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Conscientious Objection under the ECHR: The Ugly Duckling of a Flightless Jurisprudence

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1 Introduction

The European Court of Human Rights (ECtHR) is, on the whole,¹ not a soaring champion of religious freedom.² But even within a flightless jurisprudence, the Court treats claims of conscience with striking trepidation.³ Conscientious objection is the ugly duckling of the ECtHR's freedom of religion case law. Only the most established claims of conscience, those against serving in the military, have garnered the Court's concerted attention. Other claims of conscience have barely registered on its radar.⁴ The Court *has* had occasion to deal with these other claims: against performing abortions, selling contraceptives or facilitating same-sex marriages. But it has given them short shrift. It took the Court one and a half pages to send packing a civil servant who refused to register same-sex relationships.⁵ And the Court dismissed pharmacists who objected to selling contraceptives even more quickly, at half a page.⁶

Even for conscientious objection to military service, the Court waited until 2011 to oblige states to grant exemptions to those with a sincere religious or philosophical objection

¹ Important exceptions include the recognition of religious communities and other collective rights. See Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *Journal of Law and Religion* (2010), pp. 321-343. See also the chapter in this volume by Cismas, dealing (among other issues) with recognition of religious communities.

² The Court is particularly (in)famous for its lacklustre protection of religious practices. See Lourdes Peroni, 'Deconstructing "Legal" Religion in Strasbourg', 3 *Oxford Journal of Law and Religion* (2014), pp. 235-257. See also the chapter by McGoldrick in this volume, discussing religious dress, and the chapter by Martínez-Torrón, discussing religious manifestations.

³ Javier Martínez-Torrón, 'Conscientious Objections: Protecting Freedom of Conscience Beyond Prejudice', in S. Ferrari (ed.), *Routledge Handbook of Law and Religion* (London – New York: Routledge, 2015), p. 196.

⁴ Strikingly, the Court's own fact sheet on 'Conscientious objection' *exclusively* summarizes the military service cases. See *Conscientious Objection*, July 2017, European Court of Human Rights, <www.echr.coe.int/Documents/FS_Conscientious_objection_ENG.pdf>, accessed 1 September 2017.

⁵ *Eweida v. The United Kingdom*, 15 January 2013, European Court of Human Rights, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, paras. 102-106.

⁶ *Pichon and Sajous v. France*, 2 October 2001, European Court of Human Rights, No. 49853/99.

to serving in the military.⁷ The timing is no coincidence. When the Court handed down its *Bayatyan v. Armenia* ruling, most European states had already switched to voluntary military service, rendering the question of conscientious objection moot. At the time of the Court's ruling, only Azerbaijan and Turkey continued to impose compulsory military service without exemptions for conscientious objectors.⁸ Even Armenia had introduced a legal right to refuse military service more than seven years before the Strasbourg ruling.⁹ This context made it much easier for the Court to recognize a right to conscientious objection against military service under Article 9 of the European Convention on Human Rights (ECHR).

Conscientious objection, then, is not a Court favourite. In this chapter, I aim to put the ugly duckling of the Court's freedom of religion case law in the spotlight. I start by casting light on the evolution of the Court's case law on conscientious objection, in section 2. It will be shown that under the ECHR claims of conscience fall in one of four categories: (i) principally protected (conscientious objection to serving in the military), (ii) categorically rejected (*e.g.* conscientious objection to selling contraceptives and to joining military parades), (iii) conditionally accepted (conscientious objection to performing abortions), and (iv) preliminarily, but not definitively rejected (conscientious objection to facilitating same-sex marriage). The latter category is potentially controversial. But its inclusion is needed to accommodate the growing role of the margin of appreciation.

Having sketched the state of the Court's case law, I introduce two factors that determine if exemptions *can* be granted. In section 3, I indicate that the availability of alternative duties is a necessary, but not sufficient condition to exempt conscientious objectors under Article 9 ECHR. In the same section, I also identify a paradox: the more important claims of conscientious objection are, the more problematic they become. Claims of conscience are easy to accommodate when they are a marginal phenomenon in society. But if shared by many, they may become impossible to manage. Thus, frequency of conscientious objections is a second important factor in evaluating the practical feasibility of exemptions.

In the final part of the chapter, I move from description and analysis to normative assessment. In section 4, I determine whether exemptions *should* be granted. I examine conscientious objections through the contrasting lenses of respect and tolerance, which leads me to propose a set of normative claims. In doing so, I support parts of the Strasbourg case

⁷ *Bayatyan v. Armenia*, 7 July 2011, European Court of Human Rights, No. 23459/03.

⁸ *Ibid.*, para. 104.

⁹ *Ibid.*, para. 45.

law, reject other aspects and suggest how open questions should be answered. I submit that claims of conscience against serving in the military and joining military parades should be respected. I posit that claims of conscience against performing abortions can be tolerated. And I propose that conscientious objections to selling contraceptives and facilitating same-sex marriages should not be tolerated.

2 Evolution of the Court's Case Law

In this chapter, I understand conscientious objection as a refusal, for sincerely held religious or moral convictions,¹⁰ to comply with general legal or other obligations.¹¹ This understanding covers the most common claims of conscience: against serving in the military (where military service is compulsory by law), performing abortions (where access to abortion is a legal right), and facilitating same-sex marriages (where same-sex marriages are recognized under law).¹² It also accommodates more exceptional objections to general laws, such as refusals by pacifists to pay taxes, to the extent that taxes finance military activities. My understanding of conscientious objection further embraces claims of conscience that conflict with other than legal obligations. Think, for instance, of Jehovah's Witnesses who refuse to participate in school parades with a military connotation. Conscience-based refusals to sell contraceptives, finally, straddle the fence between objections to legal requirements (selling goods on an equal basis to all customers) and a refusal to abide by other general obligations (assisting any customer who enters one's store).

¹⁰ A requirement of sincerity is necessary to smoke out frivolous or opportunistic claims of conscience. See Kent Greenawalt, 'Religious Toleration and Claims of Conscience', 28 *Journal of Law and Politics* (2013), p. 103; Martínez-Torrón, *supra* note 3, p. 204.

¹¹ For similar, but also partly diverging, understandings of conscientious objection, see Martínez-Torrón, *supra* note 3, p. 191 ('conscientious objection can be defined as the individual's refusal, grounded on reasons of conscience, to accept a behaviour that is in principle legally required.');

Greenawalt, *ibid.*, p. 91 ('For the standard issue of conscience, the question is whether individuals or organizations should be allowed to engage in or avoid actions if doing so complies with their conscience, even though those actions are generally forbidden or required.').

¹² Cataloguing some of these claims as conscientious objection is controversial. Claims of conscience against performing abortions, for instance, are sometimes described as 'refusal claims' or 'dishonorable disobedience'. See respectively Frank Ravitch, *Freedom's Edge: Religious Freedom, Sexual Freedom, and the Future of America* (Cambridge: Cambridge University Press, 2016), p. 134 (describing the view without sharing it); Christian Fiala *et al.*, 'Yes we Can! Successful Examples of Disallowing "Conscientious Objection" in Reproductive Health Care', 21 *The European Journal of Contraception & Reproductive Health Care* (2016), p. 201.

Under the ECHR, the above claims of conscience fall in one of four categories: (i) principally protected, (ii) categorically rejected, (iii) conditionally protected, and (iv) preliminarily rejected.

2.1 *Principally Protected Claims of Conscience*

Only claims of conscience against serving in the military receive principal protection under the ECHR. This, however, is a recent state of affairs. It took the ECtHR until 2011 to include a right of conscientious objection to military service in the scope of Article 9 ECHR.¹³ For more than four decades leading up to that moment, the European Commission of Human Rights had categorically rejected all claims of conscience against serving in the military.¹⁴

It was not that the Commission doubted the sincerity of these claims.¹⁵ Rather, it relied on a legal-technical interpretation of Article 4(3) ECHR as *lex specialis* to Article 9.¹⁶ The Commission reasoned that the more specific provision of Article 4(3), which ‘expressly deals with’ conscientious objectors to military service,¹⁷ ‘qualified’ Article 9.¹⁸ Article 4(3) states, among others, that forced labour does not include ‘any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service’.¹⁹ For decades, the Commission interpreted this to mean that the ECHR gave states the choice ‘whether or not to recognise conscientious objectors’.²⁰ As a result, ‘objections of conscience [did] not, under the Convention, entitle a person to exemption from [military] service’.²¹

All this changed with *Bayatyan*.²² Relying on a ‘dynamic and evolutive’ interpretation of the ECHR,²³ the Court was ‘not convinced’ that the Commission’s earlier interpretation reflected ‘the true purpose and meaning’ of Article 4(3).²⁴ On the Court’s reinterpretation, the

¹³ *Bayatyan*, *supra* note 7.

¹⁴ See, for instance, *Grandrath v. Germany*, 12 December 1966, European Commission of Human Rights, No. 2299/64; *G.Z. v. Austria*, 2 April 1973, European Commission of Human Rights, No. 5591/72; *Conscientious Objectors v. Denmark*, 7 March 1977, European Commission of Human Rights, No. 7565/76; *Autio v. Finland*, 6 December 1991, European Commission of Human Rights, No. 17086/90.

¹⁵ See *Grandrath*, *supra* note 14, para. 32.

¹⁶ See *ibid.*, para. 32; *G.Z.*, *supra* note 14.

¹⁷ *Grandrath*, *supra* note 14, para. 21.

¹⁸ *G.Z.*, *supra* note 14.

¹⁹ Article 4(3)(b) ECHR.

²⁰ *G.Z.*, *supra* note 14.

²¹ *Grandrath*, *supra* note 14, para. 32.

²² I exclude discrimination cases like *Löffelmann v. Austria*, 12 March 2009, European Court of Human Rights, No. 42967/98 (ruling that state refusals to exempt a Jehovah’s Witness deacon from military service, while other religious leaders and clergy were exempt, violated Articles 9 and 14 ECHR).

²³ *Bayatyan*, *supra* note 7, para. 98.

²⁴ *Ibid.*, para. 100.

provision ‘neither [recognized] nor [excluded] a right to conscientious objection’.²⁵ And so the Court went to task in determining whether Article 9, liberated from the shackles of Article 4(3), protected a right to refuse to serve in the military.

In concluding that Article 9 did in fact protect such a right, the Court primarily relied on the evolving understanding of conscientious objection across the Council of Europe states.²⁶ At the time of the *Bayatyan* ruling, there was ‘nearly a consensus’ among all member states that either military service ought to be voluntary or conscientious objectors should be exempt.²⁷ Only two states, Azerbaijan and Turkey, had retained a system of mandatory military service without exemptions.²⁸ The Court thus did not take Europe by surprise when it ruled, subject to a sincerity requirement,²⁹ that:

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 9.³⁰

In defending its new interpretation of Article 9, the Court pointed out that ‘respect on the part of the State towards the beliefs of a minority religious group’ was not a dangerous, inequalitarian move.³¹ Instead, it ‘might ... ensure cohesive and stable pluralism and promote religious harmony and tolerance in society’.³²

In a later judgment, the Court added a further rationale for the human right of conscientious objection to military service. In *Erçep v. Turkey*, the Court described the troubling combination of compulsory military service, absence of alternative civilian service and multiple convictions of conscientious objectors as a form of ‘civil death’.³³ This unacceptable state of affairs, the Court contended, could and should be avoided by introducing alternative civilian service and exempting conscientious objectors from

²⁵ *Ibid.*

²⁶ *Ibid.*, paras. 101 and 108.

²⁷ *Ibid.*, para. 103.

²⁸ *Ibid.*, para. 104.

²⁹ *Ibid.*, para. 111; *Erçep v. Turkey*, para. 48.

³⁰ *Bayatyan*, *supra* note 7, para. 110.

³¹ *Ibid.*, para. 126.

³² *Ibid.*

³³ *Erçep*, *supra* note 29, para. 58 (speaking of ‘mort civile’).

compulsory military service.³⁴ Most recently, however, the Court has somewhat circumscribed the right to conscientious objection to military service. The Court has excluded partial objections to military service – *in casu* against serving in a secular, as opposed to Islamic army³⁵ – from the scope of Article 9.³⁶ Conscientious objection to military service, it seems, must be all-encompassing to attract the protection of Article 9.

2.2 Categorically Rejected Claims of Conscience

If conscientious objection to military service is principally protected under the ECHR, other claims of conscience are categorically rejected. The Commission and Court rejected outright claims of conscience against paying taxes,³⁷ joining military commemoration parades,³⁸ and selling contraceptives.³⁹ Since these cases predate the perspective-shifting judgments in *Bayatyan* and *Eweida v. The United Kingdom*,⁴⁰ a couple of caveats are in order.

First, the Court might decide similar cases differently in the future. Under one plausible scenario, the Court could reassess claims of conscience against joining military commemoration parades. Here, the gravitational pull of *Bayatyan* may well shift the Court's future perspective. Second, the Commission and Court did more than categorically reject claims of conscience against paying taxes, joining commemoration parades and selling contraceptives. They also excluded these claims from the very scope of Article 9. In the wake of *Eweida*, the Court could well adapt its reasoning in similar cases in the future.⁴¹ For instance, the Court could – but this is an open question – bring the claims within the scope of Article 9, before dismissing them with reference to the wide margin of appreciation of the states. Both caveats, however, rest on speculation. As it stands, the claims of conscience at issue were categorically rejected by either the Commission or the Court. Until further notice, they fall outside the scope of freedom of religion under the ECHR.

Lack of empathy towards conscientious objectors marked the Commission's and Court's stance toward these claims of conscience. When a Quaker claimed that paying taxes conflicted with his religious conscience, to the extent that taxes fund military research, the Commission swiftly showed him the door.⁴² It saw 'no specific conscientious implications' in

³⁴ *Ibid.*, paras. 63-64.

³⁵ *Enver Aydemir v. Turkey*, 7 June 2016, European Court of Human Rights, No. 26012/11, para. 79.

³⁶ *Ibid.*, para. 83.

³⁷ *C. v. The United Kingdom*, 15 December 1983, European Commission of Human Rights, No. 10358/83.

³⁸ *Valsamis v. Greece*, 18 December 1996, European Court of Human Rights, No. 21787/93.

³⁹ *Pichon and Sajous v. France*, 2 October 2001, European Court of Human Rights, No. 49853/99.

⁴⁰ The cases date from 1983, 1996 and 2001, respectively.

⁴¹ For discussion of *Eweida v. The United Kingdom*, see partly section 2.4 below.

⁴² *C. v. UK*, *supra* note 37.

the general obligation to pay taxes.⁴³ Indifference towards the moral conflict experienced by conscientious objectors also stained the Court's case law. When a Jehovah's Witness objected to participating in a school parade that coincided with a military commemoration parade, the Court categorically rejected her claims and those of her parents. The Court could 'discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the [child's and parents'] pacifist convictions'.⁴⁴ Rather than defer to the experience of the Jehovah's Witnesses,⁴⁵ the Court suggested that they had misunderstood the nature of the parade: 'commemorations of national events serve, in their way, both pacifist objectives and the public interest'.⁴⁶ Here, the ECtHR may have partly redeemed itself in later cases. The Court's judgment in *Folgerø and Others v. Norway*,⁴⁷ in particular, supplies good reasons to recognize a right to object to participating in commemoration parades, should the matter ever come before the Court again.⁴⁸

A couple of Christian pharmacists who refused to sell contraceptives, finally, were also given short shrift in Strasbourg. 'Article 9 of the Convention', the Court insisted, 'does not always guarantee the right to behave in public in a manner governed by that belief'.⁴⁹ The Court continued:

as long as the sale of contraceptives is legal and occurs on medical prescription only and compulsorily in pharmacies, [pharmacists] 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.⁵⁰

In the earlier tax case, the Commission had relied on analogous reasoning to categorically reject claims for an exemption. The Commission noted that, if religious believers consider paying taxes 'an outrage to [their] conscience', they 'may advertise [their] attitude and

⁴³ *Ibid.*

⁴⁴ *Valsamis*, *supra* note 38, para. 31. For a critique of this passage in the Court's judgement, see Martínez-Torrón, *supra* note 3, p. 128 (describing it as 'a gross mistake').

⁴⁵ This was the crux of the dissent by judges Þór Vilhjálmsson and Jambrek in *Valsamis*, *supra* note 38.

⁴⁶ *Valsamis*, *supra* note 38, para. 31.

⁴⁷ *Folgerø and Others v. Norway*, 29 June 2007, European Court of Human Rights, No. 15472/02, para. 99 (in which the Court criticized arrangements whereby for 'prayers, the singing of hymns, church services and school plays, it was proposed that observation by attendance could suitably replace involvement through participation').

⁴⁸ Jeroen Temperman's chapter in this volume analyses *Folgerø* and related cases.

⁴⁹ *Pichon and Sajous*, *supra* note 39. See also *C. v. UK*, *supra* note 37.

⁵⁰ *Pichon and Sajous*, *supra* note 39.

thereby try to obtain support for it through the democratic process’.⁵¹ Here, the Commission anticipated a similar development in United States constitutional law, which is relevant to understanding the scope for conscientious objection under the ECHR as well.

Following the United States Supreme Court’s ruling in *Employment Division v. Smith*, the First Amendment of the US Constitution no longer provides – with some exceptions⁵² – robust constitutional protection for religious practices that contravene general, neutral laws. Granting constitutional exemptions in such cases, the Supreme Court held in *Smith*, ‘would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind’.⁵³ ‘Any society adopting such a system’, the Supreme Court threatened, ‘would be courting anarchy’.⁵⁴ Rather than guide them down the constitutional path, the Supreme Court directed exemptions to the legislative process, much like the Commission had done in the tax case a decade earlier.⁵⁵

In the wake of *Smith*, the distinction between constitutionally *mandated* and constitutionally *permitted* exemption became central to US constitutional law and religion.⁵⁶ Congress responded to *Smith* by adopting the Religious Freedom Restoration Act (RFRA), ‘to ensure broad protection for religious liberty’.⁵⁷ And under RFRA, the Supreme Court upheld the right of closely-held religious corporations to object to providing their employees with insurance cover for certain contraceptives.⁵⁸ Nevertheless, the exemptions in *Hobby Lobby* were merely constitutionally *permitted*. They were not constitutionally *required*.

A similar distinction, between exemptions permitted by the Convention and those required by the Convention, holds the key to unlocking the scope for conscientious objection under Article 9. Exemptions for those who object to serving in the military, we have seen, are *required* by the Convention. Other exemptions, most notably those for doctors who refuse to perform abortions, are *permitted* by the Convention. And the nature of a final set of

⁵¹ *C. v. UK*, *supra* note 37.

⁵² See e.g. *Sherbert v. Verner*, 17 June 1963, Supreme Court of the United States, 374 U. S. 398; *Wisconsin v. Yoder*, 15 May 1972, Supreme Court of the United States, 406 U. S. 205; *West Virginia State Bd. of Educ. v. Barnette*, 14 June 1943, Supreme Court of the United States, 319 U. S. 624.

⁵³ *Employment Division v. Smith*, 17 April 1990, Supreme Court of the United States, 494 U. S. 872, 888

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at 890 (‘It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself’).

⁵⁶ *Ibid.* (‘to say that a ... religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required’).

⁵⁷ *Burwell v. Hobby Lobby Stores, Inc. et al.*, 30 June 2014, Supreme Court of the United States, 573 U.S. ____ (2014), para. 5.

⁵⁸ *Ibid.*

exemptions, including for those who refuse to facilitate same-sex marriages, arguably remains an open question.⁵⁹

2.3 *Conditionally Protected Claims of Conscience*

Claims of conscience against performing abortions are conditionally protected under Article 9 not because exemptions are required by the Convention, but because they are permitted under it. Such permission, however, is conditional. Only when certain conditions are met does the ECHR allow states to exempt doctors (and other medical staff) from their legal duty to perform abortions.

The Court has signposted these conditions, as *obiter dictum*, in a couple of Polish cases.⁶⁰ Both cases exemplify the cruelty, shaming and suffering girls and women endure in order to have an abortion in countries in which the majority abhors abortions. At the same time, both cases have forced the Court to consider how the right of girls and women to access abortion could relate to a possible right of doctors to conscientious objection. According to the Court, it is the state's duty to reconcile both rights.

'States are obliged', the Court held, '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 ... does not prevent patients from obtaining access to [abortion] services'.⁶¹ The Polish system, which failed dramatically to operate in practice, had reconciled both sets of rights in theory, 'above all ... by imposing on the doctor an obligation to refer the patient to another physician competent to carry out the same service'.⁶² I discuss the salience of alternative duties, including duties of referral, in section 3. Here, I want to insist that the Polish cases not be misread. Exemptions for doctors who object to performing abortions are not required by the Convention. Instead, the Court's *obiter* statements indicate that the Convention merely *permits* such exemptions (provided they are properly managed within the broader health system).⁶³

⁵⁹ I do not catalogue exemptions for those who refuse to pay taxes, participate in military parades or sell contraceptives. The Commission and Court have categorically excluded these claims of conscience from the scope of Article 9, which may be taken to indicate that they are Conventionally *prohibited* (a possible third category). But that finding glosses over the caveats made in the text above, around note 47 and accompanying text.

⁶⁰ *R.R. v. Poland*, 26 May 2011, European Court of Human Rights, No. 27617/04; *P. and S. v. Poland*, 30 October 2012, European Court of Human Rights, No. 57375/08.

⁶¹ *R.R.*, *supra* note 60, para. 206; *P. and S.*, *supra* note 60, para. 106.

⁶² *P. and S.*, *supra* note 60, para. 107.

⁶³ Some of the Court's language in the Polish cases is unfortunate. The Court for instance noted that 'Polish law has *acknowledged the need* to ensure that doctors are not obliged to carry out services to which they object' (emphasis added). *See ibid.*

The distinction is crucial because several European countries – including Sweden, Finland and Iceland – do not allow doctors to refuse to perform abortions.⁶⁴ The ECtHR has not yet been called upon to adjudicate such state refusals. But its cousin, the European Committee on Social Rights (ECSR), has been. In dismissing the relevant claims, the ECSR has been adamant: the right to protection of health under the European Social Charter (ESR) ‘does not impose on states a positive obligation to provide a right to conscientious objection for healthcare workers’.⁶⁵ I venture that the ECtHR would come to a similar conclusion under the ECHR, even if doctors could invoke the more fitting right to freedom of religion of Article 9 (compared to their awkward reliance on the right to health under the ESR). If exemptions for doctors who refuse to perform abortions were *required* by the Convention, the doctors would prevail and countries like Finland and Sweden would have to amend their laws. But since such exemptions are merely *permitted* under the Convention, state refusals to grant them would presumably pass the Strasbourg test.

2.4 Preliminarily Rejected Claims of Conscience

The distinction between exemptions that are required by the Convention and those that are permitted under it also illuminates the Court’s stance towards conscientious objections to same-sex marriages. In *Eweida*, the Court rejected the notion that Article 9, either alone or in conjunction with Article 14, *requires* states to grant exemptions to those who refuse to facilitate same-sex marriages and relationships.⁶⁶ The United Kingdom was not required to exempt a civil registrar from registering same-sex partnerships, even though such partnerships were only introduced in UK law after she had become a registrar.⁶⁷ The UK was also not obliged to enable an exemption for a counsellor who was ambivalent about counselling same-sex couples.⁶⁸ Neither exemption was required by the Convention.

Whether analogous exemptions are *permitted* under it, however, remains an open question. We do not know the answer to that separate question, because the Court in *Eweida* did not say much about the merits of the registrar’s and the counsellor’s claims. Instead, it summarily concluded that the United Kingdom was well within its wide margin of

⁶⁴ See *Fiala et al.*, *supra* note 12, p. 201.

⁶⁵ *Federation of Catholic Families in Europe (FAFCE) v. Sweden*, 17 March 2015, European Committee of Social Rights, No. 99/2013.

⁶⁶ *Eweida*, *supra* note 5. The Court treated the cases of Ms Ladele and Mr McFarlane as involving conscientious objection. Dissenting judges Vučinič and De Gaetano did so explicitly (at paras. 2-3 of their dissent), the majority implicitly (at para. 104).

⁶⁷ *Ibid.*, para. 106.

⁶⁸ *Ibid.*, para. 109.

appreciation in rejecting their accommodation claims.⁶⁹ Only when faced with the converse situation, in which exemptions are granted at the national level and then challenged by a same-sex couple in Strasbourg, would the Court need to reveal if such exemptions are permitted by the Convention; or prohibited by it.⁷⁰ In section 4 of this chapter, I argue that claims of conscience against facilitating same-sex marriages, those by civil servants in particular, should not be tolerated. Exemptions for such claims of conscience ought, in other words, to be prohibited by the Convention. Before I move on to normative assessment, however, I will briefly discuss two factors that are particularly salient to determining if exemptions *can* be granted, as a practical matter.

3 Alternative Duties and Frequency of Objections

Two practical considerations, availability of alternative duties and frequency of objections, may well determine if exemptions *can* be granted under Article 9. On their own, however, these factors are insufficient to conclude that exemptions *should* be granted. They nevertheless provide an essential preliminary step in the analysis. Practical considerations structure the realm of factual possibilities and delineate some of its boundaries.

Availability of alternative duties may well be a prerequisite to exempting religious objectors from their general duty to obey the law. The ECtHR certainly treats alternatives as such. The Court accepts alternatives duties as a good way to reconcile a right to conscientious objections with other rights or interests, but only in some circumstances. In the abortion cases, the Court appears to treat duties of referral as a precondition to reconciling the conscience rights of doctors with the privacy and health rights of women.⁷¹ Health systems that fail to impose referral duties on doctors would probably fail the Court's "reconciliation" test.⁷²

Availability of alternatives also structures the Court's approach to claims of conscience against serving in the military. The Court seems to consider alternative civilian service the appropriate, least restrictive way to 'reconcile the possible conflict between

⁶⁹ *Ibid.*, paras. 106 and 109.

⁷⁰ If the Court would rely on the margin of appreciation to reject the same-sex couple's claim, exemptions would be permitted by the Convention. But if it would uphold the same-sex couple's claim, exemptions would be prohibited by the Convention.

⁷¹ *P. and S.*, *supra* note 60, para. 107.

⁷² See the Court's use of 'above all' in *ibid.*

individual conscience and military obligations'.⁷³ Perhaps somewhat counterintuitively, an objector's willingness to enlist for civilian service then becomes a pertinent factor in the Court's analysis. In both *Bayatyan* and *Erçep*, the Court emphasized the objector's readiness 'to share the societal burden equally with his compatriots engaged in compulsory military service by performing alternative service'.⁷⁴ This suggests that an objector's commitment to do civilian service may be a precondition to her enjoying a right to be exempt from military service under the Convention.

But not all conscientious objectors are – or can be – granted an exemption as soon as alternatives are available. In theory, duties of referral could also assist in reconciling competing rights in the contraceptives and same-sex marriage cases. Yet, the Court has firmly rejected the notion that pharmacists, civil servants and others can be exempted from performing their legal obligations, regardless of potential duties to refer customers to a willing colleague.⁷⁵ Availability of alternatives is thus a necessary, but not sufficient condition for the enjoyment of a right to conscientious objection under Article 9.

Alternatives can, moreover, only function if conscientious objections remain a relatively marginal phenomenon. When objections are widespread, available alternatives may well diminish to the point of becoming meaningless. This creates a paradox: the more important conscientious objections are, the more problematic they become. Claims of conscience are relatively easy to accommodate, as a practical matter, when they are a marginal phenomenon. Once shared by many, however, they may well become impossible to manage. The more objectors there are in a country, region or city, the less likely it is that an exemption system based on theoretical availability of alternatives will function in practice. Frequency of conscientious objections thus operates as a reason *against* granting exemptions.

Sometimes, frequency of objections only provides a very weak reason. In relation to military service, for example, it would take an extreme scenario for conscientious objections to endanger the functioning of the military. Because availability of conscripts should be assessed at the national level, even widespread pacifism is unlikely to pose a serious threat to

⁷³ *Bayatyan*, *supra* note 7, para. 123. *See also ibid.*, para. 124 (in which the Court held that compulsory military service without exemptions is not necessary because 'there existed viable and effective alternatives capable of accommodating the competing interests [that is, introduction of alternative civilian service], as demonstrated by the experience of the overwhelming majority of the European States').

⁷⁴ *Ibid.*, para. 125; *Erçep*, *supra* note 29, para. 61 (similar wording; in French).

⁷⁵ In *Pichon and Sajous*, *supra* note 60, the Court did so (almost) explicitly ('as long as the sale of contraceptives is legal and occurs on medical prescription only and compulsorily in pharmacies, the applicants cannot give precedence to their religious beliefs'). In the cases of Ms Ladele and Mr McFarlane, the possibility of referral to a colleague was on the table. Ms Ladele, for instance, had for a while made arrangements with some of her colleagues, who replaced Ms Ladele whenever a same-sex couple was assigned to her. Nevertheless, the Court rejected Ms Ladele's claims in *Eweida*, *supra* note 5.

national security. The practice in most Council of Europe states, which have long ago switched to a system of voluntary military service, shows that conscientious objection to military service rarely raises practical problems.

In other circumstances, however, widespread conscientious objections may well upset the balance needed to make a system of alternative duties work. Abortion is the clearest example.⁷⁶ The Polish abortion cases at the ECtHR painfully illustrate how a theoretical system of alternatives may fail to function in practice. The system can collapse under the pressure of a high percentage of objectors. In Italy, the problem is particularly acute. Only gynaecologists are legally allowed to perform abortions in Italy, yet 70 per cent of them refuse to perform abortions.⁷⁷ With such a high rate of objections, it is easy to imagine how an exemption system – even with duties of referral – can create inordinate obstacles for women’s access to abortions. Frequency of objections, then, delineates the boundaries of a system of exemptions for conscientious objectors.⁷⁸

These boundaries are also pertinent to exemptions for civil servants who refuse to register same-sex marriages. Some argue that such exemptions should be granted, because it is possible to devise a practical system of referrals under which same-sex couples would never find out that someone objected to registering their marriage.⁷⁹ In section 4, I argue that such pragmatic arguments miss a crucial point: objecting civil servants still cause same-sex couples expressive harm. Here, I want to signal that the pragmatic argument is based on a paradoxical assumption. The argument assumes that conscientious objection to facilitating same-sex marriage is a marginal phenomenon. That may well correspond to the situation in many European countries. In the Netherlands, for instance, fewer than 100 civil servants object to registering same-sex marriages.⁸⁰ Data from outside Europe, however, show that objections can be much more widespread.⁸¹ In South Africa, for example, nearly 40 per cent of the country’s public marriage officers are exempt from their legal duty to perform same-

⁷⁶ See Wendy Chavkin *et al.*, ‘Regulation of Conscientious Objection to Abortion: An International Comparative Multiple-Case Study’, 19 *Health and Human Rights Journal* (2017), pp. 55-68 (their study of abortion practices in four European countries indicates that two factors impact on the operation of exemption systems: availability of medication abortions and prevalence of conscientious objections).

⁷⁷ *International Planned Parenthood Federation v. Italy*, 10 September 2013, European Committee of Social Rights, No. 87/2012, para. 82 (citing data from 2005-2009, listed in a 2011 report by the Italian Ministry of Health).

⁷⁸ *Ibid.*, para. 174 (criticizing the shortcomings in the provision of abortion services in Italy, due to poor management of the high number of conscientious objectors).

⁷⁹ Robin Fretwell Wilson, ‘The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State’, 53 *Boston College Law Review* (2012), pp. 1417-1513.

⁸⁰ Stijn Smet, ‘Conscientious Objection to Same-sex Marriages: Beyond the Limits of Toleration’, 11 *Religion & Human Rights* (2016), p. 120.

⁸¹ To my knowledge, there are no reliable figures for other European countries than the Netherlands.

sex unions.⁸² Once a critical mass of objectors is reached, any “invisible” system of referrals risks becoming inoperable.⁸³ Yet surely the strength of these persons’ conscience has not in any sense diminished. Nevertheless, their growing numbers end up undermining pragmatic arguments for “invisible” exemptions. Herein lies the paradox of the frequency of objections.

It seems to me, then, that we ought to move beyond practical considerations. We should also engage with more principled arguments. In the next section, I suggest that the legal and moral scope for conscientious objections can be delineated by analysing objections through the contrasting lenses of respect and tolerance.

4 Conscientious Objection through the Lenses of Respect and Tolerance

The lens through which courts consider conscientious objections partly determines how they respond to them. Here, I want to suggest that some claims of conscience should be viewed through the lens of respect, whereas others ought to be considered through the lens of tolerance. Both notions – tolerance and respect – feature in the ECtHR’s case law on conscientious objection. In *Bayatyan*, the Court noted that ‘the State’s role as the neutral and impartial organiser of the exercise of various religions ... is conducive to ... religious harmony and tolerance in a democratic society’.⁸⁴ In the same judgment, the Court held that ‘respect on the part of the State towards the beliefs of a minority religious group [could] promote religious harmony and tolerance in society’.⁸⁵ And in *Valsamis*, the Court noted that ‘[t]he verb “respect” [in Article 2 Protocol 1] means more than “acknowledge” or “take into account”’.⁸⁶ ‘In addition to a primarily negative undertaking’, the Court insisted, ‘it implies some positive obligation on the part of the State’.⁸⁷

Some of what the Court has said about tolerance and respect in dealing with conscientious objections, tracks the account provided below. But the normative views I am

⁸² Carl Collison, ‘Home Affairs Minister Rejects Calls to Amend Discriminatory Same-Sex Law’, 19 July 2017, *Mail & Guardian*, <mg.co.za/article/2017-07-18-home-affairs-minister-rejects-call-to-amend-discriminatory-same-sex-law>.

⁸³ Even “open” systems of exemptions may stop operating efficiently. See Helen Kruuse, ‘Conscientious Objection to Performing Same-Sex Marriage in South Africa’, 28 *International Journal of Law, Policy and The Family* (2014), p. 163 (‘Numerous media reports suggest that certain Department of Home Affairs offices [in South Africa] have turned away gay couples since every one of their marriage officers have opted out [of performing same-sex unions].’).

⁸⁴ *Bayatyan*, *supra* note 7, para. 120.

⁸⁵ *Ibid.* See also *Erçep*, *supra* note 29, para. 62.

⁸⁶ *Valsamis*, *supra* note 38, para. 27.

⁸⁷ *Ibid.*

about to set out do not neatly map onto the analysis of ECtHR's case law that preceded. Most importantly, I leave reasons to defer to states out of consideration. To obtain a complete perspective, the operation of the Court's margin of appreciation needs to be layered over the normative account that follows.

4.1 *The Link between (Religious) Conscience, Tolerance, and Respect*

A longstanding link exists between tolerance, conscience and freedom of religion. When John Locke and Pierre Bayle argued for freedom of conscience in late 17th Century Europe, they based their argument on the idea of toleration.⁸⁸ Ruling monarchs and adherents to majority religions, they posited, ought to refrain from persecuting despised religious minorities.⁸⁹ One of Locke's arguments – not necessarily his most convincing one⁹⁰ – insisted that true belief could not be compelled.⁹¹ Therefore, it was futile for the magistrate to concentrate her efforts on coercing adherents of minority religions. For religious conscience to be genuine, Locke insisted, it had to be free.

The early understanding of religious tolerance has, by and large, stood the test of time. Today, we still define religious tolerance as an act of restraint, a conscious decision not to interfere with beliefs and practices of which we disapprove. Inherent in the notion of tolerance, it is usually assumed, is a relationship of power.⁹² Those who are tolerant possess the power to interfere with another's beliefs and practices, but decide not to exercise it. Tolerance thus tends to be exercised by the state or a (religious) majority over a (religious) minority. Although the power element can be construed in hypothetical terms, so that (religious) minorities may be tolerant as well, the connotation of subordination has given tolerance a bad name. Minorities, it is said, do not wish to be merely tolerated.⁹³ They want or demand something more: acceptance, respect, recognition.⁹⁴

⁸⁸ Alex Tuckness, 'Locke's Main Argument for Toleration', in M. Williams and J. Waldron (eds.), *Toleration and Its Limits* (New York: New York University Press, 2008), pp. 114-138; Rainer Forst, 'Pierre Bayle's Reflexive Theory of Toleration', in *ibid.*, pp. 78-113.

⁸⁹ *Ibid.*

⁹⁰ Tuckness, *supra* note 88, p. 114.

⁹¹ *Ibid.*

⁹² Wendy Brown and Rainer Forst, *The Power of Tolerance: A Debate* (New York: Columbia University Press, 2014).

⁹³ Susan Mendus, *Toleration and the Limits of Liberalism* (London: MacMillan, 1989), p. 159; John Horton, 'Toleration as a Virtue', in David Heyd (ed.), *Toleration—An Elusive Virtue* (Princeton: Princeton University Press, 1996), p. 35.

⁹⁴ Mendus, *supra* note 93, p. 159; Horton, *supra* note 93, p. 36; Anna Elisabetta Galeotti, *Toleration as Recognition* (Cambridge: Cambridge University Press, 2002), pp. 10-11.

The notion of (equal) respect is particularly prominent in arguments for a move beyond tolerance.⁹⁵ The idea, here, is that tolerance is ‘too grudging and weak’ an attitude towards religious diversity.⁹⁶ As the ECtHR intimated in *Valsamis*, the contrasting notion of respect requires more than the forbearance of tolerance.⁹⁷ Respect may also impose positive duties on the state. When it comes to those duties of the state, additional doubts have been cast over the current relevance of the historical notion of tolerance.⁹⁸ Contemporary states, the argument goes, are under duties of neutrality and respect for basic rights.⁹⁹ These new duties of the state are said to displace, or at least supersede, former duties of tolerance.¹⁰⁰ Elsewhere, I acknowledge the strength of arguments that favour respect over tolerance.¹⁰¹ I nevertheless argue that there remains limited scope for vertical tolerance in the contemporary state, that is, tolerance exercised by the state.¹⁰² I explain why we ought to leave room for vertical tolerance immediately below, in elucidating how the contrasting lenses of tolerance and respect operate.¹⁰³

4.2 *Tolerance and Respect in Action*

The contrasting lenses of tolerance and respect map onto a distinction between two categories of religious beliefs and practices: those at odds with the human rights of others and those that do not impinge on the rights of others. In evaluating religious claims of conscience, I submit, the distinction is crucial.

Certain claims of conscience have no concrete impact on other human rights. Their exercise does not lead to a clash between human rights.¹⁰⁴ These claims of conscience, I

⁹⁵ Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2010); Emanuela Ceva, ‘Why Toleration Is Not the Appropriate Response to Dissenting Minorities’ Claims’, 23 *European Journal of Philosophy* (2015), pp. 633-651.

⁹⁶ Nussbaum, *ibid.*, p. 24.

⁹⁷ See *supra* notes 86-87 and accompanying text.

⁹⁸ John Gray, ‘Pluralism and Toleration in Contemporary Political Philosophy’, 48 *Political Studies* (2000), pp. 323 and 326; David Heyd, ‘Is Toleration a Political Virtue?’, in M. Williams and J. Waldron (eds.), *Toleration and Its Limits* (New York: New York University Press, 2008), p. 175. See also Martínez-Torrón, *supra* note 3, p. 206 (‘A state that is ethically and religiously neutral must respect ... all conscientious objections ... whenever there is no prevailing public interest at stake’).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* For responses, see John Horton, ‘Why the Traditional Conception of Toleration Still Matters’, 14 *Critical Review of International Social and Political Philosophy* (2011), pp. 289-305; Peter Jones ‘Toleration, Religion and Accommodation’, 23 *European Journal of Philosophy* (2015), pp. 542-563.

¹⁰¹ Smet, *supra* note 80; Stijn Smet, ‘Gewetensbezwaren en de Grenzen van Verticale Tolerantie in de Liberale Staat’, 109 *Algemeen Nederlands Tijdschrift voor Wijsbegeerte* (2017), pp. 309-328.

¹⁰² As opposed to horizontal tolerance exercised by individuals in interpersonal relationships. See *ibid.*

¹⁰³ In doing so, I draw on and expand arguments from *ibid.*

¹⁰⁴ On clashes between human rights, see Stijn Smet, *Resolving Conflicts between Human Rights: The Judge's Dilemma* (Abingdon, New York: Routledge, 2017); 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).

posit, ought to be viewed through the lens of respect. Conscientious objection to military service is a case in point. Those who refuse to serve in the military for reasons of conscience, do not undermine the human rights of their fellow citizens.¹⁰⁵ The same goes for children who object to participating in school parades with a military connotation. These types of conscientious objection should be the object of respect by the state.¹⁰⁶ This does not *ipso facto* imply that they ought to be absolutely protected. Respect is not limitless. Yet, exemptions should only be rejected in limited circumstances. I see no valid reason for limiting the conscience rights of pupils who refuse to participate in parades with a military connotation. And I venture that it would take an extraordinary situation – possibly combined with a particular political context – to restrict the right of conscientious objection to serving in the military.¹⁰⁷ But it is less far-fetched to acknowledge that the operability of tax systems can put justified limits on conscientious objections to paying taxes, even if part of those taxes might be used (indirectly) for military purposes.

The lens of tolerance, conversely, is salient to claims of conscience that *do* impinge on the human rights of others.¹⁰⁸ In evaluating those claims, we ought to take tolerance seriously. Here, the idea of vertical tolerance – tolerance by the state – retains important normative value. The respect-tolerance dichotomy allows states to send the signal that certain religious practices are merely tolerated and therefore not valued quite the same as other religious practices, which are the object of respect. On this account, states can for instance signal that they do not value church discrimination against women to the same extent as (they ought to value) women's right to wear religious head coverings. The latter should be the object of respect,¹⁰⁹ whereas the former is merely tolerated.

States can have both normative and pragmatic reasons for tolerating actions that emanate from religious conscience, but impact on the human rights of others. Conscientious objection to abortion is a prime example. Doctors who refuse to perform abortions impinge on women's right to decisional privacy, health and potentially even life. Nevertheless, most European states do not coerce doctors to perform abortions. Instead, they grant them

¹⁰⁵ See also Greenawalt, *supra* note 10, p. 109 ('[when] there are conflicting claims of toleration, it becomes debatable whether tolerance favors exemption. This contrasts with the issue of a pacifist's objection to military service ... [which] does not reflect badly on any other individuals in the society').

¹⁰⁶ These are, incidentally, also some of the few cases in which exemptions are granted to those with philosophical rather than religious objections.

¹⁰⁷ For an example, see *Ressler v. Knesset*, 21 February 2012, Supreme Court of Israel, Nos. 6298/07 *et al.*

¹⁰⁸ See also Greenawalt, *supra* note 10, p. 110 (describing exemptions for civil servants who object to registering same-sex marriages as a form of religious toleration).

¹⁰⁹ Stijn Smet, 'Freedom of Religion v. Freedom from Religion: Putting Religious Dictates of Conscience (Back) on the Map', in J. Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden – Boston: Martinus Nijhoff Publishers, 2012), pp. 113-142.

exemptions. As we saw above, these exemptions are permitted by the Convention. States may grant them under Article 9 ECHR, but they are not obliged to do so.

Granting such exemptions is a defensible act of tolerance on the part of the state. Doctors' refusal to deliver health services to which women are entitled, ought to solicit *prima facie* disapproval from states. But states might have good reasons, both principled and pragmatic, to nevertheless tolerate conscientious objections by doctors. A good principled reason is deference to doctors' conscience. A good pragmatic reason is ensuring the safety of medical interventions. On the pragmatic argument, the safety of surgical abortions (as opposed to medical abortions) may well be threatened if doctors are forced to proceed with what they view as murder. Presumably, doctors would find it extremely difficult to perform an operation that requires – as all operations do – a level of clinical detachment. Their emotional state might jeopardize the safety of the operation.

In abortion cases, principled and pragmatic reasons for tolerance are strong enough to justify exemptions, even if they do not *require* them. This is, in other words, an instance in which the margin of appreciation needs to be layered onto my normative account. Doing so may render defensible the opposite solution, adopted in countries like Sweden and Finland, that conscientious objections to abortion ought not to be tolerated. But even under the argument *for* tolerance, there are limits to its operation. The frequency of objections – discussed above – delineates those limits. When a critical mass of doctors (and other medical staff) objects to performing abortions, a system of exemptions may well create inordinate obstacles for women's access to abortion. Conscientious objections to abortion can therefore only be tolerated as an exception to the general rule that doctors provide their patients with the health services they are entitled to.

One of the reasons why doctors' conscientious objection to abortion can be tolerated, is the proximity of their objection to a moral act of serious concern.¹¹⁰ Doctors who refuse to perform abortions view their active participation as assisting in if not committing murder. Other acts, by contrast, are too remote to warrant an exemption.¹¹¹ Administrative staff at the reception desk of gynaecological wards or medical staff who prepare operating rooms, for instance, should not be exempt based on their conscientious objection to abortions.¹¹² The

¹¹⁰ On the factor of proximity, see also Greenawalt, *supra* note 10, pp. 105-106.

¹¹¹ This corresponds to how courts have viewed exemptions in, among others, the United Kingdom. See *Greater Glasgow Health Board v. Doogan & Anor.*, 17 December 2014, Supreme Court of the United Kingdom, [2014] UKSC 68, para. 38 (interpreting the terms 'participate in any treatment' in the conscience clause in section 4 of the Abortion Act 1967 as meaning 'taking part in a "hands-on" capacity').

¹¹² See also *ibid.*, para. 38. See *contra* Greenawalt, *supra* note 10, pp. 106-107 (arguing that hospital staff in charge of preparing operating rooms for abortions should be granted exemptions).

proximity of a doctor's objection to the act of abortion should also be contrasted to claims of conscience by pharmacists against selling contraceptives.¹¹³ In all these other situations, conscientious objections are too remote from the act of abortion to warrant tolerance. Rather, they approximate bare disapproval of a woman's life choices (or, worse, decisions of medical necessity). Such objections ought not to be tolerated, just like we should not tolerate objections by town hall receptionists against directing same-sex couples to the marriage registry, or by cleaning personnel of wedding chapels on the eve of a same-sex marriage.

In the context of same-sex marriage, one category of claims of conscience has been bitterly debated: objections by civil servants to the registration of same-sex marriages. Some firmly reject the notion that civil servants can be exempt from registering same-sex marriages. Exemptions, they argue, would cause same-sex couples material,¹¹⁴ psychological¹¹⁵ and/or dignitary harm.¹¹⁶ Proponents of exemptions retort that exemptions need not cause same-sex couples any harm, material or otherwise.¹¹⁷ They insist that practical systems can be implemented, under which same-sex couples never find out that a civil servant objects to registering their marriage.¹¹⁸ Invisible administrative systems would distribute couples – heterosexual and same-sex alike – to civil servants who are willing to register their marriage.¹¹⁹ Such invisible systems would, however, only operate to enable objections to same-sex marriages, not other marriages. At this juncture, opponents of exemptions often invoke the analogy to interracial marriage.¹²⁰ If we do not tolerate civil servants who object to interracial marriages, they ask, why ought we tolerate those who refuse to register same-sex marriages?¹²¹

Although the analogy to interracial marriage is imperfect,¹²² it does illuminate the nature of the harm involved. Exemptions for civil servants who object to same-sex marriages

¹¹³ Purchasing the morning-after pill is also a time-sensitive activity. Expecting women (or men) to 'shop around' for a willing pharmacist may well create an inordinate obstacle.

¹¹⁴ Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others', 77 *Modern Law Review* (2014), pp. 223–253.

¹¹⁵ Michael Kent Curtis, 'A Unique Religious Exemption from Antidiscrimination Law in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context', 47 *Wake Forest Law Review* (2012), pp. 186 and 197.

¹¹⁶ Douglas Nejaime and Reva Siegel, 'Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics', 124 *Yale Law Journal* (2015), pp. 2516–2591. *Contra* Fretwell Wilson, *supra* note 79, p. 1505 (arguing that there is dignitary harm on both sides, referencing 'the affront to religious believers who are told that their beliefs are not to be tolerated').

¹¹⁷ Fretwell Wilson, *supra* note 79, pp. 1487 and 1506; Greenawalt, *supra* note 10, pp. 116–117.

¹¹⁸ Fretwell Wilson, *supra* note 79, p. 1506.

¹¹⁹ *Ibid.*

¹²⁰ Curtis, *supra* note 115, pp. 177 and 184; Bruce MacDougall, 'Refusing to Officiate at Same-Sex Civil Marriages', 68 *Saskatchewan Law Review* (2006), p. 357.

¹²¹ MacDougall, *supra* note 120, p. 357.

¹²² Curtis, *supra* note 115, p. 185.

cause expressive harm.¹²³ Expressive harm is the harm a person suffers ‘when she is treated [by the State] according to principles that express negative or inappropriate attitudes toward her’.¹²⁴ It is closely linked with the notion of “second-class citizenship”.¹²⁵ In that respect, if and when states enact exemptions for civil servants, they prolong a pattern in which partners in a same-sex couple are treated as second-class citizens. Here, the analogy to interracial marriage is instructive. In the wake of racial equality revolutions, such as enactment of the Civil Rights Act in the United States and the end of Apartheid in South Africa, all state policies that had treated blacks as second-class citizens were abolished. During those crucial moments in history, it would have been extremely difficult to justify exemptions for individual civil servants who continued to object to interracial marriages for religious reasons.¹²⁶

Yet, many scholars today consider analogous exemptions for civil servants who object to same-sex marriages justified, or even required. These scholars dismiss the analogy to interracial marriage as unfair or overstated.¹²⁷ Same-sex marriage is distinct, they posit, in the sense that conscientious objectors “merely” rely on a religious understanding of marriage as exclusive to partners of the opposite sex.¹²⁸ On this argument, civil servants who refuse to register same-sex marriages do so out of religious concern for the integrity of marriage. They do not bear animus towards same-sex couples.¹²⁹ Herein allegedly lies the distinction with interracial marriages: ‘it is hard to imagine that a refusal to serve [an] individual [of another race] can reflect anything other than animus toward that individual’.¹³⁰ The argument from animus, however, relies on a skewed vision of history. It disregards the fact that religious arguments were deployed to resist interracial marriages in the past, just as they are being deployed to resist same-sex marriages today.¹³¹

The central difference between interracial and same-sex marriages, it seems to me, should thus be located elsewhere. It probably resides in the extent to which we have internalized equality norms. Racism is, of course, not a thing of the past. Contemporary

¹²³ Elizabeth Anderson and Richard Pildes, ‘Expressive Theories of Law: A General Restatement’, 148 *University of Pennsylvania Law Review* (2000), pp. 1503–1575.

¹²⁴ *Ibid.*, p. 1527.

¹²⁵ *Ibid.*, p. 1537.

¹²⁶ Greenawalt, *supra* note 10, p. 112.

¹²⁷ Fretwell Wilson, *supra* note 79, p. 1476; Greenawalt, *supra* note 10, p. 113.

¹²⁸ Greenawalt, *supra* note 10, p. 113 (shamelessly adding a reference to heterosexual marriage as ‘the *more* natural course’).

¹²⁹ Fretwell Wilson, *supra* note 79, p. 1476.

¹³⁰ *Ibid.*

¹³¹ Curtis, *supra* note 115, pp. 187–190 (noting, among others, that the trial judge in the anti-miscegenation case of *Loving v. Virginia* in the United States had referenced ‘the fact that God had put the races on separate continents as proof “that he did not intend for the races to mix”’).

European and North-American societies have a long way to go in securing full substantive equality for non-whites. But formal racial equality rules, at least, are sufficiently engrained in society. This explains why we do not tolerate persons who refuse to grant non-whites equal access to goods and services, even when they do so for religious reasons (as the Ku Klux Klan, for instance, is wont to do). We are arguably less firm in our commitment to formal same-sex equality. Sincere arguments that conscientious objectors should be exempt from registering same-sex marriages are a testament to that lack of commitment. It seems to me that the same-sex equality norm is insufficiently entrenched to resist those arguments.

One *could* view this as a transitional phase, in which exemptions act as a bridge towards a future of full marriage equality.¹³² The passage of time, one *could* insist, will sort everything out. But if a transitional phase with exemptions was not justified for interracial marriage in the past, why would it be justified for same-sex marriage today? The obvious response is that it is not. Claims of conscience against facilitating same-sex marriage should not be tolerated, because they undermine equality norms.

The power of equality norms, such as the Civil Rights Act,¹³³ not only resides in their instrumental function. Equality laws do more than direct behaviour. Layered onto their instrumental function, is an expressive function.¹³⁴ Racial equality laws, for instance, signal to everyone in society that non-whites will no longer be subordinated.¹³⁵ They will no longer be treated as second-class citizens. Instead, they will – or ought to – enjoy full equality. If exemptions are granted, however, that expressive message is fundamentally undermined.¹³⁶

When states insert conscience clauses for civil servants in same-sex marriage legislation,¹³⁷ they effectively grant equal citizenship with one hand, only to take it away with

¹³² Greenawalt, *supra* note 10, p. 114.

¹³³ Curtis, *supra* note 115, p. 176.

¹³⁴ On the expressive function of law, see Anderson and Pildes, *supra* note 123; Cass Sunstein, 'On the Expressive Function of Law', 144 *University of Pennsylvania Law Review* (1996), pp. 2021–2053; Wibren van der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues', 20 *Law and Philosophy* (2001), pp. 31–59. For critiques of expressive theories of law, see Matthew Adler, 'Expressive Theories of Law: A Skeptical Overview', 148 *University of Pennsylvania Law Review* (2000), pp. 1363–1501; Simon Blackburn, 'Group Minds and Expressive Harm', 60 *Maryland Law Review* (2001), pp. 467–491.

¹³⁵ Curtis, *supra* note 115, p. 202.

¹³⁶ *Ibid.*, pp. 202–203; MacDougall, *supra* note 120, pp. 364–365; Elsje Bonthuys, 'Irrational Accommodation: Conscience, Religion and Same-Sex Marriages in South Africa', 125 *The South African Law Journal* (2008), p. 479–480.

¹³⁷ As South Africa has done. See Civil Union Act 2006, section 6 ('A marriage officer ... may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such union.').

the other.¹³⁸ Exemptions undermine full equality, because civil servants who refuse to register same-sex marriages cause same-sex couples expressive harm.¹³⁹ They fail to treat same-sex couples with the equal concern and respect to which they are entitled under the law.¹⁴⁰ When state agents refuse to register same-sex marriages, the state effectively goes on treating partners in a same-sex couple as second-class citizens. It does not matter that exemptions can be rendered invisible through a distribution system, for expressive harm resides in the act of refusal itself.¹⁴¹ It does not “magically” materialize only when same-sex couples are aware of the refusal. The refusal itself constitutes the harm, just as would be the case if an invisible system would enable civil servants to circumvent interracial marriages.

Before concluding, I should address a potential worry with expressive harm: its indeterminate character. If refusals to provide services to which persons are legally entitled cause expressive harm, do doctors not cause women expressive harm when they refuse to perform abortions?¹⁴² Could, for that matter, not most conscientious objections be construed in terms of expressive harm? These are legitimate concerns. Yet, expressive harm – as I have deployed it – has a specific meaning. It refers exclusively to harm caused by the state and/or its agents,¹⁴³ through which a segment of the population is treated as second-class citizens.¹⁴⁴ When doctors refuse to perform abortions, they do not cause women expressive harm.¹⁴⁵ Unlike civil servants, doctors are not state agents whose actions equate to acts of the state. And the health services they deliver are distinct from legal status services, the recognition of which are uniquely in the power of the state. Contrary to civil servants acting for the state, then, doctors do not have the power to cast a segment of the population into a status of social subordination.¹⁴⁶ But there is an additional crucial difference between the acts doctors and civil servants would be compelled to perform, if denied an exemption. Put starkly, doctors would be forced to commit what they perceive as murder, whereas civil servants would merely be required to sign a piece of paper.

¹³⁸ *Contra* Fretwell Wilson, *supra* note 79, p. 1482 (arguing that limited exemptions, restricted to ‘situations in which no hardship for same-sex couples would result’, avoid the process I describe in the text).

¹³⁹ On expressive harm, see Anderson and Pildes, *supra* note 123, pp. 1527 and 1537.

¹⁴⁰ *Cf. ibid.*, p. 1520.

¹⁴¹ *Ibid.*, p. 1545; Blackburn, *supra* note 134, p. 470 (describing Anderson’s and Pildes’ notion of expressive harm as ‘harm [that] occurs at the time and place of the expressive act’; Blackburn, however, considers ‘unnecessary the mongrel doctrine of expressive harm’; *ibid.*, p. 489).

¹⁴² I am grateful to Pamela Slotte for having raised this point during a workshop at the Central European University, where we discussed draft papers for this volume.

¹⁴³ Blackburn, *supra* note 134, p. 472.

¹⁴⁴ Anderson and Pildes, *supra* note 123, p. 1537; van der Burg, *supra* note 134, p. 45.

¹⁴⁵ See also Kruuse, *supra* note 83, p. 166.

¹⁴⁶ *Cf.* Nancy Fraser, ‘Rethinking Recognition’, 3 *New Left Review* (2000), pp. 113-114.

5 Conclusion

The ECtHR's jurisprudence on conscientious objection is less developed than its case law in most (if not all) other areas covered in this volume. In this chapter, I have attempted to put the ugly duckling of the Court's freedom of religion case law in the spotlight. Under Article 9, conscientious objections fall in one of four categories: (i) principally protected; (ii); categorically rejected; (iii) conditionally protected; and (iv) preliminary rejected. Two elements – availability of alternative duties and frequency of objections – determine whether exemptions *can* be granted. Combined, they delineate the practical scope for a right to conscientious objection under the ECHR.

To determine whether exemptions *ought* to be granted, I have suggested to examine conscientious objections through the contrasting lenses of respect and tolerance. Objections that do not impinge on the concrete human rights of others should be viewed through the more permissive lens of respect. Claims of conscience against serving in the military and participating in military commemoration parades, for example, ought to be respected. Exemptions are, in these instances, required by the Convention. But respect is not limitless. Other claims of conscience, such as those against paying taxes, exceed the limits of accommodation (in the tax case because of their disruptive impact on the operability of tax systems).

Although respect is the primary lens through which we ought to consider claims of conscience, we should also take the contrasting lens of tolerance seriously. Objections that *do* impinge on the concrete human rights of others are best examined through the more restrictive lens of tolerance. Certain claims of conscience can (but do not have to be) tolerated. Exemptions, here, are permitted by the Convention. Conscientious objection by doctors to abortion is a case in point. Other claims of conscience, however, should not be tolerated in a democratic society. That is the case for civil servants' objections to registering same-sex marriages and pharmacists' refusal to sell contraceptives. Exemptions, in this final category of cases, ought to be prohibited by the Convention.

Some of these normative propositions are in line with the ECtHR's case law on conscientious objections. Others, however, deviate from the Court's current jurisprudence. Others still, fill in blanks in the Court's case law. The lenses of respect and tolerance may also provide insights into questions of conscientious objection that have not (yet) reached the Court. Claims of conscience against saluting a national flag or singing a national anthem, for

example, ought to be respected. And refusals by adults to have blood transfusions can be tolerated. But conscientious objections to renting out hotel rooms to same-sex couples or taking their photographs on their wedding day, should not be tolerated.

The notions of respect and tolerance, finally, could also prove instructive outside the rather narrow realm of conscientious objection. Respect and tolerance may well structure our approach to other contested issues of freedom of religion, as well. Religious practices such as wearing a *niqab* or ritual animal slaughter, for example, should be viewed through the more permissive lens of respect. Religious hate speech and male/female circumcision during childhood, conversely, are best considered through the more restrictive lens of tolerance. None of this implies that the former religious practices should be protected and the latter banned. But the lens through which we view them does govern the stringency of our analysis.