Durham University

Durham Research Online

Deposited in DRO:

25 September 2018

Version of attached file:

Submitted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Leigh, Ian (2018) 'The legal recognition of freedom of conscience as conscientious objection : familiar problems and new lessons.', in Research handbook on law and religion. Cheltenham: Edward Elgar Publishing, pp. 378-396.

Further information on publisher's website:

https://doi.org/10.4337/9781788112475.00029

Publisher's copyright statement:

This is a draft chapter. The final version is available in Research Handbook on Law and Religion edited by Rex Ahdar, published in 2018, Edward Elgar Publishing Ltd https://doi.org/10.4337/9781788112475.00029. The material cannot be used for any other purpose without further permission of the publisher, and is for private use only.

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a link is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the full DRO policy for further details.

Durham University Library, Stockton Road, Durham DH1 3LY, United Kingdom
Tel : +44 (0)191 334 3042 | Fax : +44 (0)191 334 2971
https://dro.dur.ac.uk

From R. Ahdar (ed.) *Research Handbook on Law and Religion* (Edward Elgar, 2018), 378-396
ISBN 978 1 78811 246 1 (submitted version)

The Legal Recognition of Freedom of Conscience as Conscientious Objection: Familiar Problems and New Lessons

Ian Leigh*

I INTRODUCTION

The central examples of a conflict of conscience occur when individuals are legally compelled to act against their religious or other beliefs in a way that would violate their sense of self-identity, based on religious or other fundamental beliefs. Historically, the earliest examples of recognition of conscience were in relation to the swearing of oaths invoking the deity (eg, 'I swear by Almighty God') or on the New Testament, both by witnesses, jurors[1] and by public officials such as members of parliament and judges. Compulsory oath-taking is an example of a societal practice framed against an assumption of common shared religious beliefs which inevitably poses difficulties for non-believers and members of other religions.[2] Indeed, even members of Christian minority groups have reason not to swear religious-based oaths based on their understanding of scripture. In some countries oath-taking has continued to present problems of conscience even in recent times, resulting in adverse findings from the European Court of Human Rights.[3]

Oath-taking apart, the best-known example of a compelled practice in violation of conscience is the case of military conscription. Military service poses severe difficulties for individuals with religious or pacifist objections to taking life or to bearing arms. Historically the earliest recognition of a right of conscientious objection was in the legislation of the small American colony of Rhode Island, which provided for alternative service by statute in 1673.[4] The question came to more general prominence as a result of mass conscription during the two

*Professor of Law, Durham University. This work was undertaken with the assistance of the British Academy and the Wolfson Foundation under a British Academy Wolfson Professorship. I am grateful also to Paul Taylor, for discussing with me questions of conscience related to the ICCPR and for drawing relevant materials to my attention.

[1] Some religious groups (notably members of the Exclusive Brethren and Plymouth Brethren) object to serving on juries per se as a form of enforced sitting in judgment on others, which they took to be expressly forbidden by Jesus' injunction 'Do not judge others, or you too will be judged' (Matthew 7:1). For an unsuccessful attempt in the UK to amend the then Criminal Justice Bill 1988 to give exemption from jury service to those who object on grounds of religious belief to jury service, see: House of Commons Debates, 20 June 1988, vol 135, cols 883-906.

[2] In recognition of the difficulties of conscience caused by oath-taking legal requirements were relaxed in the UK to allow for affirmation in the Oaths Act 1888 (see now Oaths Act 1978, s 5).

[3] *Buscarini v San Marino* (2000) 30 EHRR 208 (oath of office required of elected representatives violated Art 9); *Alexandridis v Greece,* App No 19516/06 (ECHR, 21 February 2008) (oath sworn by newly-qualified advocates); *Dimitras v Greece,* App Nos 42837/06, 3269/07, 35793/07 and 6099/08 (ECHR, 3 June 2010)(defendants in criminal cases).

[4] José de Sousa e Brito, 'Conscientious Objection' in Tore Lindholm, W Cole Durham Jr and Bahia Tahzib-Lie (eds)*, Facilitating Freedom of Religion or Belief: A Deskbook* (Brill, 2004) 275, 278.

World Wars. Over the intervening period, the changing nature of armed forces, with a clear worldwide move away from conscripted armies to smaller, professional contract-based ones, has meant that the question is generally less pressing.[5] In countries which retain a period of national service, it nonetheless persists. To recognize the right—as very many legal systems do by permitting alternative service—is to acknowledge that a person should not be compelled to bear arms or take another person's life against their beliefs—whether religiously-derived or not. Where countries have not provided for alternative service or have done so on terms that make it markedly more onerous than military service, legal challenges continue. Importantly, as described in greater detail below, there has been a significant incremental development of international human rights law culminating in the explicit recognition by the UN Human Rights Committee and the European Court of Human Rights of a right of conscientious objection to military service. This is an important move that may have more general ramifications for conscience claims in other contexts.

By contrast to these classic examples, modern conscience claims are often made by three groups. Firstly, we have medical professionals concerned at their participation in procedures at the beginning or end of life, such as abortion, administering emergency contraception, embryo research, withdrawal of medical treatment from the terminally ill, and physician-assisted suicide. Secondly, there are public officials, particularly marriage registrars and their equivalents. Thirdly, there are small businesses, especially those declining to offer wedding services to same-sex couples. In all three cases, a common theme is that the crisis of conscience is a side-effect of relatively recent changes, in law or technology. I have addressed the question of conscience claims in the second and third categories elsewhere and so discussion here will be confined claims by the first group (medical professionals), especially how they are treated under human rights law and how they compare to the classic conscientious objection claims.

The discussion that follows first introduces the changing nature of conscience claims and the difficulties they seem to pose before examining the various ways in which freedom of conscience is legally protected. The remainder of the chapter focuses on one classic type of conscience claim (conscientious objection to military service) and one field of new conscience claims (healthcare). Conscientious objection to military service is a striking example of a right which, despite long antecedents in municipal law, has only become firmly established in international human rights law in the past two decades. By contrast, conscientious objection in healthcare is a field in which human rights arguments for freedom of conscience have yet to be fully tested. Following analysis of the current position the conclusion draws together some comparisons and points to questions that remain to be resolved.

II THE CHALLENGE OF NEW CONSCIENCE CLAIMS

The increasing frequency of conscience claims in recent decades in fields outside of the older well-established areas protected by freedom of conscience can perhaps be accounted for by the growing pluralism of Western liberal states. In earlier times when there was a clear social consensus grounded loosely on common religious beliefs of the majority of the population, the position of identifiable religious or other minorities (such as Quakers or Jehovah's Witnesses) was relatively discrete and, precisely because of the relatively small numbers of dissenters

[5] Conscientious objection nonetheless applies to volunteer service personnel, for example where their beliefs have developed or changed or in relation to 'selective objection' (based on objections to the morality of particular conflicts or use of certain weapons, eg nuclear weapons). For an overview, see Ian Leigh and Hans Born, *Handbook of Human Rights and Fundamental Freedoms of Armed Forces Personnel* (Warsaw, OSCE/ODIHR, 2008) ch 10.

involved, easily manageable from a legal perspective. By contrast, contemporary liberal societies are less homogenous and consequently, at least in part, medical or social developments in recent decades giving rise to conscience claims have been much more contentious and divisive.

In this context, the growing tendency to invoke freedom of conscience as deserving legal recognition is also in part a reaction to, and conditioned by, the relatively weak protection given by judicial decisions to freedom of religion.[6] Arguably, claimants have been forced to respond to religious illiteracy on the part of society (and the courts) and thereby enunciate more clearly the nature and consequences of their beliefs. Religious affiliation is frequently characterized as a matter of individual choice—with the implication that it is less worthy of protection when in conflict, for example, with status rights such sexual orientation.[7] Conscience, on the other hand, is more correctly understood as a matter of duty, where the individual is reluctantly compelled to act (or abstain) by his or her convictions, even if it is to his or her own detriment.[8]

In the pluralist contemporary climate, recognition of conscience claims presents several difficulties. Firstly, the potential scale of conscience claimants may threaten to undermine the implementation of social reforms; for example, in the case of recognition of claims by pro-life doctors, the availability of abortion to women in all localities may be impaired. Whether or not the language of 'rights-balancing' is used, there is clearly some calibration of interests at stake involved, and in a way that did not seriously arise with older types of conscience claims. Conscientious objection to military service in the World Wars was, in theory, capable of undermining military effectiveness, but in practice did not, because of the proportionately small number of conscientious objectors. The question of scale is entirely different in the case of abortion—so much so that in some countries (Poland, for example) only a small number of medical professionals and clinics are prepared to carry out abortions.[9] This raises corresponding concerns about whether the state has a positive obligation to other individuals to limit or restrain freedom of conscience in some contexts.

Secondly, where reforms have been strongly but unsuccessfully opposed by religious groups, there may be some suspicion that subsequent conscience claims are somehow a bad faith rejection of the outcome of the democratic process. Arguably, this rests on a

---

[6] See further Rex Ahdar, 'Is Freedom of Conscience Superior to Freedom of Religion?' (October 2017)< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054348 > for a critique of the apparent advantages of re-casting religious freedom claims as infringements of one's liberty of conscience.

[7] This chapter does not aim to discuss conscience claims in the context of equality laws. On that topic see: Ian Leigh, 'Conceiving Religious Freedom in Terms of Obedience to Conscience' in Iain T Benson and Barry W Bussey (eds), *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto, LexisNexis, 2017) 175.

[8] Robert George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (Wilmington, ISI Books, 2013) 112: 'The right to follow one's conscience and the obligation to respect conscience—especially in matters of faith, where the right of conscience takes the form of religious liberty of individuals and communities of faith—obtain not because people as autonomous agents should be free to do as they please; they obtain, and are stringent and are sometimes overriding because people have duties and the obligation to fulfil them. The duty to follow one's conscience is a duty to do things or refrain from doing things not because one wants to follow one's duty but even if one strongly does *not* want to follow it. The right of conscience is right to do what one judges oneself to be under an obligation to do, whether one welcomes the obligation or must overcome an aversion to fulfil it.'

[9] International human rights monitoring bodies have raised concerns about the impact of conscientious objection on the provision of abortion in Poland: Concluding Observations of the Human Rights Committee on Poland's 5th Periodic Report UN doc CCPR/C/SR.2251, para 8; Concluding Comments of the Committee on the Elimination of Discrimination Against Women on Poland's Sixth Periodic Report, UN Doc CEDAW/C/POL/CO/6, 2 February 2007, [25]. See also Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford, Oxford University Press, 2016) 299.

misunderstanding of the nature of conscience claims,[10] but the highly-charged atmosphere of the Culture Wars makes such suspicion more understandable than in earlier, more socially homogenous, times. In any event, a converse argument could be made: if statutory conscience exemptions *have* been granted as a practical necessity in order to secure enactment of a controversial social reform, it could equally be argued to be in bad faith to seek to undermine or re-open those protections through litigation. Neither case is convincing: the correct response is to recognize that there is no estoppel as far the courts are concerned.

A third difficulty concerns the nature of new conscience claims. Some have argued they are now different in kind since they are no longer solely concerned with action wholly involuntarily compelled by the state of the individuals concerned and which directly affects their own behaviour. There are two questions to be considered here. Firstly, is it appropriate to protect conscience in an employment context where the employee has either 'voluntarily' exposed themselves to the moral conflict that they now face or which has arisen later (against their wishes) where they are, nonetheless, able to resolve the conflict by resigning? The employee's position appears different in kind to that of the military conscript or the reluctant juror. The crisis of conscience may, however, be involuntary if it results from changes in technology or legal reforms that post-date the employment contract (for instance, adding responsibilities for conduct civil partnership ceremonies to the work of existing marriage registrars[11]). The question should perhaps be re-phrased then in terms of whether the cost of accommodating such changes lies with the employer or the employee. Secondly, unlike the position of a person forced to kill against his beliefs, questions of moral culpability in some of these other-regarding examples may be more complex. A pharmacist asked to prescribe a 'morning after' pill that they consider to be an abortifacient, or a bed and breakfast proprietor asked to let a room to a same-sex couple may, from a consequentialist perspective, have some degree of responsibility for any resulting act that they would consider to be immoral. Nonetheless, they are plainly not the primary actors and causation is far from direct. Such examples pose the question of how far recognition of conscience should stretch in cases of secondary involvement or 'complicity' (to adopt the term that such claimants often use).[12]

III FORMS OF LEGAL PROTECTION

Conscience claims—whether in classic or new fields—tend to come to court by one of three routes: under specific statutory exemptions or exceptions for conscience from broader statutory duties; based on constitutional provisions (as in the US cake case[13]) or under international human rights law. The primary focus of this chapter is on the treatment of conscientious objection under human rights law, but brief reference will be made the statutory and constitutional protection under domestic law. Claims may come before the courts concerning the applicability or scope of these provisions. They may also arise following progressive or

---

[10] Leigh, 'Conceiving Religious Freedom'.

[11] See *Eweida v United Kingdom* [2013] ECHR 37; (2013) 57 EHRR 8. *Ladele v United Kingdom,* the appeal by Lillian Ladele, the London Borough of Islington marriage registrar, is one the four cases consolidated in *Eweida* and is discussed in Ian Leigh and Andrew Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (2014) 3 *Oxford J of Law & Religion* 2.

[12] See Douglas NeJaime and Reva B Siegel, 'Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics' (2015) 124 *Yale LJ* 2516. For a critique of the complicity thesis, see Douglas Laycock, 'Religious Liberty for Politically Active Minority Groups: A Response to Nejaime and Siegel' (2016) 125 *Yale LJ Forum* 369; Ahdar, 'Is Freedom of Conscience?', 17-22.

[13] *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission,* Colorado Court of Appeals, 2015COA 115, 13 August 2015. The case is before the Supreme Court at the time of writing. See John Corvino, 'Drawing a line in the "Gay Wedding Cake" case', *New York Times*, 27 November 2017.

innovative constitutional interpretation by the courts themselves when recognizing practices such as physician-assisted suicide,[14] or same-sex marriage.[15] as meriting constitutional protection.

In the UK, several examples of statutory provisions giving limited protection to the religious objections of certain employees on grounds of conscience can be cited: medical staff may decline to participate in abortions[16] or embryo research;[17] Sikh construction workers may wear a turban rather than a hard-hat.[18] Exemptions may be limited so that they apply only to existing employees (as with the safeguards introduced to protect some shop workers against being coerced into working on Sunday[19]) or they may apply only during a transitional period.[20] In addition, some more general legal duties have been framed in such way to allow for specific religious or conscientious practice: to exempt turban-wearing Sikhs from the legal duties to wear a motorcycle helmet,[21] or to permit slaughter of animals in accordance with religious dietary requirements, for example.[22] Legal challenges concerning statutory exemptions tend to centre on the scope of the exemption: whether a particular individual is entitled to claim the benefit or whether it protects borderline practices.[23]

So far as constitution protection is concerned, José de Sousa e Brito points out that freedom of conscience (rather than freedom of religion) was recognized in the constitutions of several American colonies, culminating in the adoption of the First Amendment to the US Constitution, and that the right is recognized in the contemporary constitutions of several European countries.[24] In legal systems in which human rights or constitutional protections apply, conscience claims may come before the courts as a challenge to the constitutionality or rights-compatibility of the law. If the courts recognize the claim they not strictly granting an exempting for conscience so much as finding that the law in question is overbroad.

In human rights treaties, freedom of conscience is grouped with freedom of religion and belief for protection—under Art 18 of the International Covenant on Civil and Political Rights (ICCPR) and Art 9 of the European Convention on Human Rights (ECHR), for example. Superficially, this textual arrangement appears to make it unnecessary to distinguish whether a particular belief is sufficiently religious in character in order to be protected, provided it reaches

---

[14] As in Canada, see *Carter v Canada (Attorney General)* [2015] SCC 5.

[15] In South Africa, see *Minister of Home Affairs v Fourie*, Case CCT 60/04, 1 December 2005 [2005] ZACC 19, which was the catalyst for inclusion in the subsequent legislation of a right of conscientious objection: Civil Union Act 2006, s 6 (see *Fourie,* [159]).

[16] Abortion Act 1967, s 4(1).

[17] Human Fertilisation and Embryology Act 1990, s 38.

[18] Employment Act 1989, s 11.

[19] Shop workers in post on 25 August 1994 are protected from being asked to work on Sundays and any dismissal for refusal to work on Sunday is deemed unfair: Employment Rights Act 1996, Part IV (the date refers to when former provisions in the Sunday Trading Act 1994 came into operation).

[20] In the UK, Roman Catholic adoption agencies exemption benefitted from a one-year exemption following the introduction of a duty not to discriminate on grounds of sexual orientation in the provision of goods and services (Equality Act (Sexual Orientation) Regulations 2007, r 15). After expiry of this period it was held that a Catholic adoption agency could not change its charitable objects so to continue to refuse service to same-sex couples: *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2012] CA/2010/0007 UKUT (UK Tax and Chancery)(2 November 2012) [2012] UKUT 395 (TCC); [2013] 2 All ER 1114.

[21] Road Traffic Act 1988, s 16(2) (replacing the Motor-Cycle Crash Helmets (Religious Exemption Act) 1976).

[22] In the UK, see Welfare of Animals (Slaughter or Killing) Regulations SI 1995/731, reg 22 and Sched 12. Recent attempts to include conscience clauses in equality legislation to protect employees with objections to placing children for same-sex adoption, or to officiating at civil partnership ceremonies were, however, rejected by Parliament.

[23] Fovargue and Neal refer to 'the liminal zone of proper medical treatment' as a 'territorial' constraint on conscience claims in medicine: Sara Fovargue and Mary Neal, '"In Good Conscience": Conscience-Based Exemptions and Proper Medical Treatment' (2015) 23 *Medical L Rev* 221.

[24] See de Sousa e Brito, 'Conscientious Objection'.

the level of 'seriousness' and 'cogency' to be treated as a matter of conscience. However, closer examination of the drafting of Art 18 of the ICCPR and Art 9 of the ECHR reveals an important distinction: both treaties additionally protect the qualified freedom to manifest one's *religion or belief*, but do not refer explicitly in this context to manifestation of *conscience*. The consequence is to make the distinction between religion and conscience potentially decisive in whether particular conscientious acts or objections are protected. The conventional approach is to distinguish on the basis of this drafting between the inner forum,[25] where freedom of the individual is inviolable, on the one hand, and the external forum. comprising manifestations where the state may within limits impose restrictions, with questions of conscience falling within the former.

This 'minimal' interpretation perhaps guards against the concern that an individual's idiosyncratic troubled conscience, if given maximal protection, would otherwise constitute a 'wild card' which could potentially trump any or all legal obligations. Any such danger could, in any event, be tempered to some extent if judges exercised responsibility for discounting insincere claims or (more controversially) those lacking cogency. While it is not possible or desirable for modern judges to open 'windows into men's souls'[26], a test of sincerity may at least be able to identify and discount claims that are transparent shams or unworthy of protection in view of the claimant's hypocrisy or inconsistency. A test of this kind is likely, however, to favour the religious-informed conscience: it will be easier for the adherent to appeal to a body of external opinion authority on which his or her beliefs are grounded in a way that holders of *ad hominem* beliefs may find difficult.

Moreover, the conventional view of the drafting raises several supplementary questions. If there is no right to act upon one's conscience—merely a right, in some sense, to enjoy a conscience in one's inner thought life—then how exactly would state action ever interfere with the right? The drafters can hardly have intended to refer to the right to freedom of conscience in such a minimal way that it has no practical application. An alternative interpretation, therefore, is to propose a maximal reading, namely, that the freedom necessarily implies a right to act on one's conscience. Reading the right of freedom of conscience in this way would lead to a startling conclusion (hence terming it 'maximal') that the right to act on or 'manifest' one's conscience is unabridged.[27] Bearing in mind the clear tendency of courts to subordinate the qualified right to manifest one's *religious beliefs* to other interests (ranging from public safety to the vaguely expressed 'rights and freedoms of others'), this alternative, unqualified, interpretation of freedom of conscience is both naturally appealing for claimants and of considerable potential practical importance. If this maximal interpretation is correct, however, it would have the implication of treating behaviour manifesting a person's conscience and religion differently.

A further possible interpretation of the human rights provisions is that freedom of conscience and religion should be treated as overlapping concepts. It would follow that conscience-based actions derived from a religious motivation would be protected within limits. Other, non-religiously grounded, conscientious actions or objections then would either (on a minimal reading) receive no protection, or (on a maximal reading) could not be restricted under any circumstances.

The concept of overlapping protection, in which some conscientious positions receive full protection and others only a qualified protection that is defeasible by other interests, gains some support from the way different types of conscience claim are often treated in practice.

---

[25] Protected under the ICCPR, Art 18(1) and the ECHR, Art 9(1) respectively.
[26] Attributed to Elizabeth I in relation to the Act of Uniformity 1558, to signify that she was seeking outward conformity in the use of the Book of Common Prayer, rather than agreement on interpretation of its meaning.
[27] See *Ewieda*, Partially Dissenting Option of Judges Vucinic and De Gaetano, [2].

There is broad consensus that some acts against one's conscience are so serious that the individual's protection against them should be absolute. Being compelled to kill another person contrary to one's beliefs about the sanctity of human life falls into this category (whether the beliefs are religiously derived or not). This helps to explain the protection in many legal systems and under human rights law for conscientious objection to military service.[28] Equally, protection for beliefs about the sanctity of life helps to explain why many countries, when introducing legally-sanctioned abortions, have provided opt-out provisions for medical practitioners. On the other hand, conscience-based beliefs about marriage or sexual conduct have tended to be treated by courts as subject to qualified protection, where, among other considerations, the rights and freedoms of others need to be proportionally balanced.[29]

In the discussion that follows the application of these principles to conscientious objection to military service is first discussed, followed by the more recent recognition of conscience claims in healthcare.

IV DEVELOPMENT OF THE HUMAN RIGHT OF CONSCIENTIOUS OBJECTION TO MILITARY SERVICE

This section traces the development of right of conscientious objection to military service, first under the United Nations system (referring primarily to the ICCPR) and in the Council of Europe under the jurisprudence of the European Court of Human Rights.

A Conscientious Objection under the ICCPR

Freedom of conscience is recognized under Art 18 (1) of the ICCPR, which reads:

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

As noted above, although a state may place limitations on the manifestation of a person's religion or beliefs,[30] the first sentence of this provision sets out absolute rights. By a process of progressive interpretation, the UN Human Rights Committee (HRC) has reached the position where this unqualified right to freedom of thought, conscience and religion is understood to include an inherent right of conscientious objection to military service.

In its older jurisprudence, the HRC found that '[t]he Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19'.[31] However, it later modified this position, stating that a right of conscientious objection could be derived implicitly from Art 18. The incremental change was a classic instance of judicial law-making: the earliest pronouncements came in obiter statements to the effect that conscientious objection fell under

---

[28] Although some earlier decisions of international tribunals on conscientious objection to military service distinguished between religious and non-religious motivation (see # below), this position has been superseded. Later judgments focus on the seriousness of beliefs about taking life, rather than their origins.

[29] See, eg *Eweida v UK,* [106](dealing with the claim brought by Ms Ladele); *In the Matter of Marriage Commissioners Appointed under the Marriage Act, 1995*, 2011 SKCA 3; *Dichmont v Newfoundland and Labrador (Government Services and Lands),* 2015 NLTD (G) 14.

[30] Under Art18(3).

[31] *LTK v Finland* (Human Rights Committee, Comm No 185/1984 UN Doc CCPR/C/OP/2, 61), [5.2].

the scope of Art 18—although in the instances in question it had not been violated. Thus, in *J P v Canada* it was stated that: 'Article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities'.[32] This was a small step, falling short of recognition that more concrete actions manifesting conscientious objection were protected. Further groundwork towards for full recognition was laid by General Comment No 22, in which the HRC argued that while there was no explicit reference to conscientious objection in the Covenant: '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.[33] That statement from the General Comment was approvingly referred to in *Paul Westerman v The Netherlands,*[34] though once again no violation of Art 18 was found on the facts, because the complainant had failed to satisfy the domestic authorities regarding his 'insurmountable objection to military service.'

The ground had thus been prepared for a straightforward finding that a state was in breach of the Covenant by failing to provide for conscientious objection. In *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*[35] the Committee decided, for the first time, that lack of alternative civilian service to military conscription breached Art 18 of the Covenant. Bearing in mind that a large number of states had introduced schemes of alternative service to accommodate conscientious objectors to compulsory military service, it found that Korea had not adequately demonstrated why, as it claimed, this was impossible in its case without compromising national security. Accordingly, it could not rely on Art 18(3) to limit the right, which reads:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

This approach, which treated conscientious objection as a manifestation of the right of religion and belief, left open the possibility that a state might in future be able to justify its refusal to accommodate conscientious objectors under Art 18(3). As one member of the HRC (Sir Nigel Rodley) later pointed out, however, that since claims of conscientious objection were mostly likely to arise against the background of existential threats to the state this possibility had 'a certain lack of reality':

> It is precisely in time of armed conflict, when the community interests in question are most likely to be under greatest threat, that the right of conscientious objection is most in need of protection, most likely to be invoked and most likely to fail to be respected in practice.[36]

---

[32] *Dr JP v Canada* (Human Rights Committee, Comm No 446/19914 UN Doc CCPR/C/43/D/446/1991, 36), [4.2]. The Committee found, however, that this did not grant exemption from taxation.

[33] General Comment 22, Article 18, 48th Session, 1993, para 9.3.

[34] *Westerman v The Netherlands*, Communication No 682/1996' (22 November 1995) UN Doc CCPR/C/43/D/682/1996 (1999).

[35] *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea,* CCPR/C/88/D/1321-1322/2004, UN Human Rights Committee, 23 January 2007.

[36] *Atasoy and Sarkut v Turkey*, Comm Nos 1853/2008 and 1854/2008, UN Doc CCPR/C/104/D/1853-1854/2008 (2012). Sir Nigel Rodley argued that because of the value of sanctity of life (protected under Art 6 of

Moreover, this reasoning could not easily account for the application of Art 18 to non-religious conscientious objectors,[37] whose right to manifest their beliefs was not explicit in the text.

In the later case of *Jeong v Republic of Korea,* the HRC, by a majority, took the final step and found that the complainants' conviction and sentence for refusing to be drafted amounted to an infringement of their freedom of conscience, in breach of Art 18 (1), rather than by way of unjustified restriction on external manifestation.[38] A minority of three members of the Committee argued that it would be preferable to treat the complainants' refusal as a direct expression of their religious beliefs, capable of limitation under Art 18(3). However, the new approach was later confirmed in subsequent decisions.[39] In *Jong-nam Kim v Republic of Korea* the HRC confirmed its view that state imposition of compulsory military service without the option for 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. They are placed under a legal obligation, either to break the law or to act against those beliefs, within a context in which it may be necessary to deprive another human being of life.[40] In *Young-kwan Kim v Republic of Korea*, the Committee acknowledged that its approach involved treating some forms of conscientious objection as absolute and others as only entitled to qualified protection. It reiterated that the distinguishing feature of military service—in contrast to objections to compulsory schooling and payment of tax—is that it makes individuals potentially complicit in taking another person's life.[41]

B The ECHR and Conscientious Objection

The approach of the European Convention organs towards conscientious objection to military service has also undergone a dramatic transformation since the earliest challenges were brought in the 1960s. At first, the European Commission found that the absence of an explicit right in the Convention was fatal to any such claims.[42] It found that Art 4, rather than the right of freedom of belief, conscience and religion under Art 9, was the relevant provision and invoked the exemption from military service to the prohibition on forced labour that appears in Article 4(3).[43] It is noteworthy that, at the time of this ruling in 1966, many Council of Europe states retained compulsory military service.

The approach was softened, however, by subsequent rulings that conscientious objection fell within the ambit of Art 9, at least for the purposes of determining whether the treatment of different categories of objectors claiming to undertake alternative civilian service

---

the ICCPR) the 'right to refuse to kill must be accepted completely' and therefore Art 18(3) was a less appropriate basis for the right of conscientious objection than Arts 18(1) and 18(2).

[37] See *Eu-min Jung, Tae-Yang Oh, Chang-Geun Yeom, Dong-hyuk Nah, Ho-Gun Yu, Chi-yun Lim, Choi Jin Taehoon Lim, Sung-hwan Lim, Jae-sung Lim and Dong-ju Goh v Republic of Korea*, Comm Nos 1593 to 1603/2007 (adopted 23 March 2010), UN Doc CCPR/C/98/D/1593-1603/2007, finding violations of Art 18 where a number of the complainants had no specific religious basis for their conscientious objection.

[38] *Jeong et al v Republic of Korea* Communications No 1642-1741/2007 (Human Rights Committee, 27 April 2011).

[39] *Atasoy and Sarkut v Turkey*.

[40] *Jong-nam Kim et al v Republic of Korea,* Communication No 1787/2008, UN Doc CCPR/C/106/D/1786/2008(2013), para 7.3.

[41] *Young-kwan Kim v. Republic of Korea,* Comm No 2179/2012 (14 January 2015), CCPR/C/112/D/2179/2012.

[42] *Grandrath v Germany,* App no 229964/10, Commission decision, 12 October 1966; see also *X v Austria,* App no 5591/72, Commission decision, 2 April 1973, Collection 43, 161.

[43] Art 4(3) states: 'For the purpose of this Article, the term "forced or compulsory labour" shall not include: … (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service.'

was discriminatory under Art 14.[44] This stopped short of requiring states to make alternative service available for conscientious objectors.[45] Additionally, in a series of cases brought against Turkey, the European Court of Human Rights found that the liability of conscientious objectors in that country to repeated prosecution for military offences as long as they refused to serve constituted a form of civil death or outlawry which violated Art 3 of the Convention.[46]

Finally, in 2011, after acknowledging that legal recognition of conscientious objection was now available in most Council of Europe states, the Grand Chamber in *Bayatyan v Armenia*[47] reversed the initial position and determined that a right of conscientious objection could be deduced from Art 9:

> 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.[48]

The Grand Chamber held that the failure to provide for alternative military service in Armenia interfered with the applicant's rights. The Court recognized that in some circumstances (where the usual criteria of sufficient cogency, seriousness, cohesion and importance are satisfied) there is a right to manifest one's objections to military service, one motivated by religious beliefs. The Grand Chamber treated the failure to report for military service as a manifestation of the applicant's beliefs as a Jehovah's Witness and his conviction for evasion of the draft was therefore an interference with the right to manifest his beliefs.[49] This, however, leaves open the question of whether non-religious pacifist beliefs would qualify in the same way. As the Court pointed out: 'the applicant . . sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious conviction.'[50] The position in Armenia under which 'no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society'.[51] Moreover, the Chamber confronted the government's objection that to make allowance for conscientious objectors would be a form of positive discrimination:

> [R]espect 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

---

[44] *Peters v Netherlands* Appl No 22793/93 (ECHR, 30 November 1994).
[45] A series of decisions confirmed that whether states chose to recognize conscientious objection was discretionary: *X v Federal Republic of Germany,* App No 7705/76 (Commission decision, 5 July 1977); *Conscientious Objectors v Denmark,* App No 7565/76 (Commission decision, 7 March 1977); *A v Switzerland*, App No 10640/83 (Commission decision, 9 May 1984), *N v Sweden*, App No 10410/83 (Commission decision, 11 October 1984), *Autio v Finland*, App No 17086/90 (Commission decision, 6 December 1991), *Peters v The Netherlands*, App No 22793/93 (Commission decision, 30 November 1994), *Heudens v Belgium*, App No 24630/94 (Commission decision, 22 May 1995), *GZ v Austria,* App No 5591/72 (Commission decision, 2 April 1973).
[46] *Ulke v Turkey* App no 39437/98 (ECHR 24 April 2004). 'These multiple convictions were considered to amount to degrading treatment as they caused the applicant severe pain and suffering which went beyond the normal element of humiliation inherent in any criminal sentence or detention' (ibid, [63]-[64]).
[47] *Bayatyan vArmenia*, App No 23459/03 (ECHR, 7 July 2011).
[48] Ibid, [110].
[49] Ibid, [112].
[50] Ibid, [126].
[51] Ibid.

> inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.[52]

In these passages, the Grand Chamber can be seen as decisively rejecting—at least the context of military service—two commonly-voiced objections to recognition of conscientious objection: that crises of conscience are self-inflicted and that for the state to address them would create unfair exemptions or privileges for certain groups.

If conscientious objection to military service is now well-established, the same cannot be said to the same extent for conscientious objection by healthcare professionals, to which I now turn.

V CONSCIENTIOUS OBJECTION IN HEALTHCARE

In practice, questions of conscience tend to be raised concerning several discrete questions at the start and end of life: participation in abortion, prescription of certain forms of contraception (the 'morning after pill' especially), embryo research, withdrawal of treatment to terminally ill patients and physician-assisted suicide.[53] Of these, it is abortion and emergency contraception that have received the most sustained legal analysis.

Recognition of conscientious objection to abortion is controversial because of its impact on the provision of lawful medical procedures to affected women. [54] In places like Northern Ireland, Italy and the Republic of Ireland, where abortion is not available or is highly restricted, the question of conscientious objection does not arise. Equally in Sweden, Norway and Iceland, conscientious objection is not permitted because there is a de facto right to abortion. In the absence of a legislative procedure for conscientious objection in such countries the issue is more likely to be raised by way of constitutional or human rights challenges. In practice, however, most states fall somewhere between these poles. Recognition of a right of conscientious objection is a compromise adopted by countries that have legalized abortion albeit on restricted terms.

Consequently, where such a right of conscientious exists it does not arise in a historical vacuum. It is always the product of a process of legal reform and argument in a particular social and historical context which it is misleading to ignore.[55] The historical position in many countries was to treat abortion as a criminal offence. Abortion rights therefore mostly take the form of liberties—a relaxation of these criminal penalties in certain circumstances, and

---

[52] Ibid.

[53] The place of conscience in patient's decisions is not discussed here. There is a substantial case law and commentary on the question of refusal of blood transfusion by Jehovah's Witnesses in particular, but the legal questions are treated through the prism of the law relating to consent (treatment of a patient against their wishes otherwise constituting an assault) and/or in relation to children of their 'best interests'. A patient can refuse treatment for any reason at all and so rather than addressing protection of conscience *per se* the courts in these cases do so only in a tangential or indirect way. See further Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, Oxford, Oxford University Press, 2013) ch 9. More directly relevant—though for another occasion—is the question of conscientious objection by parents to vaccination of their children: for discussion (in relation to Ontario legislation) see Richard Haigh, 'Should Conscience be a Proxy for Religion in Some Cases?' (2017) 79 *Supreme Court L Rev* (2d) 203.

[54] For example, see the conflicting opinions in the Special Issue, 'Abortion and Human Rights' (2017) 19 (1) *Health and Human Rights Journal*.

[55] *Cf* Jonathan Montgomery, 'Conscientious Objection: Personal and Professional Ethics in the Public Square' (2015) 23 *Medical L Rev* 200, arguing from the historical context against a general right of conscientious objection for medical professionals.

generally prescribed by medical opinion—rather than a positive legally enforceable entitlement for the pregnant woman which imposes specific duties on individual doctors.

In the Great Britain, the Abortion Act 1967 legalized abortion, primarily in order to bring illegal 'backstreet' abortions, which frequently threatened the lives of women, under medical supervision.[56] These steps were highly controversial at the time and, pragmatically, in order to secure their parliamentary approval, legal exemptions were provided as a compensating measure for the protection of medical professionals with conscientious objections to participating. The provision that became s 4 of the Abortion Act 1967 was tabled as an amendment by way of compromise during the Bill's passage. As Lady Hale put it a recent Supreme Court decision:

> The conscience clause was the *quid pro quo* for a law designed to enable the health care profession to offer a lawful, safe and accessible service to women who would previously have had to go elsewhere.[57]

Therefore, to view these provisions solely through the lenses of either patients' rights generally, or reproductive rights specifically, is to seriously misunderstand the context even granting the fact that contemporary courts interpret such provisions in the light of developing attitudes.[58]

The acceptance of the principle of conscientious objection in relation to abortion cannot avoid controversy surrounding several significant questions: who is entitled to claim the exemption—both in terms of how directly involved a person needs to be to qualify and whether it is applicable to institutions providing healthcare from a religious ethos; whether exemption also extends to supplying information about where abortion may be provided elsewhere and; whether it covers the doctor's right to abstain from referring patients to practitioners with no objection to conducting abortion.

The limits to who is entitled to claim the exemption, turn on the meaning of specific statutory terms used to frame the right.[59] In Great Britain, for example, it is not confined to doctors but is limited to those 'participating' in an abortion: s 4 of the Abortion Act 1967.[60] Judicial interpretation has restricted the provision so that it applies to direct participation only. Thus, in *R v Salford Health Authority, Ex p Janaway*[61] it was held that a secretary asked to type a letter referring a patient for an abortion did not have the right to invoke the provision since she was not participating in the treatment. In *Greater Glasgow Health Board v Doogan,* the UK Supreme Court, in a preliminary ruling, held in the case of two experienced supervising Roman Catholic midwives that 'participate' meant 'taking part in a "hands on" capacity', 'actually performing the tasks involved in the course of treatment'.[62] It is arguable that on this

---

[56] The Abortion Act 1967 does not apply to Northern Ireland.

[57] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68, [27].

[58] It is more accurate to refer, as does a Council of Europe resolution (discussed below), to participation in 'lawful medical procedures': 'The Right to Conscientious Objection in Lawful Medical Care', PACE Resolution 1763 (2010).

[59] The possibility of claims of religious discrimination from health workers falling outside the scope of the statutory conscience provisions also arises, but is not discussed here due to space constraints.

[60] Section 4(1) states 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.' The provision makes clear that it is for the person claiming a conscientious objection to discharge the burden of proof in any proceedings. The right of conscientious objection does not apply to those under a 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': s 4(2).

[61] [1989] AC 537.

[62] [2014] UKSC 68, [37], [38].

basis general practitioners do not fall under s 4 of the Act either. Although that conclusion may be a little surprising, it is nonetheless clear that general practitioners' conscientious objections are recognized under delegated legislation.[63]

The protection of conscientious refusal by religious ethos health providers to offer certain treatments is, to put it mildly, contentious. In the US, extensive protection was enacted both at the federal level and by many states following *Roe v Wade*[64] to enable denominational hospitals to opt out of procedures such abortion, sterilization and euthanasia. A number of legal challenges are pending against these protections, sponsored by the American Civil Liberties Union. In Europe, however, a rapporteur to the Parliamentary Assembly of the Council of Europe has argued that the right cannot be claimed by institutions, citing unsuccessful claims in France and Germany.[65] Moreover, in the US, the Ninth Circuit Court of Appeals has decided that the First Amendment is not violated by a state regulation that prevents pharmacies (as opposed to individual pharmacists) from declining to stock and prescribe emergency contraception for religious reasons—a blow against religious ethos small businesses.[66] This is controversial, not least because of the impact on religious autonomy. In part, however, it engages questions about the appropriateness of a conscience-based policy being afforded to bodies in receipt of public funds for the provision of public healthcare.

Thirdly, there is the question of whether a conscience objection also applies to the duty a physician would be under to refer patients to whom the medical practitioner cannot in good conscience give the treatment requested. The duty of a conscience-claiming doctor to refer is commonly insisted upon both in ethical codes promulgated by international and professional regulatory bodies and in the relevant legislation of a number of countries.[67] This accords with the views of many commentators who argue that to extend conscientious objection to refusal to referral would have a serious potential impact on the availability of information and treatment for the patient. Andrew Hambler has pointed out, however, that the issue also raises fundamental philosophical questions about the nature of conscience. Preventing use of conscientious objection by those who object to indirect involvement in abortion he argues: 'accommodates only those who adopt a rigidly deontological view of the moral rightness of their actions and not those who take a broader consequentialist view of the likely ultimate effect of those same actions.'[68]

---

[63] In England, see National Health Service (General Medical Services Contracts) Regulations 2004 (SI 2004/291), Sched 2(3)(2)(e).

[64] 410 US 113 (1973).

[65] Parliamentary Assembly of the Council of Europe, Social Health and Family Affairs Committee, Rapporteur C McCafferty, *Women's Access to Lawful Medical Care; the problem of Unregulated Use of Conscientious Objection*, Doc 12347, 20 July 2010, 4.2. See also: French Constitutional Council, Decision 2001-446 DC of 27 June 2001 (Voluntary Interruption of Pregnancy (Abortion) and Contraception Act) on the removal of the possibility for a head of department of a public health establishment to oppose terminations of pregnancy being practised in his or her department.

[66] *Storemans Inc v Wiesman*, 794 F 3d 1064 (2015). The better-known Supreme Court decision in *Burwell v Hobby Lobby Stores, Inc*, 537 US 354 (2014), confirmed the applicability of the Religious Freedom Restoration Act to a claim by a private company which, because of the religious concerns of its owners, refused to provide certain kinds of birth control in their employee insurance plans, as required by the federal Affordable Care Act 2010. That decision raises interesting and controversial questions about the applicability of protection for religious beliefs to businesses which are beyond the scope of the present discussion: see generally Rex Ahdar, 'Companies as Religious Liberty Claimants' (2016) 5 *Oxford J Law & Religion* 1.

[67] Anne O'Rourke, Lachlan De Crespigny and Amanda Pyman, 'Abortion and Conscientious Objection; the New Battleground' (2012) 38 *Monash UL Rev* 87.

[68] Andrew Hambler, *Religious Expression in the Workplace and the Contested Role of Law* (Abingdon, Routledge, 2015) 100. See also Fovargue and Neal, 'Conscience-Based Exemptions and Proper Medical Treatment', 239-241.

Put differently, it can be argued that coupling the right of conscientious refusal with a duty to refer takes the objecting doctor's viewpoint markedly less seriously than a full right would do. From the viewpoint of a doctor who believes that abortion involves the taking of a human life, to be required to refer to another practitioner who will do so is roughly equivalent to asking a conscientious objector to military service to load the rifle for another soldier to take aim and fire. The reason this perhaps seems a strained analogy is because of a societal hesitation—even where conscientious objection in healthcare is recognized—to fully acknowledge the doctor's beliefs about the sanctity of life. In the face of unresolved moral conflict in society about the status of the foetus to qualify for protection, the right of objection with a duty to refer is a compromise solution—not fully satisfactory to either side of the debate.[69] Moreover, an attempt here to balance any conscience-based exemption from referral with the patient's rights to information and treatment is going to be problematic, given that the majority of legal systems that permit abortion do so only in the earlier stages of pregnancy.

As regards the question of conscience claims by pharmacists, in its brief admissibility decision in *Pichon and Sajous v France*,[70] the European Court of Human Rights found that the conviction for refusal to sell contraceptives that had been medically prescribed did not interfere with the pharmacists' Art 9 rights:

> As long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.[71]

The decision pre-dates the change of approach of the European Court of Human Rights in *Eweida* and it is likely that were it to be decided again today, it would be on the basis that there was a justified limitation under Art 9(2) because of the need to balance the pharmacists' religious or conscience-based rights with the rights and freedoms of others.

The substantive outcome is out of step with professional codes which, in many jurisdictions, *do* allow individual pharmacists some scope for conscientious objection—often bounded by a duty to refer the customer to another convenient pharmacist.[72] As with conscientious objection to abortion, there is a spectrum of different approaches (particularly among different states in the United States),[73] but the French position would seem to lie at one end of the range rather than in the middle, and it is surprising therefore that the Strasbourg Court accepted it with so little analysis.

A markedly more nuanced position was adopted by the Court in *RR v Poland.*[74] The European Court of Human Rights stated:

---

[69] Considering the question from the viewpoint of a GP or secretary with a conscientious objection to abortion, Daniel Hill argued that their objection should logically extend to typing the letter or referring to another practitioner who is not opposed to abortion: Hill, 'Abortion and Conscientious Objection'(2010) 16(1) *KLICE Ethics in Brief* <http://klice.co.uk/uploads/Ethics%20in%20Brief/Hill%20v16.1%20pub.pdf >.

[70] *Pichon and Sajous v France* [2001] ECHR 898.

[71] Ibid,

[72] Fovargue and Neal, 'Conscience-Based Exemptions and Proper Medical Treatment', 226-7.

[73] For references, see: Jere D Odell et al, 'Conscientious objection in the healing professions: a readers' guide to the ethical and social issues— Pharmacists' (Indiana University School of Medicine, 3 May 2014) <https://scholarworks.iupui.edu/handle/1805/4404 >.

[74] [2011] ECHR 828.

> 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.[75]

This appears to impliedly acknowledge that Art 9 is in play[76] and avoids some of the obvious questions begged by the *Pichon and Sajous* decision about 'imposition' of the pharmacists' views,[77] and whether freedom to manifest views in other contexts is a reason to deny the right to do so in one's employment. The relevance of Art 9 is further supported by a Council of Europe Resolution on 7 October 2010 on 'The Right to Conscientious Objection in Lawful Medical Care'[78] which 'invites member states to develop comprehensive and clear regulations that define and regulate conscientious objection with regard to health and medical services', and which:

> 4.1. guarantee the right to conscientious objection in relation to participation in the medical procedure in question;
> 4.2. ensure that patients are informed of any conscientious objection in a timely manner and referred to another health-care provider;
> 4.3. ensure that patients receive appropriate treatment, in particular in cases of emergency.

A forthcoming Convention challenge from a midwife not allowed under Swedish law to conscientiously object to participating in abortion may shed new light on the balancing of these claims with provision of medical services.[79]

VI CONCLUSION

It may be tempting to claim that we are witnessing 'conscience creep' and that new conscientious objections claims—like those in healthcare—are different in kind to older more established forms, especially in relation to military service. Critics sometimes argue, for example, that medical practitioners have voluntarily enlisted in professions where their responsibilities to patients leave no room for individual exercise of conscience. Such an

---

[75] Ibid, [206].
[76] Admittedly the point was not directly considered by the Court (which found breaches of Arts 3 and 8 in the case of a woman suffering repeated delay in accessing prenatal screening).
[77] Much of the medical ethical literature stresses the need for healthcare practitioners refusing treatment for reasons of conscience to do so respectfully and non-judgmentally: Fovargue and Neal, 'Conscience-Based Exemptions and Proper Medical Treatment', 230. On a slightly different point, in a rural area in which the morning after pill was not otherwise available it might be more appropriate to speak of denial of a service to the patient.
[78] Parliamentary Assembly of the Council of Europe, Resolution 1763 (2010). See Explanatory Memorandum, 'Women's Access to Lawful Medical Care: the problem of unregulated use of conscientious objection', Doc 11757 (Rapporteur C McCafferty), para 3.11. The UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev 1, chap I, likewise urges (para 11): 'if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers' <http://www.refworld.org/docid/453882a73.html>
[79] Alliance Defence Fund International, 'Swedish Midwife turns to Human Rights Court', (Press release, 14 June 2017): <https://adfinternational.org/detailspages/press-release-details/swedish-midwife-turns-to-human-rights-court>.

approach begs obvious and large questions about core understandings of the nature of the medical profession and its historic attitudes towards sanctity of life, professional judgment and medical ethics. More narrowly, however, it also demonstrates a lack of understanding of the complex and varied nature of conscientious objection to military service.

Conscientious objectors are not just conscripts who are pacifists for religious or other reasons. They may also be 'selective' objectors—their objection relating to particular unjust wars or to use of indiscriminate weapons—and this is particularly pertinent to professional soldiers, rather than solely to conscripts.[80] There is a clear parallel to the position of other public officials and professionals (including healthcare professionals). Moreover, in the case of 'total' objectors, who refuse to serve in ancillary roles supporting the military effort (and who may therefore reject alternative service), we are closer to objections based on complicity. Furthermore, the long-established practice of some groups of withholding tax from military expenditure raises questions of causation that are comparable to contemporary complicity conscience claims.[81] One recalls Henry David Thoreau, who wrote an essay 'On the Duty of Civil Disobedience' following his brief imprisonment for refusal to pay tax to fund the US-Mexico War of 1812, as an early example of a selective tax withholder.[82]

Overall, older examples of conscience claims do shed some useful light on new controversies and show that, if anything, 'new' conscience claims may have more in common with classic conscience claims than is commonly assumed.

Where there is a clearer difference between the types of conscience claims concerns the effect on the provisions of services to others. This requires procedures for limiting conscience claims, for example, by professional duties to refer patients to the practitioners or through statutory limitations that specify a direct link between the conduct and the controversial procedure (such as the reference to 'participating' under s 4 of the UK Abortion Act 1967). Limitations of this kind will leave some who claim that their conscience is infringed without legal protection, but they are nonetheless an attempt to strike a reasonable balance between patient's interests and indirect or complicity conscience claims. The proportionality test applicable to limitations on the right to manifest one's religion or belief in the interests of the rights and freedoms of others is likely to be used by international bodies in the same way,[83] although there remains the possibility that some conscience claims, like those in the military sphere, will be treated as unqualified.

As healthcare conscience claims become more prominent some questions currently unresolved are likely to be clarified.[84] These concern: whether conscience is better protected as a freestanding right or a subset of religion and belief, about complicity and the proximity of conscience and action, about whether the right is absolute or limited, and whether public or professional duty and conscience are mutually exclusive. Such apparently technical matters raise profound questions for contemporary liberal societies—not least over the limits of equality, tolerance and dissent.

---

[80] Leigh and Born, *Handbook on Human Rights,* 84.

[81] Such claims have, however, tended to fail in court. See, for instance, *Cheney v Conn* [1968] 1 All ER 779 (UK); *Prior v Canada* (1989) 44 CCR 110 (FCA) (Canada).

[82] Thoreau, *Walden and On the Duty to Civil Disobedience* (orig pub 1854; Scribner, 1962).

[83] For critique of the approach of the European Court of Human Rights to limitations for the rights and freedoms of others, see Leigh and Hambler, 'Religious Symbols' and Ian Leigh, 'Reversibility, Proportionality, and Conflicting Rights: *Fernández Martínez v. Spain'* in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford, Oxford University Press, 2017) ch 11.

[84] These may also help to shed light on other current controversies not discussed here such claims by public officials and small businesses in the field of equality and non-discrimination.