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Objection of Conscience – a Right or a Duty?

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J. Cornides

The reason I have received the flattering invitation to address this conference with a speech on the subject '*Objection of Conscience - a Right or a Duty?*' seems to be that I published an article on a related subject in the International Journal of Human Rights earlier this year. The title of that Article was 'Human Rights Pitted Against Man' and dealt, among other things, with a report adopted in 2005 by an EU Network of Experts on Fundamental Rights, in which these experts sought to demonstrate that (a) in certain circumstances there was a 'Right to Have Access to Abortion' for women, and (b) that this right was of such high rank that it superseded a medical practitioner's freedom of conscience. More specifically, the Expert Network found that a clause in a draft concordat then under negotiation between the Slovak Republic and the Holy See, which aimed to guarantee 'everybody's right to refuse partaking in such acts as abortion, euthanasia, assisted procreation, cloning, etc.' was in violation of internationally recognized human rights standards, as well as of EU Community Legislation.'

For both the content of the opinion published by the Network and my reasons to criticize the Network's findings, I refer you to the article (of which copies are available); I do not want to waste your time with something that you can take and read at home. Just to resume it: My view is that there is no such right as a 'Right to Abortion'. Whenever, wherever, and under whichever circumstances it takes place, abortion takes the life of an innocent human being. It is not a right, even less a 'fundamental right', but, on the contrary, it is a violation of the most fundamental of all rights, the Right to Life. It is self-evident, then, that there cannot be any obligation for any medical practitioner or any other person to partake in abortions or to refer a woman to a medical practitioner willing to perform abortions.

In this speech, I want to look at the other side of the problem: is there a Right to Freedom of Conscience? Who says so? How is this right guaranteed? What is its relation to other rights?

At a first glance, most of us will think that there is a right, even a 'Fundamental Right', to act according to one's own conscience. Firstly, because we have been brought up to believe so. Secondly, because this right is specifically mentioned in relevant instruments of international law. For example, Article 9 of the European Convention of Human Rights and Fundamental Freedoms foresees:

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.*

If we take a closer look, however, the situation is less clear. Let me just raise a couple of points:

1. If 'Freedom of Conscience' is a fundamental right, it must, as fundamental rights usually do, precede and supersede all positive legislation. Yet in a legal system consisting of binding (written and non-written) laws, it would seem absurd to assume that there was an over-arching principle according which everybody has a right to contravene the law if his conscience so allows. If 'Freedom of Conscience' were to be understood in such a way, there would be no equality before the law any more, and, indeed, the idea of law itself would be undermined: everybody would carry his own law within himself. This is what I would describe as total autonomy for everyone.
2. It is no wonder, therefore, that – despite recognizing 'freedom of conscience' as a so-called human right, states do very little to implement it in practice. Quite on the contrary, all states have laws, and these laws are (or should be) binding for everyone. Objection of conscience is usually not allowed when it comes to paying taxes or respecting traffic rules... The reason for this is, obviously, that each state makes the assumption that its own laws are just and fair, and that there can be no valid objection of conscience against them. If someone says that he has objections of conscience against paying his taxes, or that his conscience told him to kill his sister or daughter to punish her for her immoral lifestyle and to restore the family's honor (there have been cases like this among Muslim communities in several European countries), this will not spare him the consequences. There is not, and there cannot be, a legal provision according which he who has obediently followed his conscience will never suffer any disadvantages. The law is objective, not subjective.
3. Indeed, it seems to me that the readiness to suffer dire consequences is precisely what makes the difference between a sanctimonious pretension and a true objection of conscience. For example, it is very easy to object to the duty to serve in the army if a country's legislation provides for this possibility¹ - but is this an authentic objection of conscience? And is there really a valid case to be made for objecting to serve in the army of a democratic state? By contrast, we find a remarkable and impressing example of a true conscientious objection in the case of Franz Jägerstätter, an Austrian who, during WWII, refused to serve in the German Wehrmacht. He was not a pacifist (he had served in the Austrian army prior to the Anschluss), but he refused serving in an army of which the supreme command was held by Hitler, and he knew that he would have to pay this his life. Remarkably, the Wehrmacht tried to find an alternative solution for him: in order to accommodate his concerns, Jägerstätter was offered to serve in a unit of nurses. But he refused even that. Franz Jägerstätter was canonized by the Catholic Church last year. This has raised some criticism among army veterans-

¹ (I know that in the UK, there is no obligation to serve in the army. In most European countries, such an obligation still exists, but there is the possibility for persons having objections of conscience against 'using weapons' or 'learning how to kill' to opt for an alternative (non-armed) service. The availability of such option is nowadays considered a human rights standard by many experts.

and indeed, it could be objected that his moral stance was somewhat radical. Yet nobody can say that he was not true to his conscience. (I could go on citing many more examples of heroic attitudes both from real life and mythology: Antigone, who forfeited her life burying her brother Polynikes, or the seven Maccabean brothers, Socrates, Sophie and Hans Scholl, Andrei Sacharov, Nelson Mandela, to mention just a few: they all have in common that in obeying their conscience, they broke the law. And they put up with the consequences, some of them even giving their lives).

4. As I mentioned, if we look into the statute books, we will not find many provisions that explicitly protect the ‘freedom of conscience’ by protecting those expressing such objections from negative consequences. In fact, such provisions seem to exist only in very specific contexts, namely:
 - a. religious matters: nobody is obliged to practice a faith he does not adhere to;
 - b. the obligation to military service: the availability of a peaceful ‘alternative service’ is, as I mentioned, nowadays considered a human rights standard;
 - c. abortion, euthanasia, assisted procreation, cloning, etc.

Let me just comment on (c). Abortion, euthanasia, etc. are what I would describe as practices that are widely considered as morally questionable, if not worse. In many jurisdictions where the law allows (or does not sanction) these practices, there are provisions in force explicitly foreseeing that nobody can be obliged to partake in them. Arguably, these provisions have been introduced at a time when the general moral sentiment against abortion etc. was stronger than it is today and when the pressure groups lobbying for liberalization had to take this sentiment into account. They argued that abortion etc. were not intrinsically good, but that they had to be tolerated, and that criminal sanctions did not contribute to eradicating such practices. The insertion of conscience clauses into a law legalizing abortion served a purpose: it made liberalization more palatable for opponents.

The actual meaning of these conscience clauses is not always clear. In principle (as I pointed out in my article on the Slovak concordat), the medical profession is a free profession that is exercised on the basis of contractual freedom: even in the absence of such provision, therefore, no doctor acting under his own responsibility can be obliged to perform abortions. The practical importance of conscience clauses on abortion etc. seems to concern doctors and nurses who are employed in a hospital that offers these practices.

But the conscience clause would not make much sense if they were interpreted restrictively. A correct interpretation of these clauses must include the nullity and unenforceability of any contractual provision that could be used to oblige a person to perform abortions etc. Where such conscience clauses exist, contracts on abortions are invalid. And if such contracts are invalid, this would logically imply there can be no civil responsibility if, for example, the attempted abortion remains unsuccessful, or in the so-called ‘wrongful-birth’-cases.²

² Unfortunately, law courts often fail to see this connectivity. One example is my own country, Austria, where the Supreme Court upholds claims based on ‘wrongful birth’ despite the fact that (a) the law considers abortions as unlawful and (b) the law contains a conscience clause.

Be it as it may, it is clear that in the eyes of pro-abortionists, conscience clauses on abortion are something they want to get rid of. These provisions have served their historic purpose – but now the moral sentiment of the broader public has been tranquillized to a degree that makes it possible to proceed to the next step: to turn abortion into a right for women, and an obligation for medical practitioners. Indeed, even if in a given country such conscience clauses are seldom used in practice, the mere existence of such provision is considered an obscenity: as long as it exists, it evidences the abnormality of abortion being legal, and the righteousness of the pro-life movement.

This is what is hidden behind the aforementioned Legal Opinion of the EU Expert Network. This is what motivates the campaigning of lobby groups like Planned Parenthood, Center for Reproductive Rights, Catholics for a Free Choice, etc. It is ironic that the pro-abortion movement portrays itself as ‘pro-choice’. Their campaigning against conscience clauses evidences the contrary: they are *anti-choice*. They want to prevent medical practitioners, just as they want to prevent women, from choosing not to perform abortions.

Usually, the structure of their argument is the following:

1. *“We respect the freedom of a state to legislate on whether or not abortion should be legal.”* (Meaning: no problem if abortion is made legal without any restriction)
2. *“However, there are some circumstances where abortion should be legal, - including cases of rape, or where the child suffers from a bodily impairment, or where the mother’s health is in danger.”* (N.B: the wide interpretation the pro-abortion lobby gives to these ‘exceptional circumstances’ aims to legalise abortion ‘through the backdoor’. An especially wide interpretation is give to ‘dangers for the mother’s health’, which, in the minds of certain groups, appears to include the slightest risk of a depressive mood, or the like.)
3. *“If and where abortion is legal, it must be safe. This means that safe abortions must be made available at all places and at all times”* (N.B: this is the point where ‘access to abortion’ is suddenly turned into a ‘right’. The state is made responsible for *guaranteeing* the availability of abortions)
4. *“If a medical practitioner invokes conscientious objection, there is a risk that ‘safe abortion’ becomes unavailable.”* (This is actually true. The EU Expert Network therefore believes that medical practitioners invoking objections of conscience should at least be obliged to refer a woman seeking abortion to a doctor willing to perform it. But such a referral would already mean to partake in an abortion, i.e. doing precisely what the conscience is objecting against. Also, it reveals a strange concept of ‘liberty’ if that liberty is only granted to such extent that it has no practical consequence.)
5. (additionally): *“Conscientious objection is motivated by religious beliefs. It is not rational.”* (It is remarkable that the pro-abortion-lobby attempts to describe conscientious objection as a ‘religious’, i.e. irrational, attitude. This is part of their strategy. The above-mentioned Opinion of the EU Expert Network, which purports to deal with ‘the Right to

Religious Conscientious Objection’ and ‘Concordats’, is a good example for this. The truth is that there are currently many conscience clauses in force in various European jurisdictions. They are all available to everyone, not to the followers of a specific religion; moreover they are all contained in the domestic legislation of the countries concerned, not in concordats. Moreover, conscientious objection against abortion is motivated by ethical reason, not by any religious belief. The ‘religious’ context is just a smokescreen.

6. Many of you are aware of a pro-abortionist Group calling itself ‘Catholics for a Free Choice’. (In fact, they are neither catholic, nor for a free choice.) This group recently came up with a completely new interpretation of ‘freedom of conscience’. In a letter to the editor (of IJHR, published as a reaction to my article on conscience clauses), Jon O’Brien, the chairman of that group, dismissed as ‘religious belief’ not only the Catholic Church’s views on abortion, but also his own. According to him, an abortion is nothing less than an act through which a woman “*practices her faith*”(!). Whereas so far I thought that pro-abortionists like Mr. O’Brien sincerely believed in the rationality of their own moral judgment, it now seems to me that they are fully aware of its irrationality.

The campaigning of pro-abortion lobbies is massive, and their political influence is considerable. The Opinion issued by the Expert Network as well as similar statements made by several UN Committees or by the ECtHR highlights this. There is no guarantee that the campaign will not be crowned by success, and that, on a day not far away from now, doctors could be forced to perform abortions against their will. This is a situation in which many gynaecologists and obstetricians may face the choice of either performing abortions or giving up their profession. And if the campaign against conscience clauses is extended to other contexts (such as euthanasia), the final consequence could be that no one can become a doctor if he is not prepared to kill his patients if they (or their relatives) so demand. The slippery slope becomes steeper and steeper. In the end, there might be no ‘Right to Conscientious Objection’ any more, and the ECtHR or other instances might decide that Article 9 of the ECHR does not include the freedom not to perform abortion, euthanasia, etc.

Yet it seems to me that, anyway, it is a fundamental error to believe that ‘Freedom of Conscience’ is a right.

Instead, it is a *responsibility*.

It has occurred in the past, and it will time and again occur in the future that states adopt unjust laws, i.e. laws that stand in contradiction to the moral order. Our time, however, is the first to witness attempts of imposing such laws on a continental or even global scale, using the institutional power of the UN, or the Council of Europe. If and where these attempts are successful and such laws are enacted, this will not provide any legitimacy to the policies or behaviors they purport to ‘legalize’, nor will it give any license to anyone not to object to such behaviors or policies, or to partake in them. On the contrary: it is precisely in that sense and under such circumstances that each of us does enjoy – and must make use of - freedom of conscience, i.e. the freedom to obey to our conscience rather than to positive law. Without doubt this freedom, which can also be described as a duty, is the greatest and most valuable of freedoms - but whoever uses it, must be ready to pay the price.