt to find – and adopt – the solution that is least restrictive for the objector’s freedom of conscience.

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\(^{49}\) Hasan and Chaush v. Bulgaria, 26 October 2000, para. 78. See also Manoussakis v. Greece, 26 September 1996, para. 47.

\(^{50}\) West Virginia State Board of Education v. Barnette, 319 US 624, 642 (1943).

\(^{51}\) This doctrine was initially proposed by the European Commission of Human Rights (\textit{C. v. United Kingdom}, decision on the admissibility of Appl. Nr. 10358/83, in 37 Decisions and Reports 147), and later adopted by the Court – see, for instance, implicitly, \textit{Kokkinakis v. Greece}, 25 May 1993, para. 33; and, explicitly, \textit{Saniewski v. Poland}, decision on the admissibility of Appl. Nr. 40319/98, 26 June 2001, \textit{The Law} para. 1). Other international institutions have taken the same position (see the OSCE & Venice Commission Guidelines, cited in note 13, II.B.1). See also Evans, M. D. 1997: 298–314; and Evans, C. 2001: 68–79. See also, for an interesting and expansive interpretation of the \textit{forum internum}, Taylor 2005: 115–202.
Conscientious objections


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