

## Religious conscientious objection: a troubled path

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### 1. INTRODUCTION

This chapter aims to describe the legal narrative of conscientious objection based on religious and other ethically salient grounds. We start by briefly assessing the concept on the literal, political and historical levels. We demonstrate how the rhetoric of conscientious objection has evolved from a military context to a broad range of situations relating to public health, public administration and even the provision of goods and services (Section 2). Next, we retrace the troubled path of conscientious objection as a human right in the international and regional legal systems. We show that military service is the only area in which conscientious objection has been recognized as a human right (Sections 3 and 4). Finally, we conclude by discussing major difficulties in trying to transpose the debate surrounding conscientious objection beyond participation in the military forces. In this debate, we show the extent to which the use of conscientious objection is increasing, as it is somewhat blurred with reasonable accommodation (Section 5).

### 2. DEFINITION, BOUNDARIES AND HARM

When one searches for the term ‘conscientious objection’ in a dictionary, whatever the language, it almost always yields a definition relating to the refusal to serve in the military – for example, ‘objection for reasons of conscience to complying with a particular requirement, especially serving in the armed forces’;<sup>2</sup> ‘a person who refuses to work in the armed forces for moral or religious reasons’;<sup>3</sup> ‘objection on moral or religious grounds (as to serve in the armed forces or to bearing arms)’;<sup>4</sup> and in French, ‘*refus de porter les armes formulé par un objecteur de conscience*’.<sup>5</sup>

The modern basis of conscientious objection is grounded on the introduction of universal conscription for the military service after the French Revolution. With the aim of creating a national army, Napoleon implemented large-scale conscription to address the lack of volunteers.<sup>6</sup> Other European countries followed in his footsteps, setting the stage for wars in the nineteenth and twentieth centuries.<sup>7</sup>

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<sup>2</sup> Oxford Dictionary, [https://en.oxforddictionaries.com/definition/conscientious\\_objection](https://en.oxforddictionaries.com/definition/conscientious_objection), last accessed 24 January 2018.

<sup>3</sup> Cambridge Dictionary (‘conscientious objector’), <https://dictionary.cambridge.org/fr/dictionnaire/anglais/conscientious-objector>, last accessed 24 January 2018.

<sup>4</sup> Merriam Dictionary, <https://www.merriam-webster.com/dictionary/conscientious%20objection>, last accessed 24 January 2018.

<sup>5</sup> Oxford Dictionary, [https://en.oxforddictionaries.com/definition/conscientious\\_objection](https://en.oxforddictionaries.com/definition/conscientious_objection), last accessed 24 January 2018); *Dictionnaire Larousse* (Objection de conscience), [www.larousse.fr/dictionnaires/francais/objection/55358/locution?q=objection+de+conscience#163687](http://www.larousse.fr/dictionnaires/francais/objection/55358/locution?q=objection+de+conscience#163687), last accessed 24 January 2018.

<sup>6</sup> Richard Holmes (ed), *THE OXFORD COMPANION TO MILITARY HISTORY* 556 (2001).

<sup>7</sup> UNITED NATIONS, *CONSCIENTIOUS OBJECTION TO MILITARY SERVICE* 1–5 (2012).

During the First World War, the first massive wave of conscientious objectors appeared in Europe and the United States.<sup>8</sup> Of those countries with a system of peacetime conscription, Denmark became the first to pass legislation recognizing conscientious objection.<sup>9</sup> After the Second World War, when conscription was largely implemented on all continents, conscientious objection became a human rights issue. In the United States, the number of secular conscientious objectors increased significantly during the Second World War and the Vietnam War. At that time, more than 100 000 American men were opposed to military service, of whom 22 500 were prosecuted and 8800 were convicted for the violation of conscription laws. Unlike in previous conflicts, an average of 72 per cent of those convicted were secular objectors.<sup>10</sup> On a global scale, conscientious objection was construed by the United Nations as a derived right of freedom of thought, conscience and religion enshrined in Article 18 of the Universal Declaration of Human Rights (UDHR) and later in Article 18 of the International Covenant on Civil and Political Rights (ICCPR).<sup>11</sup>

However, people also object to actions according to their moral or religious values in contexts other than military service. Currently, there are many objectors in the healthcare arena, such as parents who refuse to vaccinate their children,<sup>12</sup> Jehovah’s Witnesses who refuse blood transfusions<sup>13</sup> and doctors who oppose abortion procedures.<sup>14</sup> In the public administration, public officers have refused to celebrate same-sex marriages,<sup>15</sup> and even in the private sector, bakers have refused to make wedding cakes for same-sex couples.<sup>16</sup> Conscientious objection has permeated different layers of modern life, with objectors alleging their right to exemption from their obligations for reasons of personal morality. The expression, which has its roots in military service, has over time been appropriated by different social actors. It is increasingly used to refer to individual exemptions on religious or other ethically salient grounds.

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<sup>8</sup> Devi Prasad and Tony Smythe (eds), *CONSCRIPTION: A WORLD SURVEY – COMPULSORY MILITARY SERVICE AND RESISTANCE TO IT* 56 (1968).

<sup>9</sup> UNITED NATIONS, *supra* note 7, at 5.

<sup>10</sup> John Whiteclay Chambers II, *Conscientious Objectors and the American State from Colonial Times to the Present*, in *THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE* 41 (Charles C. Moskos and John Whiteclay Chambers II eds, 1993).

<sup>11</sup> UNITED NATIONS, *supra* note 7, at 7.

<sup>12</sup> Daniel A. Salmon et al., *Compulsory Vaccination and Conscientious or Philosophical Exemptions: Past, Present, and Future*, 367 *THE LANCET* 436 (2006).

<sup>13</sup> Carlo Petrini, *Ethical and Legal Aspects of Refusal of Blood Transfusions by Jehovah’s Witnesses, with Particular Reference to Italy*, 12 (Suppl 1) *BLOOD TRANSFUSION* 395–401 (2014).

<sup>14</sup> Emmanuelle Bribosia and Isabelle Rorive, *Seeking to Square the Circle: A Sustainable Conscientious Objection in Reproductive Healthcare*, in *CONSCIENCE WARS* 392 (Susanna Mancini and Michel Rosenfeld eds, 2018).

<sup>15</sup> See Bruce MacDougall et al, *Conscientious Objections to Creating Same-Sex Unions*, 1 *CANADIAN JOURNAL OF HUMAN RIGHTS* 127 (2012); Robert Wintemute, *Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others*, 77 *MODERN LAW REVIEW* 240 (2014); Emmanuelle Bribosia and Isabelle Rorive, *Les droits fondamentaux, gardiens et garde-fous de la diversité religieuse en Europe*, in *L’ACCOMMODÉMENT DE LA DIVERSITÉ RELIGIEUSE. REGARDS CROISÉS – CANADA, EUROPE, BELGIQUE* 192 (Emmanuelle Bribosia and Isabelle Rorive eds, 2015).

<sup>16</sup> *Lee v Ashers Baking Company Ltd and others*, UKSC 2017/0020, pending before the UK Supreme Court; *Masterpiece Cakeshop, Ltd v Colorado Civil Rights Commission*, pending before the US Supreme Court. See Emmanuelle Bribosia and Isabelle Rorive, *Why a Global Approach to Non-discrimination Law Matters? Struggling with the ‘Conscience’ of Companies*, in *HUMAN RIGHTS TECTONICS: GLOBAL DYNAMICS OF INTEGRATION AND FRAGMENTATION* (Emmanuelle Bribosia, Isabelle Rorive eds, and Ana Maria Corrêa in collaboration, 2018).

From a theoretical point of view, the question of whether someone can object to a legal obligation has been assessed. Should this be considered lawlessness? Many scholars start from the premise that the essence of the law in contemporary democracies is its equal application to all, irrespective of deeply held beliefs. In liberal regimes, political participation rights are protected by law and provide people with adequate opportunities to dispute it.<sup>17</sup> In other words, declining to obey a legal rule – even for moral or ethical reasons – is forbidden and punished. Doing otherwise would have deleterious consequences for the general nature of the law and the neutrality of the state. Conversely, some argue that legal disobedience should at times be tolerated because the meaning or constitutionality of certain rules is highly controversial, or because their application might cause harm to third parties.<sup>18</sup> Additionally, objecting to specific laws might go beyond individual reasons and aim to challenge unfair legal rules. In this line, political scientists often define ‘civil disobedience’ as ‘a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government’.<sup>19</sup>

Conscientious objection and civil disobedience are clearly related. They involve social practices motivated by religious, moral or political beliefs that are linked by ‘a certain conception of *conscientious action* that requires that a person’s convictions and her conduct be consistent’.<sup>20</sup> However, whereas civil disobedience is, by definition, a breach of law, conscientious objection might be legally protected. Conscientious objection is also considered to be less overtly political than civil disobedience, as it is more about an individual desire not to participate in practices that one opposes than an ambition to change those practices. However, the boundaries are occasionally blurred when the matter involves a replay of court battles that have already been lost in Parliament, rather than seeking individual judicial exemptions based on conscience and religious freedom.<sup>21</sup> This has been documented in recent years with respect to reproductive rights and lesbian, gay, bisexual and trans (LGBT) rights.<sup>22</sup>

One cannot address the range of individual exemptions based on religious or other ethically salient grounds in the same way. This is mainly because the harm involved varies greatly, depending on the relevant situation. While there is little impact on the rights of others where conscientious objection is raised in relation to military service, objecting to the provision of reproductive health services would greatly impair women’s human rights. Undue delay puts women’s lives at risk and may result in unsafe, clandestine and illegal abortions, which endanger the lives and physical and mental health of women.<sup>23</sup> The harm might also be indirect. It might be experienced by gay couples faced with a civil registrar’s officer refusal to marry them on religious grounds, even

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<sup>17</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 163 ff (1979).

<sup>18</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 207 (1997); JOHN RAWLS, *A THEORY OF JUSTICE* 33–36 (1973); Jürgen Habermas, *Civil Disobedience: Litmus Test for the Democratic Constitutional State*, 30(2) *BERKELEY JOURNAL OF SOCIOLOGY* 95–116 (1985).

<sup>19</sup> RAWLS, *supra* note 18, at 364; more on this perspective: Hugo Adam Bedau, *On Civil Disobedience*, 58 *JOURNAL OF PHILOSOPHY* 653 (1961); HOWARD ZINN, *DISOBEDIENCE AND DEMOCRACY* 119 (1968).

<sup>20</sup> William Smith and Kimberley Brownlee, *Civil Disobedience and Conscientious Objection*, *OXFORD RESEARCH ENCYCLOPEDIAS* 1 (May 2017).

<sup>21</sup> Douglas NeJaime and Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE LAW JOURNAL* 2542 (2015).

<sup>22</sup> Bribosia and Rorive, *supra* note 14, at 392–413.

<sup>23</sup> WORLD HEALTH ORGANIZATION, *UNSAFE ABORTION. GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008* 27 (6<sup>th</sup> ed, 2011).

though their marriage will be celebrated in the end. Equality and non-discrimination law promotes recognition and dignity, as humiliation, stigma and stereotyping can be experienced regardless of any particular material disadvantage.<sup>24</sup> Indirect harm is part of Robert Wintemute’s test to define when accommodation of the manifestation of a religious belief is legally allowed (or even required).<sup>25</sup> Cecile Laborde also recommends a strict balancing test which takes harm to dignity into account in order to decide whether a conscience claim justifies an exemption from a fair law of general application.<sup>26</sup> With respect to conscience claims raised by civil marriage commissioners in Canada, it is fascinating to see that the whole range of legal options were discussed in different provinces in Canada.<sup>27</sup> The Alberta government tried to enact legislation to back up religious and civil officials who did not wish to celebrate same-sex marriages. The Saskatchewan courts denied civil marriage commissioners any form of accommodation, to avoid perpetuating social and political prejudice and negative stereotyping.<sup>28</sup> And Ontario provided for a statutory exemption limited to religious officials, while relying on informal *ad hoc* accommodation for civil marriage commissioners.<sup>29</sup>

## 2. CONSCIENTIOUS OBJECTION AND INTERNATIONAL HUMAN RIGHTS LAW

In international human rights law, conscription is not covered by the prohibition of forced labour<sup>30</sup> and no major treaty has explicitly granted protection to conscientious objectors. The matter has been highly debated in the United Nations (UN) with respect to military service. During the negotiations of the ICCPR in the late 1950s, the Philippines strongly argued that a right to conscientious objection should be added to the provision guaranteeing the right to freedom of thought, conscience and religion (the future Article 18). It failed, as several states considered that such a right to conscientious objection was *de facto* protected in Article 18 of the UDHR, and that any additional amendment would be unnecessary. Some states were also concerned that adding a clause of conscientious objection would make it difficult to achieve consensus on the ICCPR.<sup>31</sup>

More generally, one must keep in mind that states are not significantly limited in terms of military conscription by international human rights regimes. There are only a few

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<sup>24</sup> SANDRA FREDMAN, *DISCRIMINATION LAW* 19–25 and 28–30 (2<sup>nd</sup> ed, 2010).

<sup>25</sup> Wintemute, *supra* note 15, at 228–29. Wintemute’s triple test reads as follows: ‘(i) the particular manifestation of religious beliefs itself causes no direct harm to others; and (ii) the requested accommodation involves minimal cost, disruption or inconvenience to the accommodating party; and (iii) the requested accommodation will (upon further examination) cause no indirect harm to others.’

<sup>26</sup> CÉCILE LABORDE, *LIBERALISM’S RELIGION* 197 ff (2017).

<sup>27</sup> MacDougall et al, *supra* note 16, at 132; José Woehrling, *Aménagement de la diversité religieuse et conflits entre droits fondamentaux. Le contexte juridique canadien*, in Bribosia and Rorive (eds), *supra* note 15, at 161–62.

<sup>28</sup> Court of Appeal of Saskatchewan, 2011 SKCA 3, *In the Matter of Marriage Commissioners Appointed Under the Marriage Act, 1995*, SS 1995, c M-4.1; *In the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal Under the Constitutional Questions Act*, RSS 1978, c C-29, para 52.

<sup>29</sup> Bill 171 amendments to the Ontario Human Rights Code and Marriage Act explicitly provide that registered religious officials for whom same-sex marriage is contrary to their religious beliefs are not required to solemnize such marriages.

<sup>30</sup> Article 8(3)(a) of the ICCPR. See also Article 2(a) of the 1930 Forced Labour Convention (No 29) of the International Labour Organization, Geneva, 14th ILC session (28 June 1930).

<sup>31</sup> Emily N. Marcus, *Conscientious Objection as an Emerging Human Right*, 38(3) VIRGINIA JOURNAL OF INTERNATIONAL LAW 507, 515 (1998); Matthew Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Right*, 21 CAL W INT’L LJ 31, 31 and 44–45 (1990–91).

international law safeguards, such as the restriction on the recruitment of children under the age of 15 (or 18 in some cases) and the prohibition against discriminatorily and arbitrarily ordering forced recruitment.<sup>32</sup> Furthermore, anyone has the right to refuse to serve in the military forces in apartheid regimes.<sup>33</sup>

Initially, the UN Human Rights Committee, which monitors the implementation of the ICCPR, did not consider that Article 18 provided for a right to conscientious objection. In 1985, the Committee declared inadmissible a complaint filed by a Finnish conscientious objector who refused to serve in the military forces, but volunteered to do an alternative service. According to the Committee:

the Covenant does not provide for the right to conscientious objection; neither Article 18 nor Article 19 of the Covenant. . . can be construed as implying that right.”<sup>34</sup> In any case, the alleged victim “was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service.”<sup>35</sup>

The Committee started to shift its position in the early 1990s. Change took the form of an incremental evolution. In a 1991 case, *JP v Canada*, the Committee inferred some kind of conscientious objection from Article 18 of the ICCPR in a case that was finally declared inadmissible. The case involved a Canadian citizen, a member of the Society of Friends (Quakers), who objected to a fraction of her taxes going towards military expenditure because of her religious convictions. The Committee conceded for the first time that ‘Article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures’.<sup>36</sup> However, the case was rejected on the grounds that a refusal to pay taxes for religious reasons clearly falls outside the scope of the ICCPR.

Thereafter, in the 1993 *Brinkhof v the Netherlands* case, the Committee declared that religious exemptions should be granted without discrimination. A Dutch citizen was sentenced to 12 months’ imprisonment and dismissed from the military forces for refusing to serve in the army or to perform substitute public service on the grounds of his pacifist beliefs.<sup>37</sup> According to Mr Brinkhof, ‘by performing military service, he would become an accessory to the commission of crimes against peace and the crime of genocide, as he would be forced to participate in the preparation for the use of nuclear weapons’.<sup>38</sup> The issue focused more on equality before the law and legal protection without discrimination (Article 26 of the ICCPR) than on the right to freedom of thought, conscience and religion. In the Netherlands, Jehovah’s Witnesses had been automatically

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<sup>32</sup> The 1977 Additional Protocols I (Art 77(2)) and II (Art 4(3)(c)) to the 1949 Geneva Conventions; the Convention on the Rights of the Child (Art 38); the Rome Statute of the International Criminal Court (Arts 8(2)(b) (xxvi) and (e)(viii)); the Optional Protocol to the Convention on the Rights of the Child (Art. 2); the 1990 African Charter on the Rights and Welfare of the Child (Art 22(2)); the 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Art 11(4)); the International Labour Organization Worst Forms of Child Labour Convention (no 182) (Art 3).

<sup>33</sup> GA Res 33/165, UN GAOR, 33<sup>rd</sup> Sess, Supp no 45, at 154, UN doc A/33/45 (1978).

<sup>34</sup> *LTK v Finland*, Communication 185/1984, UN doc CCPR/C/25/D/185/1984, 9 July 1985, para 5.2.

<sup>35</sup> *Id.*

<sup>36</sup> *JP v Canada*, Communication 466/1991, UN doc CCPR/C/43/D/466/1991, para 4.2.

<sup>37</sup> *Godefriedus Maria Brinkhof v the Netherlands*, Communication 402/1990, UN doc CCPR/c/48/D/402/1990, 30 July 1993.

<sup>38</sup> *Id.*, para 3.6.

exempted from military service and substitute service since 1974, unlike other conscientious objectors, who had to perform alternative service. In the view of the Netherlands, ‘membership of Jehovah’s Witnesses constitutes strong evidence that the objections to military service are based on genuine religious convictions’.<sup>39</sup> In addition, the Netherlands stressed that the special treatment for Jehovah’s Witnesses could be justified by the fact ‘that baptised members form a closed group of people who are obliged, on penalty of expulsion, to observe strict rules of behaviour, applicable to many aspects of their daily life and subject to strict informal social control’.<sup>40</sup> The Human Rights Committee did not share this view and emphasized that ‘when a right of conscientious objection to military service is recognized by a State party, no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs’.<sup>41</sup> However, once again, the alleged victim lost his case, on the ground that:

he has not shown that his convictions as a pacifist are incompatible with the system of substitute service in the Netherlands or that the privileged treatment accorded to Jehovah’s Witnesses adversely affected his rights as a conscientious objector against military service.<sup>42</sup>

Finally, in 2007, the Human Rights Committee unequivocally expressed the view that Article 18 of the ICCPR provides for a right of conscientious objection. *Yoon et al v Republic of Korea*<sup>43</sup> was brought before the Committee by two Jehovah’s Witnesses who had been sent to prison for refusing to serve in the armed forces. No alternative civilian service was provided for them and the Republic of Korea argued that ‘this restriction is necessary for public safety, in order to maintain its national defensive capacities and to preserve social cohesion’. The Committee emphasized ‘that an increasing number of. . . States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service’. In addition, the Committee observed that:

it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service.<sup>44</sup>

From the wording of the ruling, it is clear that the Human Rights Committee considers that all states party to the ICCPR, without exception, must grant the right of conscientious objection.<sup>45</sup>

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<sup>39</sup> *Id*, para 4.2.

<sup>40</sup> *Id*, para 7.3.

<sup>41</sup> *Id*, para 9.3. Note that the UN Committee relied on its General Comment 22 on Article 18, adopted in 1993.

<sup>42</sup> *Id*, para 9.3.

<sup>43</sup> *Mr Yeo-Bum Yoon and Mr Myung-Jin Choi v Republic of Korea*, Communications 1321/2004 and 1322/2004, UN doc CCPR/C/88/D/1321-1322/2004, 23 January 2007.

<sup>44</sup> *Id*, para 8.4.

<sup>45</sup> For other references to the views of the UN Human Rights Committee on individual cases concerning conscientious objection to military service, see the webpage of the UN Human Rights Office of the High Commissioner, [www.ohchr.org/EN/Issues/RuleOfLaw/Pages/ConscientiousObjection.aspx](http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/ConscientiousObjection.aspx), last accessed 24 January 2018.

Still within the UN, the UN Commission on Human Rights recognized the right to object to military service as a legitimate exercise of the right of freedom of thought, conscience and religion. The Commission also observed that the conviction to object can be based not only on religious grounds, but also on ethical or similar grounds. States should not allow conscientious objection solely on religious grounds, at the risk of discriminatory treatment. The Commission additionally called states to enact legislation allowing exemptions from military service based on profound convictions against armed service. Finally, it invited states to abstain from imprisoning conscientious objectors, emphasizing that the alternative service should be civilian and non-armed, with a public interest and without a punitive nature.<sup>46</sup>

### 3. CONSCIENTIOUS OBJECTION AND REGIONAL HUMAN RIGHTS LAW

The Charter of Fundamental Rights of the European Union is the only regional human rights instrument that expressly mentions the right to conscientious objection, which is ‘recognized in accordance with the national laws governing the exercise of this right’ (Article 10(2)).<sup>47</sup> In the Council of Europe, the existence of a fundamental right to conscientious objection has been the subject of much debate. For years, numerous applications were brought before the former European Commission of Human Rights and the European Court of Human Rights (ECtHR). As before the UN Human Rights Committee, most applications were based on breach of the right to freedom of thought, conscience and religion which is enshrined in Article 9 of the European Convention for Human Rights (ECHR).

In many cases, the former European Commission of Human Rights refused to recognize a derivative right to conscientious objection, stressing that the ECHR does not explicitly guarantee such a right which is not covered by the prohibition of forced labour (Article 4 of the ECHR). In 1966, for the first time, the Commission decided that an objector who refused to perform military and civilian service in Germany was not protected under Article 9 of the ECHR. The Commission stressed that each contracting state could decide whether to grant a right to conscientious objection.<sup>48</sup> In several subsequent cases, the European Commission of Human Rights took the same line and defended a literal construction of Article 9 of the ECHR considering Article 4 of the ECHR.<sup>49</sup>

By contrast, the Parliamentary Assembly of the Council of Europe, as early as 1967, adopted Resolution 337, which states:

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<sup>46</sup> UN Commission on Human Rights Resolution 1989/59; UN Commission on Human Rights Resolution 1991/65; UN Commission on Human Rights Resolution 1993/84; UN Commission on Human Rights Resolution 1995/83; UN Commission on Human Rights Resolution 1997/117; UN Commission on Human Rights Resolution 2000/34; UN Commission on Human Rights Resolution 2002/45 and UN Commission on Human Rights Resolution 2004/35.

<sup>47</sup> Note also that the European Parliament approved a Recommendation to the Council of 13 June 2013 on the draft EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (2013/2082 (INI)).

<sup>48</sup> *Grandrath v Federal Republic of Germany* App 2299/60 (Report of the Commission, 12 December 1966).

<sup>49</sup> See, for instance, *GZ v Austria* App 5591/72 (decision of the Commission, 2 April 1973); *X v Germany* App 7705/76 (decision of the Commission, 5 July 1977); *N v Sweden* App 10410/83 (decision of the Commission, 11 October 1984); *Peters v the Netherlands* App 21132/93 (decision of the Commission, 30 November 1994).

1. persons liable to conscription for military service, who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from the obligation to perform such service. . .

2. This right shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9 of the European Convention on Human Rights.<sup>50</sup>

It was not until 2011, in the famous Grand Chamber case of *Bayatyan v Armenia*,<sup>51</sup> that the ECtHR ruled on the applicability of Article 9 of the ECHR to conscientious objectors. Mr Bayatyan, a Jehovah’s Witness, refused to perform military service, but agreed to alternative civil service. At the time, Armenian law did not provide for such alternative service. Mr Bayatyan was convicted of draft evasion and sentenced to prison. He argued that the ECtHR should decide the case, taking due account of the European consensus on the matter, as most member states had implemented a right of conscientious objection. Based on the ‘living instrument’ doctrine, the ECtHR departed from the position of the former European Commission of Human Rights and ruled that Article 9 of the ECHR applies where a refusal to military service is motivated by serious and insurmountable religious or other beliefs. In several subsequent judgments, the ECtHR held that Article 9 was violated in cases where a refusal to perform military service was based on serious personal convictions.<sup>52</sup>

In other regional human rights jurisdictions, the right to conscientious objection has also been recognized under the guarantee of freedom of thought and religion. The American Convention on Human Rights, like the ECHR, explicitly enshrines freedom of conscience and religion (Article 12), but it does not mention a right of conscientious objection. In 2005, the Inter-American Commission on Human Rights (IACHR) decided the issue for the first time. *Cristián Daniel Sahli Vera et al v Chile* concerned a refusal to perform military service due to conscientious objection.<sup>53</sup> In Chile, military service is compulsory and the law provides only for very specific exemptions in some religious instances. The IACHR extensively acknowledged the position of the UN Human Rights Committee, according to which a right to conscientious objection to military service is a legitimate exercise of freedom of thought, conscience and religions (Article 18 of the ICCPR). The IACHR also pointed out that the European human rights system, at the time, had a different stance on the matter.<sup>54</sup> Taking stock of the controversy, the European

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<sup>50</sup> Council of Europe, Cons Ass, Eighteenth Ordinary Session (Third Part), Texts Adopted (1967), reiterated by the Parliamentary Assembly in its Res 816 (1977), adopted on 7 October 1977; Collected Texts, Strasbourg, 1987, p 222. See also Recommendation R (87) (8) of the Committee of Ministers to Member States of the Council of Europe regarding conscientious objection to compulsory military service, 9 April 1987; Recommendation CM/Rec (2010)4 of the Committee of Ministers to Member States of the Council of Europe on human rights of members of the armed forces, 24 February 2010.

<sup>51</sup> *Bayatyan v Armenia* App 23459/03 (ECHR, 7 July 2011).

<sup>52</sup> *Erçep v Turkey* App 43965/04 (ECHR, 22 November 2011); *Khachatryan and Others v Armenia* App 23978/06 (ECHR, 27 November 2012); *Feti Demirtas v Turkey* App 5260/07 (ECHR, 17 January 2012); *Buldu and others v Turkey* App 14017/08 (ECHR, 3 September 2014); *Savda v Turkey* App 42730/05 (ECHR, 12 June 2012); *Tarhan v Turkey* App 9078/06 (ECHR, 12 July 2012); *Enver Aydemir v Turkey* App 26012/11 (ECHR, 7 June 2016); *Papavasiliakis v Greece* App 66899/14 (ECHR, 15 September 2016); *Adyan and Others v Armenia* App 75604/11 (ECHR, 12 October 2017).

<sup>53</sup> *Cristián Daniel Sahli Vera et al v Chile*, Case 12219 (IACHR, 10 March 2005).

<sup>54</sup> *Id.*, p 9–20.

Commission of Human Rights considered that the freedom of conscience and religion did not apply to a conscientious objector such as the applicant. The IACHR further stressed that compulsory military service is not prohibited under the Inter-American Convention and that states are free to grant a right to conscientious objection.<sup>55</sup>

Freedom of conscience and religion is also protected in the African Charter on Human and People’s Rights (Article 8). Therefore, the right to conscientious objection to military service may be derived from this provision, similar to the approaches now favoured by the UN Human Rights Committee and the ECtHR. However, the African Human Rights system has yet to be mobilized in this respect and there is no regional standard to define a right to conscientious objection to military service.<sup>56</sup>

#### 4. A GLOBAL JIGSAW

In human rights law, conscientious objection is strongly associated with the refusal to serve in the military forces and a legitimate exercise of the right to freedom of thought, conscience and religion. In general today, anyone – at least on paper – has the fundamental right to a legal alternative to military service, and states must offer some form of civilian public service or grant a complete exemption to conscientious objectors. However, the procedure for establishing conscientious objector status varies from country to country, and not every country has a distinct legal basis on the matter.<sup>57</sup> Furthermore, in some countries conscientious objection is still a criminal offence. In 2017 Amnesty International singled out South Korea as the country in which more people are imprisoned for conscientious objection than anywhere else in the world.<sup>58</sup> UN bodies have repeatedly rejected the reasons put forward by the government of South Korea – specifically, that conscientious objectors would jeopardize national security and undermine social cohesion against a backdrop of vivid tension between North and South Korea. Recently, an increasing number of district court judges are using ‘not guilty’ verdicts based on freedom of conscience ‘to emphasize the need for a social consensus’.<sup>59</sup> Meanwhile, the

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<sup>55</sup> *Id.*, p 20.

<sup>56</sup> ANDREAS SPECK, A CONSCIENTIOUS OBJECTOR’S GUIDE TO THE INTERNATIONAL HUMAN RIGHTS SYSTEM 89–107 (2012).

<sup>57</sup> See, for instance, the case of Russia: EUROPEAN BUREAU FOR CONSCIENTIOUS OBJECTION, ON THE IMPLEMENTATION OF THE RIGHT TO CONSCIENTIOUS OBJECTION TO MILITARY SERVICE (2016 report). More generally in Europe, see EUROPEAN BUREAU FOR CONSCIENTIOUS OBJECTION, REPORT ON CONSCIENTIOUS OBJECTION TO MILITARY SERVICE IN EUROPE (2017), [www.ebco-beoc.org/reports](http://www.ebco-beoc.org/reports), last accessed 24 January 2018. Worldwide, see UNITED NATIONS, *supra* note 7, at 48 ff.

<sup>58</sup> Amnesty International, *The Torment Goes On. Story of a South Korean Conscientious Objector* (29 September 2017), [www.amnesty.org](http://www.amnesty.org), last accessed 24 January 2018.

<sup>59</sup> Kim Min-kyung, *Three More Conscientious Objectors Found Not Guilty*, HANKYOREH (12 June 2017), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/798476.html](http://english.hani.co.kr/arti/english_edition/e_national/798476.html), last accessed 24 January 2018. See also Steven Borowiec, *South Korean Conscientious Objectors Keep Up Fight Against Military Service*, LOS ANGELES TIMES (26 June 2015), [www.latimes.com/world/asia/la-fg-korea-conscientious-objectors-20150626-story.html](http://www.latimes.com/world/asia/la-fg-korea-conscientious-objectors-20150626-story.html), last accessed 24 January 2018; Kim Min-kyung, *Acquittals of Conscientious Objectors Rise Sharply in 2017*, HANKYOREH (25 September 2017), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/812442.html](http://english.hani.co.kr/arti/english_edition/e_national/812442.html), last accessed 24 January 2018.

Supreme Court and the Constitutional Court are once again<sup>60</sup> reviewing this matter, while lawmakers are still hesitant to introduce an alternative military service system.<sup>61</sup>

The situation in Israel confirms that the boundaries of military conscientious objection can be tricky to draw. Since the state’s foundation, there has been a long history of people refusing to perform military service in Israel. With a growing amount of military energy devoted to the occupation of the West Bank and Gaza Strip, as well as safeguarding settlements erected on Palestinian land, the phenomenon of soldiers remaining in the army but refusing particular orders or postings has become widespread. The issue of whether these selective refusals fall within the conscientious objection framework is still hotly debated in Israel.<sup>62</sup> In fact, very few countries recognize selective conscientious objection.<sup>63</sup>

Outside the military, the rhetoric of ‘conscientious objection’ has also developed with regard to the contentious topic of abortion.<sup>64</sup> With few exceptions, a refusal clause – most commonly known as a ‘conscience clause’ in Europe – is enshrined in European legal systems, although it takes different forms (eg, statutory law, medical policies or codes of ethics).<sup>65</sup> Today, human rights defenders are denouncing the worrying trend of the erosion of abortion rights worldwide, which is putting women’s rights and gender equality at risk.<sup>66</sup> Conscientious objection in reproductive healthcare can create structural obstacles to effective access to sexual and reproductive rights.<sup>67</sup> Numerous issues stem from the fact that the use of conscientious objection is highly unregulated in many jurisdictions.<sup>68</sup>

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<sup>60</sup> Conscientious objectors had unsuccessfully appealed several times to the Supreme Court of South Korea since 1969. They also lost at least two cases before the Constitutional Court on 26 August 2004 and 30 August 2011. For more details and legal references, see *South Korea: Constitutional Court Again Denies Right to Conscientious Objection*, blog posted on WAR RESISTER’S INTERNATIONAL (5 September 2011), [www.wri-irg.org/en/story/2011/south-korea-constitutional-court-again-denies-right-conscientious-objection](http://www.wri-irg.org/en/story/2011/south-korea-constitutional-court-again-denies-right-conscientious-objection), last accessed 24 January 2018.

<sup>61</sup> Kim Hyung-bin, *Decision On Objectors Near, Says Constitutional Court*, THE KOREA TIMES (18 March 2018), [www.koreatimes.co.kr/www/nation/2018/03/205\\_245790.html](http://www.koreatimes.co.kr/www/nation/2018/03/205_245790.html), 24 January 2018.

<sup>62</sup> Amir Paz-Fuchs, *The Fallacies of Objections to Selective Conscientious Objection*, 36(3) ISRAEL LAW REVIEW 111–43 (2002).

<sup>63</sup> UNITED NATIONS, *supra* note 7, at 58–59. This report mentions Australia, Germany and Norway.

<sup>64</sup> On this debate, see Bribosia and Rorive, *supra* note 14, at 392–413. Note that the next two paragraphs are based on this paper (at 394–95).

<sup>65</sup> In EU member states, conscientious objection to performing abortion is granted by law, except in countries such as Sweden, Finland, Bulgaria and the Czech Republic. Within the Council of Europe, the same applies, with a few exceptions such as Norway, Switzerland and Iceland. The lack of express regulation does not mean that there is no use of conscientious objection in practice. See Anna Heino, Mika Gissler, Dan Apter and Christian Fiala, *Conscientious Objection and Induced Abortion in Europe*, 18(4) EUR. J. CONTRACEPTION & REPRODUCTIVE HEALTH CARE 231–33 (2013).

<sup>66</sup> Nils Muižnieks, *Women’s Rights and Gender Equality in Europe* (2016), *Human Rights Comment - CoE Commissioner for Human Rights’ Blog*, § 48–53; NILS MUIŽNIEKS, *Protect Women’s Health*. At the global level, see the retrogressive measures denounced by the UN Committee for Economic, Social and Cultural Rights (CESCR) in its General Comment 22 on the right to sexual and reproductive health (Article 12 of the CESCR), 2 May 2016, E/C.12/GC/22, para 2. In the United States, see, for instance, House Bill 2 enacted in 2013 in Texas and struck down by the Constitutional Court in *Whole Woman’s Health v Hellerstedt*, 579 US (2016).

<sup>67</sup> See the seminal case of *International Planned Parenthood Federation European Network (IPPF-EN) v Italy*, Complaint 87/2012 (CESCR, decision adopted on 10 September 2013 and delivered on 10 March 2014). On this case, see Emmanuelle Bribosia, Ivana Isailovic and Isabelle Rorive, *Objection Ladies! Taking IPPF-EN v Italy (CESCR) One Step Further*, in *REWRITING INTEGRATED HUMAN RIGHTS* 261–85 (Eva Brems ed, 2017).

<sup>68</sup> See Social Health and Family Affairs Committee, *Report on Women’s Access to Lawful Medical Care: The Problem of Unregulated Use of Conscientious Objection* (Rapporteur: Christine McCafferty) (2010),

Doubts persist regarding its scope – especially as regards who is entitled to object and with respect to what kind of activity. This is particularly salient in a context in which hospitals and corporations are also claiming a right to conscientious objection.<sup>69</sup>

Then again, military service is the only area in which conscientious objection has been recognized as a human right.<sup>70</sup> As the ECtHR puts it, freedom of religion does not protect every act motivated or inspired by a religion or belief,<sup>71</sup> and medical doctors cannot rely on their faith to escape from professional duties. In other words:

States are obliged to organize their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.<sup>72</sup>

And since a 2016 decision of the European Committee of Social Rights, it is clear that states parties to the European Social Charter are under no positive obligation to provide a right to conscientious objection for healthcare workers under the right to health.<sup>73</sup>

With the development of equality and anti-discrimination law based on religion and belief,<sup>74</sup> it is striking to note the extent to which the use of conscientious objection is increasing, as it is somehow muddled with the concept of reasonable accommodation:

Reasonable accommodation is based on a fundamental observation: some individuals, because of an inherent characteristic they have, such as disability or religion, are prevented from performing a task or from accessing certain spaces in conventional ways. Since society is organised primarily on the basis of people who do not share those traits, the former may be unable to access employment, services, or other activities.<sup>75</sup>

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[www.assembly.coe.int/committeedocs/2010/20100621\\_aah%202010\\_18.pdf](http://www.assembly.coe.int/committeedocs/2010/20100621_aah%202010_18.pdf), last accessed 24 January 2018.

<sup>69</sup> Ruth Fletcher, *Conscientious Objection and Harm Reduction in Europe*, in T-388/2009. CONSCIENTIOUS OBJECTION AND ABORTION. A GLOBAL PERSPECTIVE ON THE COLOMBIAN EXPERIENCE (WOMEN’S LINK WORLDWIDE AND O’NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW 12346, 2014), Online: QUEEN MARY SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER, 228/2015, <https://ssrn.com/abstract=2568409>, last accessed 24 January 2018, p. 123; Bribosia and Rorive, *supra* note 16.

<sup>70</sup> UNCCPR, *General Comment No. 22: Article 18* (Forty-eighth session, 1993), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (1994), UN doc HRI/GEN/1/Rev.1 at 35, § 11; *Bayatyan v Armenia* App 23459/03 (ECHR (GC), 7 July 2011); OHCHR, *Conscientious Objection to the Military Service* (2012), [www.ohchr.org/Documents/Publications/ConscientiousObjection\\_en.pdf](http://www.ohchr.org/Documents/Publications/ConscientiousObjection_en.pdf), last accessed 24 January 2018.

<sup>71</sup> See, for instance, *Pichon and Sajous v France* App 49853/99 (ECHR, 2 October 2001). See also Adriana Lamacek, *Conscientious Objection in Reproductive Health Care: Analysis of Pichon and Sajous v France*, *EUROPEAN JOURNAL OF HEALTH LAW* 7 (2008).

<sup>72</sup> *RR v Poland* App 27617/04 (ECHR, 26 May 2011), para 206. See also *P and S v Poland* App 57375/08 (ECHR, 30 October 2012), para 106.

<sup>73</sup> *Federation of Catholic Families in Europe (FAFCE) v Sweden*, Complaint 99/2013 (ECSR, 17 June 2015). The right to health is enshrined in Article 11 of the European Social Charter.

<sup>74</sup> In Europe, see Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (OJ L 303 of 2 December 2000, at 16).

<sup>75</sup> Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, *Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?*, 17 *MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW* 137–38 (2010).

As the wording clearly indicates, the duty to accommodate has its limits: it must be ‘reasonable’, meaning that it cannot impose a disproportionate burden on the person that must bear it or on the rights of others.<sup>76</sup> So far, the ECtHR has upheld the legitimacy of a public policy that requires employees to act in a non-discriminatory way despite their religious beliefs. This policy falls within the wide margin of appreciation that national authorities deserve when they strike a balance between competing rights.<sup>77</sup> There was no obligation for the United Kingdom to accommodate the religious belief of a civil servant (Mrs Ladele) who was fired from the London Borough of Islington after repeated refusals to register same-sex civil partnerships based on her religious view of marriage. On the other hand, there is an obligation for the state ‘to *introduce appropriate exceptions* to the rule barring persons convicted of a serious crime from the profession of chartered accountants’.<sup>78</sup> This case concerned Mr Thlimmenos, a Jehovah’s Witness who, despite having successfully passed the relevant exam, was refused appointment as a chartered accountant in Greece on the ground that he had been convicted five years earlier for refusing to do military service for religious reasons.

Beyond the issue of civil servants who raise conscience claims to avoid participating in the celebration of same-sex unions, a real concern is the detrimental effect that accommodation policies could have on the overall operation of non-discrimination law.<sup>79</sup> In the past few years, an emblematic line of cases in the United Kingdom, the United States and Canada has concerned for-profit companies with no religious corporate object that refused to provide services to LGBT customers based on the Christian beliefs of their managers.<sup>80</sup> So far, most national courts have held that those denials of services based on sexual orientation were discriminatory; but issues relating to free speech are still pending. Unequal treatment occurred, even if those customers could obtain the same service elsewhere with no additional cost. The crucial aspect of these cases is the injury to dignity and the humiliation suffered by a minority which has experienced structural prejudice for many years.

There are major difficulties in trying to transpose the debate on conscientious objection beyond the military context. In this process, it is key to keep in mind the specific features of the military context. First, the issue arises with regard to military service which is mandatory by law. Second, a conscientious objector refusing to perform his or her legal duty to the military is in a particularly vulnerable situation, as he or she will often face criminal charges. Third, there is almost no impact on the rights of others when conscientious objection is raised in the military context. These aspects should be considered when the rhetoric of conscientious objection is used towards groups that have been fighting against structural discrimination for years. Otherwise, there is a significant risk that the human rights battle fought by military conscientious objectors will take a troubled turn and equality law will begin to unravel.

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<sup>76</sup> Bribosia and Rorive (eds.), *supra* note 15.

<sup>77</sup> *Eweida and Others v United-Kingdom* App 48420/10, 59842/10, 51671/10 and 36516/10 (ECHR, 15 January 2013), paras 104–06.

<sup>78</sup> *Thlimmenos v Greece* App 34369/97 (ECHR, 6 April 2000), para 48 (our emphasis).

<sup>79</sup> This point was already made in Bribosia and Rorive, *supra* note 14.

<sup>80</sup> Many cases are discussed in Bribosia and Rorive, *supra* note 16.