Towards the Core of Conscience

A Study on Conscientious Objection in the Workplace under the Freedom of Thought, Conscience and Religion

Pilvi Rämä

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 18 December 2019

European University Institute
Department of Law

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Examining Board

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Researcher declaration to accompany the submission of written work
Department of Law – LL.M. and Ph.D. Programmes

I , Pilvi Tuulia Rämä, certify that I am the author of the work 'Towards the Core of Conscience: A Study on Conscientious Objection in the Workplace under the Freedom of Thought, Conscience and Religion' I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

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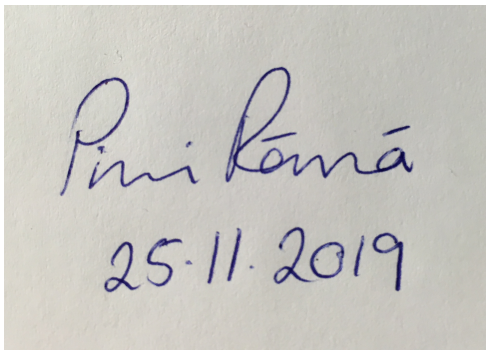

Thesis Summary

This thesis is concerned with the protection of conscientious objection in the workplace under the freedom of thought, conscience and religion, particularly as protected in Article 9 of the European Convention on Human Rights. Specifically, the aim of this thesis is to try to identify particular norms under the freedom of thought, conscience and religion as apply to instances of conscientious objection in the workplace, defined as instances of irreconcilable conflict between an individual's fundamental moral precepts and an otherwise applicable work duty. In order to identify such norms, this thesis considers three case studies: first, the jurisprudence of the European Court of Human Rights concerning Article 9 rights in the workplace context, second, approaches to conscientious objection in the healthcare profession, and third, approaches to selective conscientious objection in the professional military. Having identified some tentative norms under the freedom of thought, conscience and religion as apply to conscientious objection in the workplace, this thesis concludes by considering whether the norms identified are 'rules' or 'principles' according to the distinction articulated by Robert Alexy in *A Theory of Constitutional Rights*. This thesis argues that correctly identifying the applicable norms as either rules or principles enables a more coherent legal framework for approaching instances of conscientious objection in the workplace to be constructed. Moreover, it is suggested that identifying particular norms as either rules or principles allows for a reconceptualization of the freedom of thought, conscience and religion based on an inalienable core of 'rules' surrounded by a more general principle. It is argued that such a conceptualization addresses at least some of the criticisms which have been voiced regarding the traditional *forum internum/externum* (or belief/practice) construct of the freedom of thought, conscience and religion.

Acknowledgements

I recall, in the early days of my studies at the European University Institute, browsing through some of the numerous completed doctoral theses lining the shelves of the library and feeling both encouraged and a little daunted. On the one hand, these manuscripts were concrete proof that completing a PhD project was possible, and yet despite my enthusiasm at the thought of researching and writing a doctoral thesis, I was a little anxious as to how my particular project would unfold. Nevertheless, despite the many 'unknowns' ahead of me at the time, I knew already then that by the time I would be submitting a final draft, it would be my honour to thank the many individuals who have helped me in so many ways along the way. I am glad to finally have the chance to do so in writing.

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In closing I would like to thank my parents Veli-Matti and Paula Tahvanainen, and my brother Ilkka Tahvanainen, for their unconditional love and encouragement throughout the years, and for instilling in me a sense of curiosity from an early age. Lastly I would like to thank my husband Tomi for his steadfast love and constant support ever since I first started thinking about the possibility of pursuing a PhD. Thank you for embarking on this adventure wholeheartedly and for making sure we never stopped laughing! And finally, thank you to our three wonderful children, who bring me endless joy and inspire me each day.

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CHAPTER 1: Conscientious objection in the workplace under the freedom of thought, conscience and religion: Introduction

1. Introduction

Conflicts between law and morality are by no means a new phenomenon. Such conflicts – and normative evaluations of how they ought to be approached or resolved – abound not only in culture but also a wide range of academic disciplines including philosophy, theology, psychology, and indeed law. Conflicts between law and morality can be addressed, on the one hand, from the perspective of the latter, by considering what is the morally right course of action when such a conflict arises. On the other hand, these conflicts can also be addressed from the perspective of the former: how does the law approach conflicts between law and morality, specifically when a claimed moral duty conflicts with a legal duty? In the past, it may have been the case that the answer was simply that the law should prevail. After all, the law is, or at least should be, a generally applicable normative framework in lieu of anarchy.[1] Indeed, the idea that individual notions of right and wrong should displace provisions of the collective normative framework which law provides is, in the abstract, almost inimical to the concept of law. Yet particularly since the emergence of international human rights law, approaching conflicts between law and morality from the vantage point of the law is somewhat more complex given that among the catalogue of internationally protected human rights is the freedom of thought, conscience and religion. Upon even a cursory reading of the provisions protecting the freedom of thought, conscience and religion it is evident that what is being protected is the realm of individual moral judgment, which presumably may at times be at odds with the law. Thus the discourse on law and morality can be approached with some

[1] As noted in Smet, 'Conscientious Objection Under the European Convention on Human Rights: The Ugly Duckling of a Flightless Jurisprudence' in J. Temperman, T.J. Gunn and M.D. Evans (eds.), *The European Court of Human Rights and the Freedom of Religion or Belief* (Brill, 2019) 282, at 289, citing the US Supreme Court case of *Employment Division v. Smith*, 494 U.S. 872 (1990), in which, regarding the question of whether religious exemptions to generally applicable laws were mandated by the Constitution, the Supreme Court held that doing so would 'open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind', which, according to the Court, would be akin 'to courting anarchy', at 888.

complexity purely within the framework of the law, which is indeed the focus of the present study.

Although undoubtedly many of the most noted examples of conflicts between law and morality – and the moral heroes who have emerged therefrom – have arisen in times of particular moral crisis (for example, during wars) such conflicts can also arise in the midst of the mundane. Indeed, conflicts between law and morality or law and conscience can arise in any context to which the law extends its reach. A conflict between an individual's moral precepts or conscience and a legal duty has, in various contexts, been denoted as 'conscientious objection', insofar as the individual facing the conflict objects to abiding by a conflicting legal duty. The term 'conscientious objection' is perhaps most often understood to refer to moral opposition to bearing arms or rendering military service, as indeed was the first form of such an objection to gain explicit recognition as an aspect protected under the freedom of thought, conscience and religion.[2] However, whenever an objection to a legal duty arises for reasons of conscience, then 'conscientious objection' is an appropriate expression to denote all manner of such objections. Indeed, conscientious objection thus defined will be term of choice for the purposes of the present thesis.

Among the more 'mundane' contexts in which conflicts between law and individual moral convictions may arise is the workplace. The workplace is an interesting context for inquiring about the approach of the law to conscientious objection given its particular nature. Specifically, work and employment are undoubtedly highly significant aspects of people's lives, if not necessarily for the substantive content of one's work, at least for the purposes of making a living. Indeed, the right to work and make a living is itself a right protected in the catalogue of international human rights.[3] Yet there is also an element of voluntariness when it comes to work as a sphere of activity, as compared to, say, compulsory education or some other generally applicable duties which a state can impose on its citizens or those within its jurisdiction (e.g. national service or taxation). On the other hand, neither is work, in this broad sense, a sphere which is entirely voluntary as might be the case regarding one's choice of

[2] Most notably, See the UN Human Rights Committee's General Comment No. 22: Article 18 (Freedom of thought, conscience and religion), CCPR/C/21/Rev.1/Add.4, adopted 30 July 1993, at para 11.
[3] For example, the right to work is most explicitly recognised in Art. 6(1) of the International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3, as well as Article 1 of the European Social Charter (revised) 1996, ETS No. 163.

leisure activities, for example. Rather, often an element of choice exists when applying or training for a particular job or profession.[4]

What then does conscientious objection in the workplace look like? In contrast to conscientious objection to generally applicable laws,[5] conscientious objection in the workplace context more often concerns objections to particular work duties, which have their basis in the employment contract, job description or workplace convention. Conscientious objection in the workplace might concern certain aspects associated with a particular job, for example workplace dress codes, regular working hours, or indeed objections to specified duties which would otherwise fall within a particular job description. Given that conflicts of conscience can arise in the course of work, as well as the nature of the workplace as referenced above, how is conscientious objection in the workplace approached under the law, in particular the freedom of thought, conscience and religion as protected in international human rights law? This is the question at the heart of the present thesis, and is presented in greater detail below.

2. Research question

This thesis is concerned with determining whether and/or to what extent the human right to freedom of thought, conscience and religion extends protection to an individual facing an irreconcilable conflict between his or her fundamental moral convictions (i.e. conscience) and an otherwise applicable work duty. In particular, this thesis aims to identify specific norms under the freedom of thought, conscience and religion as apply to claims of conscientious objection in the workplace. Moreover, rather than focusing on a particular instance or type of conscientious objection, this thesis takes a step back and considers whether norms which apply to any and all instances of conscientious objection in the workplace can be identified, and whether on this basis it is possible to begin to construct a theoretically (more) coherent framework for approaching such conflicts under the freedom of thought, conscience and religion. Identifying or constructing such a framework is arguably ever the more urgent given

[4] This 'element of choice' has been a predominant feature in the ECHR case law concerning the workplace, particularly with regards to Art. 9 until recently. Paul Taylor, writing in 2005, has observed that 'The element of voluntary choice in taking employment or resigning appears similarly to be decisive in cases where the employer requires the applicant to act contrary to his beliefs', in P. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005). However, as will be discussed in due course, particularly in Chapter 3, the 'voluntariness' of the workplace is no longer *decisive* in cases concerning Art. 9 in the workplace context.

[5] For example laws concerning military service, compulsory education or taxation.

the often controversial nature of conscientious objection claims and the heated public debate which can ensue as a result, and also because of the wide variety of possible conscientious objection claims which might arise in today's increasingly morally and religiously diverse – or perhaps even polarized[6] – societies. Furthermore, it is suggested that identifying applicable norms to instances of conscientious objection and constructing on that basis a coherent framework for approaching such conflicts is not only useful from a legal-pragmatic perspective for the purpose of resolving cases, but also for attaining a more profound understanding of the nature of the freedom of thought, conscience and religion. As such, a concomitant question to be addressed throughout this thesis concerns the theoretical conceptualization of the freedom of thought, conscience and religion, and whether or how, through a process of identifying norms applicable to instances of conscientious objection in the workplace, a more accurate conceptualization thereof might be proposed.

It follows that the research questions addressed in the present thesis as outlined above have two broad dimensions. On the one hand there is the substantive legal question of correctly identifying the approach to conscientious objection in the workplace under the freedom of thought, conscience and religion, with a view to ascertaining particular applicable norms, and indeed the nature of such norms. On the other, and related to the question regarding the nature of the applicable norms, this thesis also has a significant theoretical dimension. Indeed, the theoretical aspect of the thesis in effect bookends the substantive legal study conducted. In its theoretical dimension, this thesis sets out to investigate whether it is possible to identify within the norms applicable to instances of conscientious objection in the workplace norms which are rules, and norms which are principles, as articulated in particular by Robert Alexy in *A Theory of Constitutional Rights.*[7] The difference between rules and principles is both theoretically and pragmatically significant, with particular repercussions for how norm conflicts are resolved. Proceeding from this qualitative dichotomy among norms based on the

[6] Keller and Heri observe that in recent years 'a number of legally and politically polarizing cases concerning Article 9' have been raised before the European Court of Human Rights, due, they suggest, to increased religious diversity resulting both from the 'eastward expansion of membership and to migration', in Keller and Heri, 'The Role of the Euopean Court of Human Rights in Adjudicating Religious Exception Claims', in S. Mancini and M. Rosenfeld (eds.), *The Conscience Wars: Rethinking the Balance Between Religion, Identity, and Equality* (Cambridge University Press, 2018) 303, at 305. In addition to the factors observed by Keller and Heri, we might add also the increased numbers of people not identifying with any particular religion or indeed rejecting religion.

[7] R. Alexy, *A Theory of Constitutional Rights*, (Oxford University Press, 2002), translated by Julian Rivers. The distinction among norms between rules and principles is not unique to Alexy. Others, including Ronald Dworkin for example, have also addressed the distinction between rules and principles (see R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), at 22-28)). However, the present thesis draws on the distinction between rules and principles as articulated by Alexy.

work of Alexy, it will be argued in this thesis that a more useful and coherent conceptualization of the freedom of thought, conscience and religion would be based primarily on the characteristics of the norms encompassed therein, rather than its traditional theoretical construct based on the dichotomy of the *forum internum* (i.e. the realm of inner belief) and the *forum externum*, (the external realm of practice).

The research questions outlined above will be addressed mostly with reference to the freedom of thought, conscience and religion as protected in Article 9 of the European Convention on Human Rights.[8] While also other relevant sources will be considered, Article 9 of the ECHR comprises the focal point of the legal analysis as well as the theoretical argument advanced.[9] The methodology employed to address the research questions is considered next.

3. Methodology

It was mentioned above that the present thesis has both a theoretical and a substantive legal dimension. In the interests of clarity, the methodology employed to address these questions will likewise be divided into the theoretical methodology (3.1.) and the substantive legal research methodology (3.2.).

[8] Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS No. 005, (European Convention on Human Rights, ECHR).

[9] It should be noted, however, that the freedom of thought, conscience and religion is not the only possible provision which could be invoked by an individual seeking to assert a right of conscientious objection in the workplace. In addition to possible applicable domestic law provisions, even at the European level such a claim could, in addition to Art. 9, be argued in terms of the prohibition of discrimination (on grounds of religion or belief) under Article 14 together with another substantive provision of the ECHR, or indeed, under Article 1, Protocol 12 of the ECHR (ETS No. 177), if the relevant State has ratified the Protocol. In addition, it could be argued that a claim of conscientious objection could be addressed under the Employment Equality Directive (Council Directive 2000/78/EC), where such a claim arises in a Member State of the EU. However, with regards to the latter, it is unclear to what extent protection would extend to claims of conscientious objection, given some of the Directive's provisions (e.g. preamble, para 17; and Article 4 on occupational requirements). However, despite these possible alternative sources of legal protection, the present thesis approaches the issue of conscientious objection under the freedom of thought, conscience and religion. The reason for this is not due to an argument or preference as to how such claims should be framed – indeed, as will be argued in this thesis, the two (freedom of religion and prohibition of discrimination) are linked - but rather due to the (theoretical) focus of the research question regarding the conceptualization of the freedom of thought, conscience and religion. On the different ways of framing the question of religious conscience, see McCrudden, 'Marriage Registrars, Same-Sex Relationships, and Religious Discrimination in the European Court of Human Rights', in Mancini and Rosenfeld (eds.), *Conscience Wars: Rethinking the Balance between Religion, Identity and Equality* (Cambridge University Press, 2018) 414, at 414-415.

3.1. Theoretical dimension

A number of components make up the theoretical framework undergirding the arguments advanced in this thesis. Although these theoretical components are discussed in more detail in Chapter 2 below, the central ideas thereof are presented here by way of introduction. First, one central theoretical discourse concerns the traditional construct of the freedom of thought, conscience and religion based on two *fori*: the 'inner sphere' of the *forum internum,* (i.e. the sphere of inner belief), and the outer sphere of the *forum externum* which concerns external manifestations of religion or belief (i.e. 'practice'). In brief, traditionally the freedom of thought, conscience and religion has been understood in terms of two distinct realms pertaining to religion or belief, the realm of inner belief and outer practice or manifestation. Indeed, such a distinction seems to arise directly from the text of the provisions protecting the freedom of thought, conscience and religion which routinely demarcate between the inner realm of belief which is inviolable and the outer realm of manifestation, which may be subject to limitations. Nevertheless, as will be explained more clearly in the next Chapter, this construct of the freedom of thought, conscience and religion has been subject to significant criticism on a number of fronts. For the purposes of the present research, it is particularly noteworthy that instances of conscientious objection (or at least some such instances) are not easily categorized as either fully 'internal' nor fully 'external', and as such there is some debate as to how such claims ought to be addressed under the freedom of thought, conscience and religion. Given the significant legal consequences of being categorized as one or the other, such a state of affairs is, to put it mildly, confusing. Moreover, given the increasing number of diverse claims of conscientious objection in various contexts including the workplace, it is suggested that an alternative, theoretically more coherent construction of the freedom of thought, conscience and religion is – if not called for – at least highly desirable. It is suggested that such an alternative construct might be based not on the nature of the aspect of religion or belief in question (i.e. either 'belief' or 'manifestation'), but rather on the types of norms comprising the freedom of thought conscience and religion.

The discourse on the *categorization* of the various norms under the freedom of thought, conscience and religion is based on the second theoretical component employed in this thesis. Specifically, this thesis draws on the distinction between norms which have the quality of a *rule* and norms which have the quality of a *principle* as articulated by Robert Alexy in *A*

Theory of Constitutional Rights.[10] This qualitative distinction between these two types of norms is significant for a number of reasons, but perhaps most significantly due to the difference of how conflicts among the two types of norms are resolved. Although the details of these differences will be explained in more depth in the next and final chapters of this thesis, it is suggested here that conceptualizing the freedom of thought, conscience and religion on the basis of the types of norms of which it is comprised is of interest not only from the point of view of legal human rights theory but also for more practical reasons. Specifically, such a conceptualization of the freedom of thought, conscience and religion also has some significant pragmatic advantages, most evidently regarding the resolution of such norm conflicts as arise in instances of conscientious objection. Moreover, distinguishing between the two types of norms can have implications also for a third human rights legal-theoretical discourse, namely that concerning the 'essence' or 'core' of individual human rights. In particular, it is argued, that the 'essence' of human rights including the freedom of thought, conscience and religion might be understood, again, on the basis of the distinction between rules and principles, such that it is the 'rules' under a particular human rights provision which comprise its 'essence' or 'core', as proposed by Scheinin.[11]

3.2. Substantive legal dimension

Having outlined the theoretical framework of the present study, it is time to consider the methodology employed in addressing the substantive legal aspects of the research questions identified above. As already established, the legal framework at focus in the present study is the freedom of thought, conscience and religion as protected in Article 9 of the European Convention on Human Rights. As such, in order to discern the approach to conscientious objection in the workplace under Article 9, it is necessary to study and analyse the relevant jurisprudence of the European Court of Human Rights (the Court, ECtHR), as indeed is the focus of Chapter 3. Specifically, the case law of the European Court of Human Rights (and, as applicable, European Commission of Human Rights) regarding claims of conscientious objection arising in the workplace will be addressed in detail, with a particular view to identifying norms under the freedom of thought, conscience and religion which are considered applicable by the Court. However, a number of important issues should be noted at

[10] R. Alexy, *A Theory of Constitutional Rights*, *supra* note 7.
[11] Scheinin, 'Core Rights and Obligations', in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law,* (Oxford University Press, 2013), 527- 540 at 534-5; Scheinin, 'Terrorism and the Pull of 'Balancing' in the Name of Security', in M. Scheinin et al., *Law and Security – Facing the Dilemmas,* (EUI Working Papers, Department of Law, 2009/11) 55, at 55-56.

the outset. First, the Court has not had many opportunities to address claims of conscientious objection in the workplace under Article 9. Although some such instances exists, there are significant problems with drawing too heavily on such a narrow sample of case law. Moreover, there has been a distinct shift in the Court's approach to claims concerning Article 9 in the workplace since the landmark judgment in 2013 of *Eweida et al*[12]. Thus not only is there an initially restricted pool of case law to be analysed, but that case law also has to be interpreted in light of some fairly recent and significant developments. This being the case, and in order to gain as comprehensive a view as possible of the Court's approach to conscientious objection in the workplace, Chapter 3 also considers case law raising issues of Article 9 in the workplace more generally than only with respect to the narrower confines of 'conscientious objection'. Furthermore, case law concerning conflicts arising between work duties and other rights protected under the ECHR (most notably Article 8), are considered as well.

In addition to the relative scarcity of case law on conscientious objection in the workplace, a further feature of the jurisprudence of the European Court of Human Rights is worth noting. Specifically, in practice, perhaps the most common instances of conscientious objection arising in the workplace at present concern particular professions, most notably in the healthcare sector. Moreover, conscientious objection in the healthcare profession arises particularly often in relation to certain procedures in the field of reproductive health (e.g. abortion, fertility treatment). Nevertheless, applications concerning conscientious objection in the healthcare profession have not as yet been raised before the Court[13]. On the other hand, many domestic jurisdictions recognize the right of healthcare professionals to exemption from at least some such procedures to which they hold a conscientious objection. This being the case, any case law analysis which does not account for what appears to be the most common instance of conscientious objection in practice would be significantly deficient. In order to address this weakness, this thesis also considers the legal approach to conscientious objection in the workplace arising in the contexts of two professions with particular ethical responsibilities. The first such profession is, as mentioned, the healthcare profession. In order the ascertain the (likely) legal approach to conscientious objection in the healthcare profession

[12] *Eweida and Others v. United Kingdom*, Appl. nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013.

[13] But note that there is a pending application at the ECtHR concerning the issue of conscientious objection by healthcare professionals, 'Swedish midwife takes case to ECHR over anti-abortion discrimination' available at http://www.euractiv.com/section/health-consumers/news/swedish-midwife-to-eu-court-over-anti-abortion-discrimination/ (accessed 23 July 2019).

under the freedom of thought, conscience and religion, a slightly modified methodology as compared with that of Chapter 3 will be employed. Specifically, I will consider the approach to conscientious objection in the healthcare profession under the ECHR on the basis of case law in which the issue has featured, despite not being the specific focus of such cases. Second, I will consider the approach to conscientious objection in healthcare under the jurisprudence of the European Committee of Social Rights, still under the auspices of the Council of Europe. Thirdly, the approach to conscientious objection in healthcare under some professional ethical standards will be considered, illustrated as appropriate with domestic law examples.

The second profession with particular ethical responsibilities which will be considered is the professional military. Although in many respects a vastly different professional context to that of the healthcare profession, the approach to conscientious objection in the armed forces – or selective conscientious objection as it is known therein – is nevertheless of interest for present purposes. For one, conscientious objection as an independent derivative right under the freedom of thought, conscience and religion was first recognized as such in the context of compulsory military service. Moreover, recent developments in the jurisprudence on conscientious objection to military service at the international level (especially the Human Rights Committee) invite the possibility of extending protection also to claims of selective conscientious objection, that is, claims of conscientious objection by (voluntarily recruited) professional soldiers to some aspect of their military duties. As such, analysing the possible approach to such claims of conscientious objection will add yet more depth to the present endeavour. Although instances of selective conscientious objection in the professional military context rarely make their way to international courts, a number of available sources are of use in trying to discern the possible legal protection of such selective objectors. In particular, sources including international human rights law, international refugee law and examples of domestic legal approaches will be considered in order to gain as complete an understanding as possible of the norms (under the freedom of thought, conscience and religion) which might apply to cases of selective conscientious objection.

4. Overview

Having outlined the research questions addressed in this thesis, as well as the methodology to be employed, this introductory chapter concludes by way of a brief overview of the structure

of the thesis. In Chapter 2, the three major components which comprise the theoretical underpinnings of this thesis will be introduced in detail, starting with the *forum internum/externum* construct of the freedom of thought, conscience and religion, and the criticisms to which it has been subject. Second, the distinction between rules and principles according to Robert Alexy's theory will be explained, followed by the wider discourse on the 'essence' or 'core' of human rights. Chapters 3, 4 and 5 comprise the substantive legal analysis undertaken in this thesis. First, Chapter 3 focuses on the approach to conscientious objection in the workplace under the jurisprudence of the European Court of Human Rights. The analysis will proceed by looking at some preliminary issues related to the freedom of thought, conscience and religion and the applicability of human rights to the workplace context, followed by an analysis of conscientious objection claims arising in the secular workplace context regarding objections to regular working hours, dress codes and specific duties. In addition, objections arising in the context of religious or ethos-based workplaces will also be considered, concluding with an initial reflection on the approach to conscientious objection claims in the workplace under Article 9. Chapter 4 in turn addresses the issue conscientious objection in the context of the healthcare profession, with a view to identifying norms applicable thereto. Specific regard is had to the approach to conscientious objection in the healthcare profession under the jurisprudence of the European Court of Human Rights (insofar as such can be discerned), and the European Committee of Social Rights, where the issue has been addressed more directly. In addition, the approach to some instances of conscientious objection by healthcare professionals in professional codes of ethics will be considered, illustrated with some domestic law approaches, concluding with an initial account as to the norms and factors which apply and regulate such conscientious objection. Chapter 5 then focuses on the issue of selective conscientious objection in the professional military under international human rights law. The chapter proceeds, by way of introduction and background, by considering the wider context of international law, particularly international criminal law and international humanitarian law, against which the issue of selective conscientious objection is appropriately positioned. Following from this, the protection of conscientious objection to military service under the freedom of thought, conscience and religion in international law is analysed, including with particular reference to some important recent developments. Next, standards under international refugee law will also be considered in some detail given that instances of selective conscientious objection have on occasion given rise to claims of asylum on the basis of which a body of law has developed. Finally, some examples of domestic legal approaches to selective conscientious objection are

considered, concluding with an initial account of applicable norms and factors. Finally Chapter 6, drawing on the substantive legal analysis of Chapters 3-5 and the theoretical framework introduced in Chapter 2, combines these two dimensions to put forth the main argument of this thesis. First, combining the findings of Chapters 3-5, a number of norms applicable to conscientious objection in the workplace under the freedom of thought, conscience and religion are identified as either rules or principles. Moreover, the implications of the identified rules and their qualities are demonstrated by considering the resolution of norm conflicts in the context of conscientious objection. Finally Chapter 6 concludes by suggesting a reconceptualization of the freedom of thought, conscience and religion on the basis of the type of norms contained therein. Specifically it will be argued that the freedom of thought, conscience and religion might be best conceived of as a right comprised of an 'essence' or 'core' or 'rules' embedded within a broader principle. Finally, a number of suggestions will be made regarding the implications of the argument proposed in this thesis for some related legal-theoretical discourses.

CHAPTER 2: Theoretical Considerations

1. Introduction

A central line of argument in this thesis concerns the theoretical (re)conceptualization of the freedom of thought, conscience and religion generally, and particularly as regards the protection of 'conscientious objection' therein. As was explained in the introductory chapter above, this thesis comprises both a substantive legal and a legal-theoretical dimension regarding the research question at hand, and as to the latter, bestrides somewhat the line between the descriptive and the normative. In other words, while the theoretical argument advanced in the present thesis is drawn from the substantive legal analysis of the three case studies addressed in Chapters 3-5, it nevertheless utilizes three connected but distinct theoretical discourses to suggest a modified conceptualization of the freedom of thought, conscience and religion. While this modified theoretical conceptualization may at first sight sit uneasily with traditional theory, it is nevertheless sufficiently consistent with judicial practice (albeit implicitly rather than explicitly, as will be explained further below) and plausible from a normative perspective to warrant at least earnest consideration. The present chapter in turn presents in more depth the three theoretical discourses on which this modified conceptualization of the freedom of thought, conscience and religion is founded. As such, this chapter is divided into three main sections, each concerned with one of the theoretical discourses. These discourses are, in the order addressed herein, first, the traditional *forum internum/forum externum* conceptualization of the freedom of thought, conscience and religion (or more specifically a critique thereof), second, the distinction among norms between rules and principles, particularly as advanced by Robert Alexy, and third, the 'core theory' of human rights. Finally, this chapter concludes with a short summary and preview of the significance of the three theoretical discourses for the main theoretical argument to be advanced in this thesis, most fully in Chapter 6.

2. The *forum internum/externum* construction of the freedom of thought, conscience and religion – and its critique

2.1. Introduction

The human right to freedom of thought, conscience and religion as protected in international human rights instruments is routinely, with minor variations in wording and the structure of the various provisions, depicted as a two-limbed right containing both an internal and external dimension, often referred to in Latin as the *forum internum* and the *forum externum*.[1] Specifically, the right to freedom of thought, conscience and religion is articulated in the various provisions expressing the right as encompassing both the right to hold/not to hold a belief (or to adhere/not adhere to a religion) and the right to manifest one's religion or belief. There is thus, explicitly in the provisions, a recognition of the freedom of thought, conscience or religion encompassing two broad aspects, which has come to be referred to as either the internal/external or belief/practice dichotomy, an aspect which has arguably been cemented if not entirely clarified under the jurisprudence of the European Court of Human Rights, (and previously also the European Commission of Human Rights).[2] The distinction between these

[1] Neither the words 'internal' and 'external' nor the terms *forum internum/forum externum* themselves appear in the texts of the various provisions. Rather, their usage is commonplace in both academic discourse (as noted by Peter Petkoff, 'It is almost inconceivable to consider freedom of religion or belief without coming across at least one reference to *forum internum* and *forum externum*' in Petkoff, 'Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights' 7 *Religion and Human Rights* (2012) 183, at 184) and (albeit to a lesser extent) in judicial practice (see for example ECtHR *Sinan Işık v. Turkey*, Appl. no. 21924/05, Judgment of 2 February 2010, at para 42). Nevertheless, the conceptual divide between the internal (belief) and the external (practice) undergirds the Article 9 jurisprudence of the European Court of Human Rights, and is discussed further below at 2.2. As has been established, the present thesis focuses on the freedom of thought, conscience and religion as protected in Article 9 ECHR, but for reference, other international human rights instruments which protect the freedom of thought, conscience and religion in a more or less similarly drafted provision include the Universal Declaration of Human Rights (UN GA resolution 217 A (III), 10 December 1948) Article 18; International Covenant on Civil and Political Rights 1966 (999 UNTS 71) Article 18; Charter of Fundamental Rights of the European Union (OJ 2012/C 326/02) Article 10; International Convention on the Protection of the Rights of Migrant Workers and Members of their Families 1990 (2220 UNTS 3) Article 12, American Convention on Human Rights (144 UNTS 123) Article 12. While there are minor variations in the wording and structure of the above provisions, a commonality among them is the apparent distinction between the internal and external aspects of the freedom of thought, conscience and religion. There is, however a lack of clarity as to the actual origin of the terms *forum internum/externum* in the human rights context, see P. Petkoff, 'Forum Internum and Forum Externum in Canon Law and Public International Law' (see reference at the beginning of the present footnote) at 184-185. On the critical significance and context of some of the variations in the drafting of different provisions on the freedom of thought, conscience and religion, see P. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, (Cambridge University Press, 2005), at 28-42.

[2] According to Carolyn Evans, writing in 2001, 'The wording of Article 9 itself does suggest that a distinction must be drawn between the general right to freedom of religion or belief and the right to manifest that religion or belief.' C. Evans, *Freedom of Religion or Belief under the European Convention on Human Rights* (Oxford University Press, 2001), at 76. Paul Taylor, (writing in 2005) notes that 'The Strasbourg institutions have nevertheless demonstrated a marked tendency to focus on the manifestation of belief to the exclusion of other aspects of Article 9(1) of the European Convention', in P. Taylor, *Freedom of Religion*, *supra* note 1, at 127. Such a practice thus on the one hand maintains the distinction between belief and manifestation, while adding very little by way of clarity, particularly as regards the inner realm of belief. See also the discussion on ECtHR

aspects attains heightened importance, as the provisions protecting freedom of thought, conscience and religion, for example Article 9 of the ECHR, also contain a clause pertaining to limitations, according to which

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[3]

Even a cursory reading of the provision thus hints at the significant implications of the above clause: limitations to the 'internal' aspect of the freedom of thought, conscience and religion are not permitted,[4] but limitations to the external 'practice' aspect of the same may be permissible, in accordance with the articulated criteria.[5] For purposes of legal practice, it becomes crucial, therefore, to identify whether a claim pertains to the 'manifestation' (external) aspect of the freedom of thought, conscience or religion, or 'belief' (or 'internal') aspect thereof. In the case of the former, the possibility of limitations to manifestation of religion or belief is left open. In other words, a successful complaint under the freedom of thought, conscience and religion will not only have to establish that there has been an interference with the right to manifest religion or belief, but also that such an interference was an impermissible limitation under, in the context of the ECHR, Article 9(2). On the other hand, if it can be established that there has been an interference with the right to hold a religion or belief (that is, the first limb of the freedom of religion or belief), then such an

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Buscarini and Others v. San Marino, Appl. no. 24645/94, Judgment of 18 February 1999, in P. Taylor, *Freedom of Religion*, *ibid*. at 129-130.

[3] Art. 9(2) ECHR.

[4] This has been confirmed in the case law, with the freedom of religion or belief (i.e. the internal dimension) being recognized as 'absolute and inviolable', see for example: ECtHR *Eweida and Others v. United Kingdom*, Appl. nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013, at para 80.

[5] Sometimes this aspect of the freedom of thought, conscience and religion is expressed in the literature in a manner identical or similar to the phrase 'manifestations of religion or belief are subject to limitations'. However, the present author considers such word choice to be inaccurate, as it suggests that all manifestations of religion or belief may be subject to limitations, in accordance with the relevant criteria. A more appropriate (if pedantic) expression of the so-called limitation clause emphasizes the conditionality of the permissibility of limitations to the broad 'manifestation' aspect of the freedom of thought, conscience and religion, while not as such implying that any and every manifestation of religion or belief may be subject to limitations. In this regard it should be recalled that other human rights provisions are, as a whole 'subject to limitations' in that they lack the dichotomous structure of the freedom of thought, conscience and religion, yet rarely are such rights talked about with an emphasis *purely* on their limitability (even though, for example, Articles 8-11 ECHR are often grouped together due to the fact that they all contain a 'limitation clause'). It is interesting to ponder to what extent the explicitly dichotomous structure of the freedom of thought, conscience between the 'internal' and 'absolute' versus the 'external' and 'relative' has in fact played into the general lack of a robust doctrine as to those aspects of the 'external' which may not, or at least only rarely, be subject to limitation. This, however, is a question for further reflection and study, and is beyond the scope of the present thesis.

interference already amounts to a violation.[6] It can thus be seen both how the structure of the provisions protecting freedom of thought, conscience and religion gives rise to the distinction between the internal and external aspects of the right, and the legal implication of that distinction. The rest of this sub-section will consider in more detail each of these aspects in turn, before addressing more fully the criticism which has been voiced against such a construction, which is of particular importance given the intention in the present thesis to ultimately propose an alternative, modified construction of the freedom of thought, conscience and religion.

2.2. The forum internum

2.2.1. The scope of the forum internum

As introduced above, the freedom of thought, conscience and religion comprises both an internal and external dimension.[7] While with respect to the external, 'manifestation' dimension, the relevant provisions (e.g. Article 9) at least cursorily expound forms of manifestation of religion or belief protected therein,[8] the same is not true for the internal dimension of the right.[9] Indeed, while it can be surmised that the internal dimension of the freedom of thought, conscience and religion includes at least the right to believe (or not to believe), including the right to change or recant one's religion or belief,[10] the question has rightly been raised as to what exactly the purpose or utility of such a right would be.[11]

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[6] Of course, in such cases it nevertheless has to be established both that the matter at hand falls within the scope of Article 9, and that there has in fact been an interference.

[7] Indeed, as noted by Malcolm Evans, 'Few elements of the Article 9 framework seem more settled than the distinction between the right to hold a pattern of thought, conscience or religion – the *forum internum* – which is subject to absolute protection, and the right to manifest that pattern of religion or belief – the *forum exergue* – which is subject to limitation.' M. Evans, 'Freedom of Religion or Belief since *Kokkinakis*. Or Quoting *Kokkinakis*' in 12 *Religion and Human Rights* (2017), 83-98, at 87.

[8] Namely, with reference to the standard litany of 'worship, teaching, practice and observance'. While the afore-mentioned notions may not be altogether self-explanatory, they do cover a wide range of activities and modes of being. This is particularly true of the category of 'practice'.

[9] C. Evans, writing in 2001 notes that neither the European Court of Human Rights, nor the Commission have explained in any detail as to what the forum internum entails (C. Evans, *Freedom of Religion under the European Convention on Human Rights*, *supra* note 2, at 72). Despite a substantial body of jurisprudence since 2001, it remains the case that the *forum internum* and the protection afforded thereto by Article 9 remains significantly less clear than is the case with the manifestation aspect of religion or belief.

[10] See *Eweida et al. supra* note 4, at para 80, and indeed the very text of Art 9(1) ECHR.

[11] Perhaps, for example, as distinguished from the freedom of opinion as protected under Art. 10 ECHR, or Art. 19 ICCPR. Writing with regards to the 'standard recital' of the European Commission of Human Rights regarding Article 9 primarily protecting 'the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*' (herein citing cases of the European Commission of Human Rights such as *C. v. United Kingdom*, Appl. no. 10358/83, Decision of 15 December 1983; *V. v. the Netherlands*, Appl. no. 10678/83, Decision of 5 July 1983; *Vereniging Rechtswinkels Utrecht v. the Netherlands*, Appl. no. 11308/84, Decision of 13 March 1986), Malcolm Evans submits that 'If this was all that the first sentence of Article 9 protected, there would be little difficulty in its application both because of its simplicity and the rarity of its

However, despite its seemingly 'intangible' nature, the freedom of the *forum internum,* (i.e. the freedom to hold to any thought, conviction or belief), is not insignificant.[12] Although scholars have voiced criticism over the lack of a more robust jurisprudence of the *forum internum* resulting, it seems, not only from a lack of case law directly engaging issues of the 'internal dimension' of the freedom of religion or belief, but also from the Court evading the opportunity to do so when the complaint before it invites such engagement[13], some aspects of the *forum internum* have been articulated. Specifically, indoctrination by the state is prohibited as a violation of the *forum internum,*[14] as is being forced to reveal one's religion or belief,[15] or to participate in the practice of a religion which is not one's own.[16] With regards to being forced to reveal one's religion or belief, there is some inconsistency in the case law as to whether such falls within the 'internal' or 'external' dimension of the freedom of thought, conscience and religion. On the one hand, in *Sinan Işik v. Turkey*, the court is clear in

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being breached, since an applicant would have to show that external pressure sufficient to induce a forcible change in the inner belief had been applied.' In M.D. Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997), at 294, as also discussed in C. Evans (2001) *supra* note 2, at 72-73.

[12] See discussion in P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.) *Theory and Practice of the European Convention on Human Rights* (4th edn.), (Intersentia, 2006), 752-753. See also Vermeulen, 'The Freedom of Religion in Article 9 of the European Convention on Human Rights: Historical Roots and Today's Dilemmas' in A. Van de Beek, E.A.G.J. van der Borght & B.P. Vermeulen (eds.), *Freedom of Religion (*Brill, 2010) 9, at 12-13.

[13] Such has been argued by Carolyn Evans vis-à-vis the Court's reasoning in ECtHR *Buscarini and Others v. San Marino*, Appl. no. 24645/94, Judgment of 18 February 1999, in C. Evans (2001) *supra* note 2, at 73-74. See also discussion on *Buscarini* in P. Taylor, *Freedom of Religion, supra* note 1.

[14] See van Dijk, van Hoof, van Rijn and Zwaak *supra* note 12, at 752 (footnote 3), citing ECmHR, *C.J., J.J. and E.J. v. Poland*, Application No. 23380/94, Decision of 16 January 1996, in which it was noted by the Commission that 'according to its case-law, Article 9 (Art. 9) of the Convention affords protection against religious indoctrination by the State. Article 9 (Art. 9) primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the forum internum.' The prohibition of indoctrination on the part of the state is also closely linked to the rights of parents to ensure the education of their children in conformity with their religious and philosophical convictions as protected in Article 2 of Protocol 1, ECHR, see for example ECtHR *Osmanoğlu and Kocabaş v. Switzerland*, Appl. no. 29086/12, Judgment of 10 January 2017, para. 91. See also discussion in M. Evans *Religious Liberty* (1997) *supra* note 11, at 294-295, citing ECtHR *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Application No. 24095/94, Judgment of 7 December 1976, para 48.

[15] See ECtHR *Sinan Işik v. Turkey*, Application No. 21924/05, Judgment of 2 February 2010, at para 42: 'What is at stake is the right not to disclose one's religion or beliefs, which falls within the *forum internum* of each individual. This right is inherent in the notion of freedom of religion and conscience. To construe Article 9 as permitting every kind of compulsion with a view to the disclosure of religion or belief would strike at the very substance of the freedom it is designed to guarantee.' In the context of the protection of freedom of religion or belief in international human rights law more generally, the prohibition of coercion to reveal one's religion or belief was has also been suggested as an aspect of the forum internum by Bahiyyih G. Tahzib, in B. G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Protection*, (Kluwer Law International, 1996) at 26. See also the concurring opinion of Judge Power in the Grand Chamber judgment in ECtHR *Lautsi v. Italy*, (Appl. no. 30814/06, Judgment of 18 March 2011), who submitted, in response to the applicants'' complaint that the display of a crucifix on a classroom wall violated their freedom of thought, conscience and religion, that '[t]he test of a violation under Article 9 is not "offence" but "coercion"', at p. 45.

[16] See ECmHR *Darby v. Sweden,* Application No. 11581/85, Report of the Commission, 9 May 1989, at para 50-51, 'In the Commission's view, this right protects everyone from being compelled to be involved directly in religious activities against his will without being a member of the religious community carrying out those activities.'

considering the right not to disclose one's religion or beliefs as falling within the *forum internum,*[17] yet in other cases, most recently in *Mockuté v Lithuania*, the Court has articulated the same as a negative aspect of the freedom to manifest religion or belief,[18] albeit one, it is implied, which is unqualified.[19] For present purposes, it suffices to note that despite some aspects identified in the jurisprudence under Article 9, the *forum internum* remains somewhat ethereal as to its precise substantive content. Nevertheless, perhaps most intriguing and significant from a legal theoretical standpoint, is its quality as 'absolute' and 'inviolable', as is discussed below.

2.2.2. The 'absolute' nature of the forum internum

The importance of the internal dimension of the freedom of thought, conscience and religion has been evident throughout the ECHR jurisprudence on Article 9, of which the landmark judgment of *Kokkinakis v. Greece*[20] serves as a helpful starting point. In its assessment of the alleged violation of Article 9 for the applicant's criminal conviction for proselytism, the majority of the Court opined that the freedom of religion was *primarily* a matter of 'individual conscience'[21] while also *implying* the freedom to manifest one's religion.[22] Indeed, the Court referenced the inviolability of the freedom of religion or belief by submitting that the requirements of Article 9 were reflected in the Greek Constitution, which protected the inviolability of 'freedom of conscience in religious matters.'[23] Moreover, the Court drew

[17] See *Sinan Işik v. Turkey, supra* note 15.

[18] ECtHR *Mockuté v. Lithuania,* Application No. 66490/09, Judgment of 27 February 2018, at para. 119, 'The Court reiterates that freedom to manifest one's religious beliefs comprises also a negative aspect, namely the right of individuals not to be required to reveal their faith or religious beliefs and not to be compelled to assume a stance from which it may be inferred whether or not they have such beliefs' therein citing ECtHR *Alexandridis v. Greece* (Application No. 19516/06, Judgment of 21 February 2008 at para. 38) and ECtHR *Grzelak v. Poland* (Application No. 7710/02, Judgment of 15 June 2010, at para. 87). Malcolm Evans, commenting on the scope of the *forum internum* vis-à-vis the right not to disclose one's religion or belief, considers that 'Refusing to reveal one's religion is not aptly described as a manifestation of religion or belief: I am not aware of any religion which requires its followers to refuse to reveal their religious identity to others, but there are, of course, many situations in which religious believers might not wish to do so; some of which are more pressing than others. The only way such Court decisions can be explained convincingly is by seeing them as extending the scope of the *forum internum*, by accepting that the mere fact of holding a religion or belief must mean that there a range of necessary ancillary protections which flow from this.' M. Evans, '*Quoting Kokkinakis'* (2017) *supra* note 7, at 87-88.

[19] In para 119 of *Mockuté* (*supra* note 18) the Court continues as follows: 'Consequently, State authorities are not entitled to intervene in the sphere of an individual's freedom of conscience and to seek to discover his or her religious beliefs or oblige him or her to disclose such beliefs (…)The Court has also emphasised the primary importance of the right to freedom of thought, conscience and religion and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs.'

[20] ECtHR *Kokkinakis v. Greece,* Application No. 14703/88, Judgment of 25 May 1993. *Kokkinakis* was the first case in which the European Court of Human Rights found a violation of Article 9.

[21] *Ibid.,* at para. 31.

[22] *Ibid*., Admittedly, the Court's choice of the verb 'imply' is curious, given the explicit inclusion of the freedom to manifest religion or belief in the very text of Article 9.

[23] *Ibid.,* para 32.

attention to the structure of Article 9, as compared with the other provisions of the ECHR allowing for limitations (that is, Articles 8, 10 and 11). Observing that whereas the limitation clauses of Articles 8, 10 and 11 extended to all the rights protected under the first paragraphs of the respective articles, the Court stated that the same was not true vis-à-vis Article 9, in which the limitations could only be permissible in respect of the freedom to manifest religion or belief.[24] Further references to the primacy, and indeed the absolute nature of the internal aspect of the freedom of thought, conscience and religion can be found throughout the Court's jurisprudence under Article 9,[25] and summarised well in the Court's submission in the important judgment of *Eweida et al. v UK,* that the right 'to hold any religious belief and to change religion or belief, is absolute and unqualified'. [26] Looking beyond ECHR jurisprudence, the absolute and unqualified nature of the 'internal dimension' of the freedom of thought, conscience and religion is explicitly recognized in General Comment No. 22 of the Human Rights Committee.[27] Similarly, the 'Guidelines for Legislative Reviews of Laws affecting Religion or Belief", adopted by the Venice Commission (as referenced on occasion in the judgments of the European Court of Human Rights),[28] explicitly denote the '*forum internum'* aspect of the freedom of religion and unconditional.[29] Evidently the absolute or

[24] *Ibid.,* para 33.
[25] See for example, ECtHR *Kalaç v Turkey*, Application No. 20704/92, Judgment of 1 July 1997, at para. 27; ECtHR *Bayatyan v. Armenia*, Appl. no. 23459/03, Judgment of 7 July 2011*,* para 119. See also ECtHR *SAS v France*, Appl. no. 43835/11, Judgment of 1 July 2014. para 125.
[26] In *Eweida et al. v UK*, *supra* note 4, at para 80.
[27] UN Human Rights Committee, General Comment No. 22: Article 18 (Freedom of thought, conscience and religion), CCPR/C/21/Rev.1/Add.4, adopted 30 July 1993, at para 3 provides: 'Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.' On the status and function of general comments and general recommendations of UN treaty monitoring bodies, see Scheinin, 'International Mechanisms and Procedures for Monitoring', in C. Krause and M. Scheinin (eds.) *International Protection of Human Rights: A Textbook,* (Institute for Human Rights, Åbo Akademi University, 2009) 601, at 610-611. According to Scheinin, general comments and recommendations are 'systematic compilations of lines of interpretations or the treaty provisions', representing 'one form of institutionalized practice of interpretation' (at 610).
[28] For example in ECtHR *İzzettin Doğan and Others v. Turkey*, Appl. no. 62649/10, Judgment of 26 April 2016, para 54.
[29] European Commission for Democracy through Law (Venice Commission), OSCE/ODIHR Panel of experts on religion or belief (Opinion No. 271/2004), *Guidelines for legislative reviews of laws affecting religion or belief,* 11 June 2004, available at
https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2004)061-e
See also Manfred Nowak and Tanja Vospernik who submit that (with regard to the human right to freedom of thought, conscience and religion in general), that 'the freedoms of the *forum internum* are (….) widely regarded as absolute freedoms', (citing *inter alia* P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn.) (Kluwer, 1998) at 541 and M. Evans *Religious Liberty*, *supra* note 11 at 221), in Nowak & Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in Tore Lindholm,

inviolable nature of a human right or aspect thereof is of great significance in that any interference with such a right amounts to a violation. As put by Peter Petkoff, the *forum internum* (as the concept has evolved in international human rights law), is a sphere in which the state 'has effectively no jurisdiction', a forum 'which is constructed as a domain outside of a state's control'[30]. In other words, under the *forum internum/externum* construction of the freedom of thought, conscience and religion, the divide between the two forums is one definitive line demarcating the extent of state power, indeed, the law.[31]

2.3. The *forum externum*

While, as established above, the *forum internum* is both somewhat elusive as well as sacrosanct, the *forum externum*, i.e. the external aspect of the freedom of thought, conscience and religion, is easier to grasp, even if 'manifestation of religion or belief' is not fully self-explanatory as a concept. Nevertheless, the Court has stressed that 'bearing witness in words and deeds is bound up with the existence of religious convictions'[32], thus highlighting the significance of the external aspect of the freedom of religion or belief, even if restrictions on that aspect may be permissible, in contrast to the *forum internum*.

The text of Article 9 explicitly lists a number of forms that manifestation of religion or belief may take for the purposes of the protection offered therein. However, while 'worship, teaching, practice and observance'[33] covers a wide range of pursuits or modes of being, the Court has articulated that not every act 'which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief'[34]. Specifically, acts which 'do not directly express the belief concerned or which are only remotely connected to a precept of faith'[35] are not protected. Rather such acts as are protected under Article 9 must be 'intimately linked' to the religion or belief at hand. However, protection is not limited to generally

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W. Cole Durham, Jr., Bahia G. Tahzib-Lie et al. *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, 2004), at 148.

[30] Petkoff, 'Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights', 7 *Religion and Human Rights* (2012), 183 at 189.

[31] Or, as put by Pamela Slotte, ''a hands-off' area for States' in Slotte, 'International law and freedom of religion and belief: Origins, presuppositions and structure of the protection framework' in S. Ferrari (eds.), *Routledge Handbook of Law and Religion*, (Routledge, 2015) 103, at 110. See further the critique of the forum internum/externum dichotomy as discussed below at 2.4.

[32] *Kokkinakis, supra* note 20, at para 31.

[33] For a brief explanation of differences between these four categories of manifestation of religion or belief, see Martínez-Torrón, 'Manifestations of Religion or Belief in the Case Law of the European Court of Human Rights', in 12 *Religion & Human Rights* (2017) 112, at 120-127.

[34] See *Eweida et al. supra* note 4, at para 82.

[35] *Ibid*.

recognized forms of practice or devotion of a particular religion or belief, but 'the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case.'[36] Furthermore, recent case law, as discussed more fully in the next Chapter, has established that it is not necessary to show that a given act amounted to a duty under a particular religion in order to be protected as a manifestation.[37] Moreover, it should be noted that manifestation covers both the public as well as the private spheres.[38]

The manifestation aspect of the freedom of religion or belief is, in part at least, easier to conceptualize than the *forum internum*, even if leaving open some important questions, introduced below at 2.4. From a legal perspective, at present a (if not *the*) key significance of the *forum externum* pertains not to the particular features within the category of 'manifestations' but simply the fact of whether the substance of a particular complaint falls within that category, rather than the *forum internum*. As already alluded to above, such an approach opens the door to the question of permissibility of limitations, and, moreover, recourse to the margin of appreciation.[39] These aspects will be expanded in more detail in the next chapter, but are nevertheless mentioned here by way of introduction.

2.4. Critiques of the *forum internum/ externum* dichotomy

Despite its persistent place in both the judicial and academic discourse as the established theoretical construction of the freedom of thought, conscience and religion,[40] the *forum*

[36] *Ibid*.
[37] *Ibid*.
[38] At times the distinction between the forum internum and externum is conceived of as corresponding to a private/public divide. However, such is not accurate: the right to manifest religion (*forum externum*) includes the right to do so in both public as well as private (and alone or in community with others). See Art. 9(1) ECHR. See also Bielefeldt, Ghanea and Wiener, writing with regard to the prohibition of coercion under the freedom of thought, conscience and religion submit (commenting on Manfred Nowak's submissions in M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev.) (N.P. Engel, 2005) at 410ff) that 'Nowak wrongly conflates the difference between the *forum internum* and *forum externum* with that between 'private and public freedom.' Manifestations of freedom of religion or belief (in the *forum externum*) cover both private and public dimensions.' In Bielefeldt, H., Ghanea, N. and Wiener, M., *Freedom of Religion or Belief: An International Law Commentary*, (Oxford University Press, 2016), at 198 (footnote 4).
[39] Be it denoted as 'wide', or 'broad', 'certain' or 'limited', it cannot be denied that the 'margin of appreciation' doctrine is particularly prevalent in Article 9 jurisprudence. The 'margin of appreciation' in the jurisprudence of the ECHR refers, broadly speaking, to 'the room of manoeuvre the Strasbourg institutions are prepared to accord to national authorities in fulfilling their obligations under the European Convention on Human Rights' (in S. Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights',* (Council of Europe Publishing, 2000), at 5. See for example, Hill and Barnes, 'Limitations on Freedom of Religion and Belief in the Jurisprudence of the European Court of Human Rights in the Quarter Century Since Its Judgment in *Kokkinakis v. Greece*', in 12 *Religion & Human Rights* (2017) 174, at 190-193. However, as observed by Hill and Barnes, resort to the margin of appreciation does not mean that no violation of the relevant article will ever be found, at 193.
[40] Recall Petkoff *supra* note 1; M. Evans *supra* note 7.

internum/externum dichotomy has nevertheless also been subject to regular criticism, various strands of which are introduced here. First, a curious feature of the *forum internum/externum* dichotomy on the one hand is its almost self-evident existence, along with, on the other hand, significant uncertainty as to the precise site of the divide between the two *fori* on the part of the Court.[41] A particular case in point is the conceptualization of the negative aspects of the freedom of religion, such as the right not to reveal one's religion or belief (or lack thereof), the right not to participate in religious practices of a religion which is not one's own, and arguably too (and particularly significant for present purposes), the right not to act in a way which is incompatible with one's religion or belief. On occasion such aspects have been conceptualized as falling within the scope of the *forum internum*,[42] on other occasions, the *forum externum*.[43] Given the significant repercussions of whether an aspect of the freedom of religion or belief is considered as falling within the 'internal' or 'external sphere' vis-à-vis the possibility of the state introducing limitations thereto, such inconsistency and confusion is problematic. However, rather than pressing for increased conceptual clarity regarding the internal/external dichotomy in this regard, the present thesis will, rather, argue in favour of stepping away from such a dichotomy altogether (if not completely abandoning the dichotomy), proposing an alternative conceptualization of the freedom of religion or belief (see most fully in Chapter 6).

Second, and not entirely dissimilar to the previous criticism, scholars have noted the possible permeability or overlap between the two *fori*:[44] for example, it has been argued that some

[41] In another context, Malcolm Evans observes that despite it's ostensibly inviolable nature, the *forum internum* appears to have some 'discretionary edges', see M. Evans*, 'Quoting Kokkinakis' supra* note 7, at 88. See also the discussion in C. Evans (2001) *supra* note 2, at 73, on the 'self-evident' yet somewhat unclear divide between the internal and external realms of the freedom of religion or belief. See also discussion in Demir Gürsel, 'The Distinction Between the Freedom of Religion and the Right to Manifest Religion: A Legal Medium to Regulate Subjectivities', in 22 *Social & Legal Studies* (2013) 377 at 378-379.

[42] ECtHR *Sinan Işık v. Turkey*, Appl. no. 21924/05, Judgment of 2 February 2010.

[43] See *Buscarini v San Marino supra* note 2, see also applications of Ladele and MacFarlane in *Eweida et al*. *supra* note 4.

[44] See again, M. Evans *supra* note 7, at 88; C. Evans *supra* note 2, at 73, and also at 76: 'At some point, burdening external manifestations of belief must have serious implications for the internal realm', indeed, C. Evans (commenting on the US case of *Wisconsin v. Yoder*) suggests that 'At some point, placing burdens on manifestations of belief must also be a breach of the basic right to freedom of religion or belief'. Indeed, writing with regard to the forum internum/externum dichotomy in the context of Art. 18 ICCPR, Bielefeldt, Ghanea and Wiener note the necessary connectedness of the two *fori* such that 'In practice, *forum internum* and *forum externum* closely belong together and should generally be seen in a continuum', commenting also on the views of the Human Rights Committee in *Hudoyberganova v. Uzbekistan*, Communication no. 931/2000, CCPR/C/82/D/931/2000, 18 January 2005, where, in para 6.2., the Human Rights Committee held that the expulsion of the author from University for failure to remove her religious headscarf violated the author's rights under Art. 18(2) ICCPR not to be subject to coercion which would impair her freedom to have or adopt a religion or belief of her choice, in Bielefeldt, Ghanea and Wiener, *supra* note 38, at 206-208.

restrictions on the *forum externum* could conceivably encroach on the *forum internum*.[45] In other words, some restrictions on the freedom to manifest religion or belief may be so coercive as to interfere with the very freedom to hold to a particular thought or belief.[46] Similarly to the first criticism articulated above, such an overlap sits uneasily with the apparent separation between the two realms. Indeed, the concept of '*coercion'* in the context of the freedom of religion or belief will be explored in greater detail throughout the subsequent chapters. However, for present purposes it suffices to propose that 'coercion' with regards to religion or belief, is not easily confined to either of the traditional *fori*. For example, Paul Taylor argues, (albeit maintaining the language of the *forum internum),* that 'freedom from coercion to act contrary to one's religion or belief is protected within the *forum internum*'[47] while at the same time acknowledging that 'a general prohibition to that effect would be unacceptable because of its breadth.'[48] In short, one line of inquiry (and argument) in the present thesis explores the applicability of the prohibition of coercion under the freedom of religion or belief to (at least) some instances of conscientious objection in the workplace.

A third broad strand of criticism problematizes the *forum internum/externum* dichotomy more from the vantage point of the religious individual (or indeed an individual holding a particular (non-religious) belief), for whom the distinction between belief and action may not be a meaningful one. As astutely observed by Carolyn Evans,

> the emphasis given in the case law to the primacy of internal or belief-based systems as the core meaning of religion is also not necessarily consonant with the way in which many religions would define themselves.[49]

Indeed, articulating the matter further, she argues that forcing an individual to act in such a way as is contrary to his or her religion or belief – or imposing a penalty for compliance with

[45] See for example, M. Evans, 'Manual on the Wearing of Religious Symbols in Public Areas,' (Martinus Nijhoff Publishers, 2009), at 16-17; See also C. Evans (2003) *supra* note 2, at 82, on the question of how, for example, requiring individuals to reveal their religious affiliation (or lack thereof, or indeed changes in) for the purposes of taxation might interfere with the *forum internum*. Similarly C. Evans considers the possibility of the state requiring individuals to act in ways which are in direct contradiction to the requirements of their beliefs as arguably interfering with the internal as well as the external realm, at 76-78.
[46] Even if it is not exactly clear what form or severity such a burden would need to take: C. Evans *supra* note 2, at 78; M. Evans, *Religious Liberty, supra* note 11, at 300-303.
[47] P. Taylor, *Freedom of Religion supra* note 1, at 119.
[48] *Ibid*.
[49] C. Evans, *supra* note 2, at 75.

such beliefs – 'is not irrelevant to the core of many people's religion or belief'.[50] Moreover, others assert that the emphasis on the primacy of belief vis-à-vis practice/action reflects a narrow understanding of (Western, especially protestant) religion, which does not accord with many other religions.[51]

Finally,[52] perhaps due to the established conceptualization of the freedom of religion or belief, together with the nature of the complaints presented before the Court, it can be argued that the jurisprudence on the manifestation of religion or belief has not developed such as to also consider aspects of manifestation to which limitations may not, or may only very rarely be permissible. It should be recalled that 'manifestation of religion or belief' as protected under Article 9 covers not only such 'worship, teaching, practice and observance' as occur in public and 'in community with others' but also that taking place alone and in private. Commenting on the texts of the provision protecting freedom of religion and belief in the ECHR, ICCPR and UDHR, Stephanie Berry argues that the inclusion of the manifestation of religion or belief within the relevant provisions was deliberate in view of protecting against 'unwarranted interference' with such manifestation.[53] The question can legitimately asked when, if ever,

[50] *Ibid.,* at 75-76. Moreover, Bielefeldt, Ghanea and Wiener also reflect on the connectedness of the two *fori*. They suggest that 'a merely internal religious act would lack any visibility and thus would hardly become an issue of legal contention, a merely external act, by contrast, would amount to mere conformism and might arguably even cease to be a manifestation of any serious religious (or non-religious) conviction.' Bielefeldt, Ghanea and Wiener, *supra* note 38, at 206.

[51] See M. Evans, 'It is arguable that the entire way in which we conceive of human rights has the effect of privileging certain forms of religion or belief', forms which tend to be 'voluntarist, private and individualistic' (M. Evans, 'Freedom of Religion and the European Convention on Human Rights: approaches, trends and tensions', in P. Cane & C. Evans (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2008) 291, at 313. See also P. Slotte on the cautious stance of the Court to certain forms of religion, P. Slotte *supra* note 31, at 105-106 and Diamantides, 'Affect and the Theo-Political Economy' in S. Mancini and M. Rosenfeld (eds.) *Conscience Wars: Rethinking the Balance between Religion, Identity and Equality,* (Cambridge University Press, 2018), 149 who submits, with regard to Article 9, that 'arguably, the very assumption of the primacy of conceptual over affective meaning contributes to the alleged bias of Western judges and lawmakers against non-Western religions', at 167. However, the present author is sceptical of emphasising such bias. The jurisprudence of the Court, as discussed in more detail in the next Chapter in fact provides some apt examples of different religions being treated in a similar manner in cases of analogous facts (e.g. worktime conflicts with religion, conflicts with religion and curriculum in the educational context, and also in the display/wearing of religious symbols and attire). If one pre-eminent explanation for the Court's stance in such cases would have to be identified, it would likely be resort to the respondent State's margin of appreciation on the matter. If , on the other hand a bias vis-à-vis a particular religion (or an interpretation/mode of practice thereof) had to be identified in the Court's jurisprudence, a strong contender would be religious nominalism.

[52] It is not argued here that the criticisms presented here are an exhaustive summary of the academic literature on the forum internum/externum. Rather, it is suggested that the criticisms introduced herein suffice for the purpose of the present argument, namely establishing the problematic nature of the forum internum/externum dichotomy, warranting at least earnest consideration of an alternative theoretical conceptualization of the freedom of thought, conscience and religion.

[53] Berry, 'A 'good faith' interpretation of the right to manifest religion? The diverging approaches of the European Court of Human Rights and the UN Human Rights Committee', in 37 *Legal* Studies (2017) 672 at 676.

might the Article 9(2) criteria for permissible limitations in respect of some solitary, private act (or omission!) of, say, an individual's religious observance be satisfied.[54] And if at least some aspects of manifestations or religion or belief could be identified where such restrictions are conceivably never permissible, would such manifestations not be more appropriately classed within the 'absolute' or 'inviolable' realm of the freedom of religion or belief?

2.5. Time for a radical rethink of the *forum internum/externum* dichotomy?

On the basis of the above brief discussion, it is appropriate to ask whether time is ripe for a radical rethink of the *forum internum/externum* construction of the freedom of thought conscience and religion. A curious feature of the jurisprudence under Article 9 is, on the one hand, the seemingly steadfast commitment to the separation of the internal and external spheres of the freedom of religion or belief (with the subsequent legal repercussions), while at the same time apparent confusion as to the exact location of the divide. This is not entirely a criticism; there are arguably solid reasons to conceptualize two distinct spheres under which to assess all the phenomena that might conceivably fall under the very broad category of 'religion and belief', while also shying away from too fixed a delineation of such spheres due to the danger of doing so arbitrarily. Nevertheless, the present thesis will seek to argue that an alternative theoretical conceptualization of the freedom of religion or belief is also possible. Such a conceptualization necessitates some additional conceptual ingredients drawn from two other theoretical discourses, as introduced in the subsequent discussions below.

3. The 'core' theory of human rights

3.1. Introduction

The notion of 'core' in human rights theory and practice can be used to denote a number of different issues.[55] For one, the notion of 'core' can be used with reference to the question of

[54] See ECtHR *Dimitrova v. Bulgaria*, Appl. no. 15452/07, Judgment of 10 February 2015, where a violation of Article 9(2) was found due, inter alia, to the search and confiscation of several items from the applicant's home for the sole purpose that she was known to be a member of a particular religious community and had organized religious meetings in her home (paras 28-31); *Mockuté v. Lithuania supra* note 18, which concerned the right of a patient in a psychiatric hospital to practice her religion.

[55] Martin Scheinin considers three main approaches to the identification of 'a core within the normative framework of human rights law' in Scheinin, 'Core Rights and Obligations', in D. Shelton (ed.) *The Oxford Handbook of International Human Rights Law,* (Oxford University Press, 2013), 527-540. The three approaches discussed include (1) considering some particular human rights as core rights, (2) considering each human right as containing an essential core and (3), considering the core obligations owed by states in respect of their human rights commitments.

'absolute' human rights (often related to the issue of hierarchy among human rights)[56], or, particularly in the context of economic, social and cultural rights, to refer to a state's minimum core obligations.[57] Moreover, the notion of 'core' can also be considered with respect to the function thereof in human rights theory and practice,[58] or indeed to highlight the general importance of a particular aspect of a human right, without implying any categorical theoretical conclusions. Notwithstanding such analyses, the present thesis considers and will proceed on the basis of the notion of human rights provisions containing an 'essential or inalienable core', i.e. an aspect/s which are not subject to limitations in the sense of being balanced against competing interests,[59] with a particular view to identifying such a core in respect of the freedom of thought, conscience and religion. While the latter – the main theoretical argument advanced in the present thesis – is most fully presented and explained in Chapter 6, the present section is concerned with introducing the particular category of the 'core' theory of human rights employed in the present thesis. In other words, my purpose is to articulate (and also differentiate) the notion of the core theory of human rights utilized in the present thesis vis-à-vis other possible meanings. Notably, however, I am not concerned as such with dismissing the other possible uses of the 'core' notion in human rights law. Nevertheless, the presence of multiple meanings of 'core' in this context should be recognised, to avoid unnecessary confusion and conflation of similarly denoted but distinct meanings of the term.

[56] *Ibid*., at 526-532.
[57] *Ibid*., at 536-538. See also Gerards, 'Core rights and the interaction or normative and analytical elements in human rights scholarship' (2 February 2017), in M. Scheinin (ed.), *Methods of Human Rights Research* (working title), Forthcoming, Available at
SSRN: https://ssrn.com/abstract=3333627 or http://dx.doi.org/10.2139/ssrn.3333627 , at 10-15.
[58] *Ibid*. Gerards identifies four such functions, first as a tool to define human rights, second, as a tool to determine the intensity of review of limitations, third, with a role in reasonableness review and fourth, with regards to positive obligations and socio-economic rights (at 2).
[59] As put by Scheinin, this understanding of the 'core' of human rights stipulates that 'all or many human rights contain an inviolable core, i.e. one or more essential elements that are not subject to limitations or exceptions.' Scheinin *supra* note 55, at 532. However, as will be explained later in Chapter 6, such a formulation does not necessary mean that such 'cores' are completely unlimited. The argument advanced here, as indeed argued by Scheinin, is that the 'core' of human rights is articulated on the basis of the type of norm of which it comprises – i.e. norms which are 'rules' and not 'principles' (see section 4. below). However, the categorization of a particular norm as a *rule* does not necessitate the conclusion that such a rule applies in each and every circumstance, always determining the outcome of a case. Such would only be the case if the scope of application/validity of such a rule were unlimited. Yet, this latter requirement is a separate analytical step from the step of correctly identifying a particular norm as a rule.

3.2. The 'essential core' of human rights

3.2.1. Basis in international human rights law

Support for the notion of each (or many) human rights containing an essential core (at least 'in the spirit' of the notion of 'core' explored and argued in favour of in the present thesis) can be garnered from various sources of law.[60] At the domestic level, the 'essence' or essential core of fundamental rights is perhaps most famously associated with the German legal system, where, Article 19§2 of the German Basic Law (on restrictions to basic rights) provides that 'In no case may the essence of a basic right be affected' when restrictions are applied.[61] At the international level, evidence for such a formulation can be found in General Comments issued by the United Nations Human Rights Committee, as exemplified in its General Comment No. 27 on the freedom of movement,[62] articulating that any restrictions applied to the right 'must not impair the essence of the right'[63]. Such a stance is repeated in more general terms in General Comment No 31: 'The Nature of the General Obligation Imposed on States Parties to the Covenant' wherein the Human Rights Committee provides that 'In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.'[64] Furthermore, support for the notion of the 'essence' of a human right can also be found in the European context.[65] Perhaps most explicitly, in the Charter of Fundamental Rights of the European Union, the Article addressing permissible limitations to fundamental rights (Article 52(1)) specifically provides that any limitations

[60] It is admittedly somewhat confusing to search for a concept which is at present somewhat undefined. Indeed, the argument advanced in the present thesis will argue in terms of defining the concept of 'core/s' in a particular way, which, even if not explicitly endorsed in the practice as it is at present, is nevertheless a plausible conceptualization not inconsistent with present practice, and which moreover accommodates certain criticisms voiced against the concept of the 'essential core of human rights' (such as articulating certain aspects of a right as more important – necessarily implying the lesser importance of other aspects of that right).

[61] Basic Law for the Federal Republic of Germany, 23 May 1949, Print version as at November 2012, available at https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510 As discussed in J. Christoffersen, in the context of German constitutional law, a central debate on the 'essential core' of basic rights concerns whether such an 'essential core' is understood as objective or subjective, or in absolute or relative terms, J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, (Martinus Nijhoff Publishers, 2009) at 137. The present thesis seeks to understand and articulate the theory of 'essential core' of human rights within the ECHR as understood in terms of the categories of norms (i.e. rules or principles) encompassed therein.

[62] Human Rights Committee, General Comment No. 27: Article 12 (Freedom of movement), CCPR/C/21/Rev.1/Add.9, 2 November 1999, at para. 13.

[63] *Ibid*. See discussion in Scheinin *supra* note 55, at 533.

[64] General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, at para 6.

[65] For a discussion of the 'essence' of fundamental rights in the EU context, see Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights Under the Charter' (Case note on ECJ 6 October 2015, ECJ C-362/14 *Maximillian Scherms v. Data Protection Commissioner*) 12 *European Constitutional Law Review* (2016) 318.

must *inter alia* respect 'the essence of those rights and freedoms'.[66] Moreover, there are also multiple references to 'the essence of a human right' in the jurisprudence of the European Court of Human Rights. Although it remains somewhat unclear what precisely is meant by such an 'essence'[67], there are several references to the concept in respect of the right to a fair trial[68], but also in respect of other rights, [69] or particular aspects of a right.[70] The 'essence' of the freedom of thought, conscience and religion has not been explicitly developed, although certain aspects of Article 9 (notably the autonomous existence of religious communities) have been identified as being 'at the heart' of the protection afforded by Article 9[71], in addition to repeated references to the 'absolute' or 'inviolable' nature of the so-called *forum internum*, as discussed in section 2.2.2. above.

3.2.2. Refining the concept of 'essential core' of human rights

The above discussion establishes, for initial purposes, a vague notion of an 'essential core' of human rights,[72] including, it is suggested, the freedom of thought, conscience and religion. However, what precisely such an essence signifies from a theoretical perspective is not yet clear. A very low resolution depiction of the matter suggests that regarding all the various

[66] Charter of Fundamental Rights of the European Union, OJ 2012/C 326/02, Article 52(1).
[67] Hoyano, 'What is Balanced on the Scales of Justice? In Search of the Essence of a the Right to a Fair Trial', [2014](1) *Criminal Law Review* 4, at 15. Indeed, as it should be noted that the use of 'core' or 'essence' may vary, see Christoffersen, *supra* note 61, at 140-5.
[68] See Hoyano *ibid.,* particularly at 15-16.
[69] See for example ECtHR *Hirst v. United Kingdom (No.2)*, Appl. no. 74025/01, Judgment of 6 October 2005, at para 62 (regarding Article 3, Protocol 1); ECtHR *Aziz v. Cyprus*, Appl. no. 69949/01, Judgment of 22 June 2004, paras 29-30 (Article 3, Protocol 1), ECtHR *Christine Goodwin v. United Kingdom*, Appl. no. 28957/95, Judgment of 11 July 2002, para.101 (on Article 12), ECtHR *Leyla Şahin v. Turkey*, Appl. no. 44774/98, Judgment of 10 November 2005, para 154 (Article 2, Protocol 1).
[70] A good example being the Court's references to the right against self-incrimination under the right to a fair trial, for example in ECtHR *Saunders v. United Kingdom,* (Appl. no. 19187/91, Judgment of 17 December 1996) at para 74 (albeit explicitly not pronouncing on whether the right against self-incrimination is absolute or whether infringements may be justified in some circumstances).
[71] ECtHR *Sindicatul "Păstorul cel Bun" v. Romania*, Appl. no. 2330/09, Judgment of 9 July 2013, a case raising issues under Article 9 and Article 11, the Court articulated that 'The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords.' Interestingly, in the same case the Court referred to the necessity of assessing whether the 'very essence' of Article 11 (the freedom of association) had been impaired, however not proceeding to articulate the matter further in its reasoning, at para. 139. The autonomous existence of religious communities has repeatedly been endorsed as being 'at the heart of the protection that Article 9 affords'. However, such is not yet to assert that the autonomy of religious groups is absolute, see judgment in ECtHR *Fernández Martínez v. Spain*, Appl. no. 56030/07, Judgment of 12 June 2014, para 127.
[72] If not all human rights, at least many. The present argument does not delve into the discussion as to whether each and every human rights provision must encompass an 'inalienable core' as conceptualized in the present thesis, although it is suspected that such is the case. Nevertheless, inevitably the content of such a core will differ somewhat from provision to provision. However, for the purposes of the present argument it suffices to establish that at least some human rights – of which the freedom of thought, conscience and religion is one – contain such an essential core.

aspects of protection afforded under a particular human right[73], certain aspects are – by virtue of the 'essence' or 'essential core' theory – somehow qualitatively distinct from other aspects protected under the right. The distinction that is often made is that the 'core' relates to aspects of a right that under no circumstances may be transgressed or limited (or 'balanced away'), while the non-core aspects may be subject to such balancing.[74] There is a significant body of scholarship devoted to the debate on such a notion of 'core'[75], and particularly as to whether such a notion encapsulates an 'absolute' or 'relative' conceptualization of the essential core. Under the absolute position, as summarized by Christoffersen, the essential core of a right can be determined a priori whereas under the relative approach, the 'essential core' is whatever is left over after the proportionality assessment.[76]

However, a problem with the afore-mentioned basis for a distinction between the 'essential core' and other aspects of a given right is that such a distinction is not categorical. In other words, it is not necessarily the case that aspects which are not subject to 'weighing and balancing' are therefore aspects of a right which cannot be limited, in the sense of having no limits to their scope. The 'weighing and balancing' associated with human rights generally involves the assessment of the permissibility of limitations, including proportionality, which is most pertinent with regards to Article 8-11 ECHR. For one, to point out the obvious, human rights provisions have 'scopes' or 'ambits' of applicability, meaning that they are not 'limitless' entitlements, albeit some are much wider in scope that others (e.g. Article 8 on the right to private and family life is perhaps the provision with the widest scope of application, extending in ambit to a vast range of aspects of life). On the other hand, whatever the 'essential core' of a human right is, it is often denoted as an aspect which is applicable – and therefore cannot be limited or restricted – in any situation. Such a conceptualization has many important commonalities on the discourse concerning so-called 'absolute rights', which tend to stand or fall on the absence or presence of a single exception.[77] Nevertheless, an alternative basis for at least an initial distinction vis-à-vis the 'essential core' and 'non-core' aspects of a given human rights provision would be the type of norm encapsulated therein. Such an argument has been proposed by Scheinin, who suggests that the 'inviolable core' of a human

[73] Here it is recalled that single human rights provisions, as for example Article 9, cover a number of different identifiable aspects of protection.
[74] See Christoffersen *supra* note 61, at 138.
[75] See Gerards *supra* note 57, at 8-9.
[76] Christoffersen, *supra* note 61, at 138-9. See also discussion in Gerards, 7-9.
[77] I.e. if a single exception to an absolute right can be found, then the right is not really 'absolute', so the argument goes. See for example, the debate on the 'absolute prohibition of torture'.

right might be understood as consisting of norms within the ambit of a particular human right which are 'rules' as compared with norms which are 'principles' as per the distinction made regarding the nature of norms by Robert Alexy in his 'A Theory of Constitutional Rights'[78]. It is argued here that such a distinction – based on the type of legal norm engaged – provides a sound basis for an initial analytical distinction between 'core' and 'non-core' aspects of a right, while not requiring the application of the 'core' in any and every circumstance.[79] In other words, distinguishing the core on the basis of norms which are rules under a particular human rights provision does not yet entail demarcating such aspects as 'absolute' in the common understanding of the term, though neither does it preclude the existence of at least some such 'essential cores' being absolute, thus understood. This conceptualization of the 'essential core' will be returned to in the concluding section of the present chapter, and more fully in Chapter 6. However, before proceeding thus, the following section will turn to consider the distinction among norms between rules and principles, as espoused by Alexy.

4. Rules and Principles

4.1. Introduction

The purpose of the present section is to introduce the third key component of the theoretical argument advanced in the present thesis, namely the distinction between norms which are 'rules' and norms which are 'principles' are advanced by Robert Alexy in his 'A Theory of Constitutional Rights'[80]. While Alexy's theory as a whole is built on his analysis of constitutional rights in the German legal order, for present purposes, the focus pertains to his analysis of legal norms as either rules or principles, a facet of his theory which is transferable also to other legal systems, including international law.[81] According to Alexy, norms (that is, 'ought' judgments)[82], can be categorised into either rules or principles, which amount to two

[78] See Scheinin *supra* note 55 at 534-535. It is important to note, however, that the specific aspect of Alexy's theory utilized here is the distinction among norms between rules and principles. In fact, Alexy himself considered constitutional rights to be principles, see postscript to *A Theory of Constitutional Rights* (*infra* note 80), at 388.
[79] As discussed in the following section (section 4), one identifying feature of norms with the characteristic of a rule is the delimitation of their scope of applicability.
[80] R. Alexy, *A Theory of Constitutional Rights,* (Oxford University Press, 2002), translated by Julian Rivers.
[81] See B. Böök, *Rules and Principles in International Law: Applying Alexy's Principles Theory,* (2018) at 63-66, PhD Thesis, on file in the library of the European University Institute.
[82] According to Alexy, both rules and principles are norms as 'they both say what ought to be the case. Both can be expressed using the basic deontic expressions of command, permission and prohibition', see Alexy *supra* note 80, at 45.

qualitatively distinct (and exclusive) types of norms.[83] Of paramount importance therefore is the correct identification of a norm as either a rule or principle. Criteria for distinguishing rules and principles, including the nature of resolving conflicts of norms, are introduced below.

4.2. Criteria for distinguishing between rules and principles

A number of criteria for distinguishing rules and principles have been suggested. These include the criteria of generality/specificity[84], the precision with which their respective spheres of application can be stated and their mode of creation, for example.[85] However, a particularly clear (indeed for Alexy, the decisive) difference between rules and principles can be found vis-à-vis the nature of their relative spheres of validity. In this regard, 'Principles are *optimization requirements*'[86] which can therefore 'be satisfied to varying degrees'[87] with the degree to which they are satisfied depending 'not only on what is factually possible but also on what is legally possible'[88]. Rules on the other hand, 'are norms which are always either fulfilled or not.'[89] Key in this regard is therefore determining the correct sphere of application of given rule, as 'If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less'.[90] On this basis, the importance of correctly identifying the nature of a particular norm as either a rule or principle can be seen. This is particularly so with regard to rules, given their definitive, all-or-nothing nature. With specific reference to the ambit of the present research, we can surmise that if there are rules to be identified among the norms under the human right to thought, conscience and religion, indeed as applied to the assessment of conscientious objection claims, then it is particularly expedient to identify them, given the categorical nature in which they apply. In other words, if there are norms with the quality of a

[83] See Alexy *supra* note 80, at 45: 'Principles are reasons for concrete judgments as to what ought to happen just as much as rules are, even if they are reasons of a very different nature.' However, in considering the thesis that the difference between rules and principles is one of degree as opposed to the thesis that the said difference is qualitative and categorical, Alexy agrees with the latter, concluding that 'There is a criterion which allows us to distinguish strictly between rules and principles' (at 47), namely regarding their relative spheres of validity.
[84] Among the suggested distinguishing criteria between rules and principles identified by Alexy is that of generality. According to this criteria, principles are norms with a high degree of generality, while the converse is true of rules. See Alexy *supra* note 80, at 45. Interestingly, to demonstrate the criteria of generality , Alexy uses the 'freedom of religion' as an example of a norm with a high degree of generality. On the other hand, Alexy demonstrates a norm with a low degree of generality with reference to a norm stating that 'every prisoner has the right to seek to persuade other prisoners to abandon their faith' at 45-46. Alexy further provides examples of other suggested distinguishing criteria between rules and principles, at 46.
[85] *Ibid*.
[86] Alexy *supra* note 80, at 47.
[87] *Ibid.,* 47-48.
[88] *Ibid.,* 48.
[89] *Ibid*.
[90] *Ibid*.

'rule' under the freedom of conscience, then such rules does not lend themselves to being weighed against other possible competing interests but rather, if valid, they must be fully complied with. This aspect – and indeed in general the qualitative difference between the two types of norms - is further expounded in Alexy's discussion on competing principles and the conflict of rules.

4.3. Conflicts of norms

First, according to Alexy an apparent conflict between rules can only be resolved by either reading an exception into one of the said rules, or by declaring (at least) one of the rules invalid.[91] If it is not possible to read an exception into one of the rules, then according to Alexy, at least one of the rules is invalid and must therefore be 'excised from the legal system', as legal validity 'does not admit of degrees'[92], but rather, 'legally speaking, a rule is valid or it is not'. More specifically, 'the fact that a rule is valid and applicable to a certain set of facts means that the legal consequence is valid'.[93] From the sphere of the freedom of conscience we might demonstrate this as follows. A rule under the freedom of conscience might state that it is prohibited to require anyone to reveal their religious affiliation (or lack thereof). Another rule might be postulated that in order to benefit from an exception granted from a general obligation on the basis of a particular religious affiliation, one must declare (and as appropriate substantiate) one's religious affiliation. The apparent conflict between the above rules is resolved by reading an exception into the general prohibition against requiring individuals to reveal their religious affiliation, whereby when claiming a particular privilege (such as an exemption from a particular legal obligation), the appropriate authorities may require an individual to reveal their religious affiliation. In such a situation neither of the rules needs to be declared invalid, but rather what is prima facie a very broad sphere of application of the first rule is, as it were, slightly refined in order to take into account the second rule. On the other hand in the case of a hypothetical rule stating that no one is allowed to recant one's religion (rule 1) and another rule stating that anyone is at any time and for any reason allowed to renounce one's religion (rule 2), there is a clear conflict, which cannot – as the rules stand – be resolved by reading an appropriate exception into one of the rules. Rather, one of the rules (in this case rule 1) would under international human rights law be declared invalid.[94]

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[91] *Ibid.,* at 49.
[92] As might other types of validity, such as social validity. *Ibid.*, at 49.
[93] *Ibid*.
[94] I used the example of renouncing one's religion instead of changing one's religion given that one's freedom to at least formally affiliate with a particular religion may on the other hand be limited by the internal religious

Conflicts between principles, or as Alexy articulates the matter, 'competing principles', are resolved in an altogether different way. Rather than reading an exception into one principle, or by refining the sphere of validity of a particular principle, an apparent conflict between two principles is to be resolved by *weighing*.[95] In other words, if one principle calls for one normative outcome, while the second principle calls for another (or even opposite) outcome in a given circumstance, 'then one of the principles must be outweighed'.[96] It is important to note, as articulated by Alexy, that the outweighed principle is not invalid, nor has the outweighing principle been read as an exception into the first, but rather 'the outweighed principle may itself outweigh the other principle in certain circumstances.'[97] So while the resolution of conflicting rules takes place 'at the level of validity', the resolution of competing principles is 'played out in the dimension of weight instead'.[98] Alexy demonstrates the resolution of competing conflicts with reference to a German case on the efficient running of the justice system, but for present purposes, to keep the discourse within the sphere of freedom of religion, I will demonstrate this difference with reference to a case decided before the European Court of Human Rights, namely *Sessa v Italy*[99]. This case, as will be discussed in Chapter 3, concerned a conflict between the religious observance of a lawyer and a scheduled preparatory hearing in a criminal trial, the injured party in which the applicant was representing. At the level of norms, the conflict was between 'proper administration of justice' (a principle) and the freedom to manifest one's religion (for present purposes – and in its broad sense also categorized as a principle). In its judgment, the Court in effect weighed these two principles against each other.[100] On the one hand, the freedom of the applicant to practice his religion would have called for a rescheduling of the hearing. On the other hand, what the ECtHR referred to as the rights of others – namely 'the public's right to the proper administration of justice and the principle that cases be heard within a reasonable time'[101]

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norms of that religion (i.e. religious doctrine)– an aspect which is itself protected under the freedom of thought, conscience and religion.

[95] Alexy *supra* note 80, at 50.

[96] *Ibid*.

[97] *Ibid*.

[98] *Ibid*.

[99] ECtHR *Sessa v Italy*, Application no. 28790/08, Judgment of 3 April 2012.

[100] It should be noted that this is an over-simplification of the technicalities of the case which was concerned with whether a failure by a court to reschedule a preparatory hearing for a criminal trial (for which the applicant did not have to be present, but with regards to which the counsel for the injured party' had the option to be present' according to the applicable law) amounted to an interference on the applicant's freedom to practice his religion by way of religious observation.

[101] *Sessa v Italy*, *supra* note 99, at para 38. The issue of 'reasonable accommodation' of religion or belief, and particularly whether such a duty can or should be read into the prohibition of discrimination on grounds of religion or belief under existing (EU law) standards is a hotly debated topic among scholars, see for example K. Alidadi, *Religion, Equality and Employment in Europe: The Case for Reasonable Accommodation*, (Hart

arguably (and in the Court's view decisively) called for not rescheduling the date of the hearing. For the purposes of the theoretical argument advanced in the present thesis, further support for these two norms being classified as principles can be garnered from the dissenting opinion in *Sessa v Italy*, where in short, three judges of the Court reached a slightly different outcome in weighing the two competing principles. Specifically, the dissenting judges considered, in light of the particular facts of the case and in line with the principle of proportionality [102], 'the conditions were met for attempting to reach a *reasonable accommodation* of the situation, that is to say, one that did not impose a disproportionate burden on the judicial authorities.'[103] In other words, the judges were of the view that by way of a few concessions, it would have been possible 'to avoid interfering with the applicant's religious freedom without compromising the achievement of the clearly legitimate aim of ensuring the proper administration of justice.'[104] Moreover, the classification of the norms concerned as principles is further supported by the submissions of the dissenting judges who suggested slightly altered facts in which the principles would have been weighed differently, with particular reference to an analogous case in which the applicants (also practicing members of the Jewish faith) had requested that a hearing be rescheduled on account of it coinciding with an important Jewish holiday.[105] However, in that case, the applicants had not informed the authorities of this clash until just over a week before the scheduled hearing (which had in fact been scheduled some months before). In *Sessa*, on the other hand, the applicant had informed the authorities of the clash immediately, the date of the hearing being still some months away.[106] Moreover, the dissenting judges rightly drew attention to the fact that the hearing in *Sessa* was not urgent such as would have been the case had it concerned a detention matter, for example. In other words, these deliberations serve to show how altered

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Publishing, 2017); and Foblets and Alidadi, 'The RELIGARE Report: Religion in the Context of the European Union: Engaging the Interplay between Religious Diversity and Secular models' in M-C. Foblets, K. Alidadi, J. Nielsen and Z. Yanasmayan (eds.) *Belief, Law and Politics: What Future for a Secular Europe*, (Routledge, 2014) 11. The present thesis, focusing as it does on the freedom of thought, conscience and religion rather than the prohibition of discrimination, does not seek to contribute specifically to the debate on reasonable accommodation, even though ultimately the analytical framework for approaching conscientious objection in the workplace might also be of relevance to that debate.

[102] Namely that the authorities – when choosing between the various means to achieve the legitimate aim pursued were to choose the measure which was least restrictive of rights and freedoms.

[103] *Sessa v Italy*, *supra* note 99, Joint Dissenting Opinion of Judges Tulkens, Popovic and Keller, at para 10.

[104] *Sessa v Italy*, *supra* note 99, Joint Dissenting Opinion of Judges Tulkens, Popovic and Keller, at para 10.

[105] ECmHR *S.H. and H.V. v. Austria*, Application no. 18960/91, decision of 13 January 1993.

[106] *Sessa, supra* note 99, joint dissenting opinion at para 11.

facts would have led to the competing principles in question being weighed slightly differently, with no overall order of priority being granted to either one in the abstract.[107]

It is hoped that the above discussion has shed some light on the nature of rules and principles as norms. It should be noted however that while – as per Alexy – norms are exclusively either rules or principles, particularly in the field of human rights there may be a slightly confusing interaction between norms which are general principles and specific rules which seem to arise or coexist from those principles.[108] Moreover, the resolution of competing principles may in themselves give rise to a rule, in which under certain given conditions a certain principle always weighs more than another.[109]

5. Conclusion

This chapter has introduced the reader to three essential components upon which the theoretical argument advanced in this present thesis is based. These theoretical discourses included first, the construction of the freedom of thought, conscience and religion as a dichotomous right comprising the (inviolable) *forum internum* and the *forum externum (*which may be subject to limitations). Section 2 introduced the notion of such a dichotomy, as well as an initial look into the scopes of the respective *fori*, concluding by presenting some key criticism of the said construction and proposing the need for a modified theoretical conceptualization of the freedom of thought, conscience and religion. Second, section 3 proceeded to introduce the notion of 'essential' or 'inviolable cores' of human rights as a theory of human rights with a basis in both the practice and theory of international human rights law (as well as constitutional law), even if such a notion is not altogether uncontroversial. A particular point of debate or controversy centres on whether the notion of 'essential core of fundamental/human rights' should be understood as an absolute or a relative notion, a debate closely linked to the role of proportionality or balancing in the case of limitations or conflicts of rights. However, it was pointed out that such debates can be understood as drawing false dichotomies, particularly as regards whether in order to be 'absolute' an essential core of a right need apply in each and every circumstance, and how such is in effect disproved by a genuine conflict between two such 'essential cores'. The

[107] Or indeed, for an applicable 'rule' to determine the outcome of the case (e.g. particular 'rules' under the right to a fair trial pertaining to the rights of a defendant in a criminal trial) instead of particular principles.
[108] See Scheinin, 'Terrorism and the Pull of 'Balancing' in the Name of Security' in M. Scheinin et al., *Law and Security – Facing the Dilemmas,* (EUI Working Paper Law 2009/1) 55, at 55
[109] See Alexy *supra* note 80, at 53.

afore-mentioned is also related to the notion of 'relativity'. However, it is suggested here that close care should be taken with one's choice of words, and in particular their meanings in particular contexts. For one, 'relative' can be taken to refer to the indeterminacy or changing nature of a right, (as contrasted with absolute as unchanging), or alternatively simply to the existence of a right in relation to, or in the context of, other interconnected rights. However, the latter understanding does not need to imply indeterminacy or varying meanings. A right can be 'relative' in the sense of being 'interrelated' and 'interdependent' (to use the standard human rights litany) to other rights, without, as a consequence, necessarily compromising the determinacy of its character. This is particularly so if we consider rights on the basis of the types of norms contained therein. Specifically, the 'essential core' of a right might be conceptualized as those norms under its ambit with the character of a rule (with a particular all or nothing nature) rather than a principle (a generally applicable optimization requirement). Applying the notions of 'absolute' and 'relative' to these two types of norms, we can say that rules are 'absolute' whereas principles are relative in the sense that within their sphere of applicability rules determine the outcome of a case, whereas principles are 'optimized' in a particular case relative to other principles, and the outcome of a case thus depending on a correct weighing of simultaneously applicable principles, with the principle carrying the most weight in a particular case determining its outcome. However, a key qualifying factor vis-à-vis the absoluteness of rules is that they are only applicable within their particular spheres or scopes of application, outside of which they are not applicable at all. It therefore becomes crucial to determine the scope of application of a particular rule. Notably, such a scope may in fact be relatively narrow, and as such seemingly not rendering such a rule 'absolute' in the sense of applying in each and every circumstance. On the other hand, neither is such a rule 'relative' in the sense of having varying meanings (or more specifically leading to varying outcomes), but rather its nature is in fact categorical (i.e. it either applies or it doesn't, and in the former, the rule determines the outcome of the case). On the other hand, distinguishing between rules and principles under a particular human rights provision does not preclude some such rules in fact having such a wide scope of application that they may also be understood as 'absolute' in the sense of the word implying applicability in each and every circumstance. Now, it may be appropriate to debate whether the notion of 'essential core' may be best left to connote such rules (i.e. rules with an unbounded scope of application), rather than just 'rules' as such. However, I suggest the former approach is ill-advised given the difficulty of definitely determining the applicability of such rules in each conceivable (and indeed, presently inconceivable) circumstance. Rather, understanding the

'essential core' as norms with the characteristic of a rule under a particular human rights provision allows for a necessary distinction to be made between the two types of norms (rules and principles) at play – and importantly the nature of resolving conflicts there amongst – while not necessitating categorical declarations as to the all-embracing nature of their spheres of applicability.

For the purposes of the focus of the present research, the theoretical components presented in the present chapter interact as follows. It was suggested that the *forum internum/externum* construction of the freedom of thought, conscience and religion suffers from a number of weaknesses, warranting a serious reconsideration as to whether it remains an apt and appropriate way to theorize the said freedom. Instead, it is suggested here that distinguishing between norms under the freedom of thought, conscience and religion on the basis of their nature as either rules or principles is an alternative and importantly a useful way to conceive of the right, enabling the delineation of the 'essential core' and the 'non-core' aspects thereof. Despite what the language of core/non-core might suggests, such a differentiation does not (need to) imply relative value (i.e. core is most important, non-core less important), but is rather a delineation with primary significance vis-à-vis the nature of the sphere of validity of each applicable norm, a matter most manifest in the resolution of conflicting norms. While such a conceptualization does not conclude the debate in any way, it provides an analytical framework and a set of tools for achieving heightened clarity and coherence. However, such a formulation of a right's essential core is not to say that the core is an aspect of the freedom of thought, conscience and religion which applies (and therefore determines the outcome of a case) in each and every circumstance, as the rule's scope of application is limited *inter alia* by the respective scopes of application of other rules.[110] While this may somewhat modify or even apparently demean the value of that which might at first be thought of as the core of a right[111], it is suggested here that even such a 'core' (understood as one or more identifiable rules under a particular human right) is nevertheless of significance. Such 'rules' amount to identifiable points of legal certainty under a more generally couched human rights provision. Although their precise scope of application may not be initially apparent, importantly it is ascertainable as the scopes of application of other surrounding rules are identified. While in practice this may take time as cases involving different potentially conflicting 'rules' are

[110] Both under the same human rights provision (e.g. we can presuppose the scope of application of a 'rule' under the freedom of religion being demarcated at least in part by the scope of application of a rule under 'freedom from religion'), as well as other human rights provisions.
[111] E.g. 'the irreducible aspect of a human right which always and in every circumstance applies'.

adjudicated,[112] once determined, the scope of application of a rule vis-à-vis another provides a demarcation of legal certainty. The same cannot be said at the general level as regards competing principles.[113]

Having introduced the three key theoretical components of the present thesis, and their significance for the theoretical argument advanced therein, the following three chapters will therefore turn to look for 'norms' applicable under the freedom of thought, conscience and religion in the context of conscientious objection in employment through three case studies, before returning, in Chapter 6 to analysing such norms under the theoretical framework presented in the present chapter.

[112] However such is not always the case, as some 'rules' are more easily identifiable, such as in the case of clear prohibitions which admit of no limitations or derogations.
[113] However, Alexy explains how an independent 'rule' can emerge with regards to competing principles, where under certain specific conditions, one principle always takes precedence over another – see Alexy *supra* note 80, at 50-54.

CHAPTER 3: Conscientious Objection in the Workplace under Article 9 of the European Convention on Human Rights

1. Introduction

Under the European Convention on Human Rights, two provisions are of particular significance to instances of conscientious objection in the workplace. Specifically, an individual facing a conflict between his or her conscience and a work duty might rely on either the freedom of thought, conscience and religion (Article 9), or the prohibition of discrimination on grounds of religion or belief (Article 14 together with Article 9, or Article 1, Protocol 12) in order to claim a right of conscientious objection. The purpose of the present Chapter is to consider the approach to claims of conscientious objection arising in the workplace specifically under the freedom of thought, conscience and religion as protected in Article 9 ECHR. This task is of interest not simply in view of the research question at hand, but also as there have been some significant developments in the relevant jurisprudence of the European Court of Human Rights in recent years. Moreover, despite some advances in the protection of religion/conscience in the workplace, many questions remain as yet unresolved, and a clear direction of future developments cannot be identified. This chapter therefore aims to assess the level of protection offered under Article 9 ECHR to an individual facing a conflict of conscience in the course of his or her work duties as far as it can be ascertained at present.

This chapter will proceed as follows. First, some important preliminary issues will be presented by way of background, for one introducing the freedom of thought, conscience and religion as protected in Article 9 and some central concepts thereof, as well as the application of the ECHR to the workplace context more generally, with reference to the categories of workplace under scrutiny. The main body of the chapter will then consider the relevant jurisprudence of the European Court of Human Rights as it has developed over the years in regard to claims of conscientious objection arising in the context of both secular (public and private) and religious/ethos-based workplaces. As case law specifically concerning conscientious objection in the workplace has been scarce, I will take a slightly broader approach, looking at cases pertaining to Article 9 in the workplace more generally (especially

as regards requests for some form of exemption), as well as considering conflicts between some other ECHR rights and workplace duties and expectations. By way of conclusion, I will identify the main lines of interpretation in the case law applicable to claims of conscientious objection in the workplace as well as the many unresolved issues which remain, suggesting that a more robust approach to the freedom of thought, conscience and religion reconceptualised around an 'inviolable core' would help to add analytical clarity – and a heightened level of legal certainty – to such conflicts, even if not necessarily always leading to markedly different outcomes in such cases.

2. Background: key concepts for understanding the freedom of thought, conscience and religion in workplace contexts under the ECHR

2.1. The freedom of thought, conscience and religion under Article 9 ECHR

While aspects of religious freedom intersect with several rights protected in the ECHR,[1] the focal provision for present purposes is Article 9, the text of which provides as follows:

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

The wording of Article 9 corresponds to that in relevant provisions in the Universal Declaration of Human Rights (UDHR)[2] and the International Covenant on Civil and Political Rights[3] as well as the Charter of Fundamental Rights of the European Union[4]. The structure

[1] For example, the freedom of expression (Art. 10 ECHR), freedom of association (Art. 11 ECHR), right to private and family life (Art 8 ECHR) and the prohibition of discrimination (Article 14 ECHR).

[2] See Art. 18 UDHR, (United Nations General Assembly, Universal Declaration of Human Rights, UN GA resolution 217 A (III), 10 December 1948), although notably the UDHR is drafted such that instead of a limitation clause attached to particular provisions, there is a general limitation clause in Article 29(2).

[3] The text of Art. 18 ICCPR is, however, slightly expanded to include a provision in Article 18(2) that 'No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice' and specifying the freedom of parents, and where appropriate, legal guardians, to ensure that the moral and religious education of their children conforms with their own moral convictions in Article 18(4).

[4] Article 10 of the Charter of Fundamental Rights (OJ 2012/C 326/02) provides: "1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in

of the right to freedom of thought, conscience and religion as protected in Article 9 thus contains two 'limbs', namely the freedom to hold or change one's beliefs[5], in addition to the freedom to manifest one's religion or belief which may be subject to limitation in accordance with Article 9(2).[6] The wording of Article 9 is slightly curious and asymmetric. On the one hand it refers to 'freedom of thought, conscience and religion', but the content of this right is only fleshed out in respect of 'religion and belief', and importantly only manifestation of religion or belief (and not conscience) is specified, and only such manifestation may – in accordance with Article 9(2) – be subject to limitations by states. There is some dispute among scholars as to the significance of the specific wording used – and in particular the change in the terminology over the course of Article 9. Some indicate that the choice to refer only to religion and belief (omitting conscience and thought) is not significant,[7] while others assert that given the ordinary and plain meaning of the words, a change in terminology is significant.[8] For present purposes, the text of Article 9 – especially as regards the

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worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right." Similarly to the UDHR, the Charter of Fundamental Rights provides for a general (instead of an article specific) limitation clause in Article 52(1): "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

[5] Art. 9(1).

[6] However, despite this structure, it has been suggested that even this external 'manifestation' aspect of the freedom of religion or belief may contain a 'core' which may not be subject to limitations, or which might in certain instances overlap with the so-called forum internum (as discussed in the previous Chapter under 2.4). For example, recent developments in the jurisprudence of the UN Human Rights Committee suggest that conscientious objection to military service is to be considered as 'inhering' in the freedom of thought, conscience and religion such that it may not be subject to limitation (see the Human Rights Committee in *Jeong et al. v. Republic of Korea* nos. 1642-1741/2007, (23 March 2011), CCPR/C/101/D/1642-1741/2007, para 7.3., 'the right to conscientious objection to military services inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion'. Such an outcome could be reached either by framing conscientious objection (to military service) as an aspect of the freedom to hold a religion or belief, or as an inviolable 'core' aspect of the freedom to manifest one's religion or belief. This will be discussed in more detail towards the end of the Chapter and in Chapter 6.

[7] Edge, 'Current Problems in Article 9 of the European Convention on Human Rights', *The Juridical Review* (1996) 42, at 43.

[8] See e.g. C. Evans, *Freedom of Religion Under the European Convention on Human Rights,* (Oxford University Press, 2001), at 52, in particular at footnote 8. Evans notes at 52-53 that 'Many people come to their religious beliefs by following their conscience and their conscience is, in turn, shaped by the nature of those religious beliefs. The individual believer may not find the distinction a meaningful one. Yet the distinction has been made in the wording of Article 9 and should inform the decision-making of the Court.' Van Dijk and van Hoof are of the view that Article 9 should be construed such that the freedom of conscience, namely the freedom to hold any moral conviction is absolute, but that Article 9 does not protect a general right to manifest one's conscience. They submit that 'If the freedom of conscience would comprise the right to act in accordance with the dictates of conscience, this freedom would be unlimited in the sense that every legal obligation would have to yield to (an appeal to) conscientious objections and convictions. But such unrestricted freedom of conscience in *foro externo* would amount to the abolition of the legal order as a binding system of general rules. Therefore it must be concluded that the freedom of conscience in Article 9 does not cover the "external manifestations" but only the

conscience/belief distinction – can be understood by construing 'conscience' in the first part of Article 9(1) as referring to the entire framework of an individuals moral dictates, acting in accordance to which is not a general and unlimited right protected under Article 9. On the other hand, the external aspects of one's conscience or moral framework can be covered by 'beliefs' in the second part of Article 9(1), manifestations of which may potentially be subject to limitations under Article 9(2). The Court has adopted a broad interpretation of 'belief' under Article 9, such that various types of beliefs, whether religious, irreligious or philosophical have been protected.[9] The general requirement has been that such beliefs attain a certain level of 'cogency, seriousness, cohesion and importance'[10] and as such not all opinions or convictions are protected under Article 9.[11] As regards manifestations of religion covered by Article 9, for present purposes it suffices to highlight that a distinction has been drawn in the jurisprudence between acts 'merely' motivated or inspired by a religion or belief and acts required by the religion or belief[12]. Although the more stringent demands of 'necessity' have been somewhat relaxed as a result of recent developments in the case law[13], the Court has, to a degree, still maintained the requirement for a close/direct link between actions (manifestations) and the relevant belief[14], a matter which is to be determined on the facts of each case.[15]

"inner world" (the *forum internum)*' in P. Van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights,* (Intersentia (4th ed.) 2006), at 754.

[9] See C. Evans *Freedom of Religion under the ECHR, supra* note 8. at 54-59.

[10] See for example ECtHR *Eweida et. al v. UK*, Appl. nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013.

[11] See ECtHR *Campbell and Cosans v. UK,* Appl. nos. 7511/76; 7743/76, Judgment of 25 February 1982, at para 36. The case concerned an alleged violation of Article 2, Protocol 1, and not Article 9 as such. Nevertheless, the submissions of the Court regarding convictions and beliefs is relevant for – and has been repeatedly referenced with regard to Article 9 jurisprudence as well. See also B. Rainey, E. Wicks and C. Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights,* (6th edn.)*(*Oxford University Press, 2014), at 412-413.

[12] The formulation as regards acts merely inspired or motivated by religion or belief was established in the *Arrowsmith* case (ECmHR *Arrowsmith v. United Kingdom*, Appl. no. 7050/75, Decision of 16 May 1977) concerning a woman who distributed pacifist leaflets to members of the armed forces, which inter alia included information on conscientious objection. The Commission did not consider the claimant's actions in distributing the leaflets to fall within the ambit of 'practice' under Article 9. See C. Evans *supra* note 8, at 113.

[13] Most notably *Eweida et al. supra* note 10, where a practice which was not considered a requirement under the relevant religion was nevertheless held to be protected under Article 9 such that a limitation of that practice (in the specific facts of the case) was not considered justified, and as such it was held that Article 9 had been violated. In finding a violation of Article 9, the Court in effect rejected the respondent Government's claim that the wearing of a cross did not attract the protection of Article 9 as it amounted merely to a 'personal expression of faith' and not 'a generally recognised form of practising the Christian faith, still less one that was regarded as a mandatory requirement' (para 58). Rather, the Court simply concluded that the applicant's desire to wear a cross 'was motivated by her desire to bear witness to her Christian faith' which was considered 'a manifestation of her religious belief in the form of worship, practice and observance', as such attracting the protection of Article 9. (para 89). Indeed, earlier in para 82, the Court specifically articulated that 'there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question'.

[14] See *Eweida et al. v. UK supra* note 10, at para 82: 'Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or

With specific regard to the present research question, how is a claim of conscientious objection (defined as the refusal to perform some activity/duty which irreconcilably conflicts with an individual's deep moral convictions) then to be approached under the freedom of thought, conscience and religion in the ECHR? The text of Article 9 itself provides for a number of possibilities. First, conscientious objection could, at least in some circumstances, be interpreted as falling under the absolute *forum internum* component of Article 9, namely the freedom to hold or adhere to (or not hold or adhere to) a religion or belief (to use the traditional vocabulary).[16] This might be the case where state coercion on an individual to act in a certain way is particularly severe[17] or where the act in question encroaches on a particularly sensitive ethical issue.[18] Such a construction would potentially have significant implications for States, given that the absolute component of Article 9 cannot by any interpretation be subject to limitations in accordance with Article 9(2). Alternatively, conscientious objection could be construed as a manifestation of religion or belief, which (at least initially) opens the possibility of limitations in accordance with Article 9(2). Indeed, this has been the line of reasoning adopted by the Court (and earlier by the Commission) so far in analogous cases which have been considered.[19] A third possibility – not much discussed in the

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influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1…'

[15] *Ibid*.

[16] Such a possibility has been suggested by Carolyn Evans: 'The Court needs to develop a more sophisticated definition of what the *forum internum* is and to explain in greater detail how it can be interfered with. In particular, there should be a recognition that there is a point where State coercion to force someone to act in a certain way is so severe that it interferes with belief as well as with manifestation.' In C. Evans *Freedom of religion under the EHCR*, *supra* note 8, at 205.

[17] *Ibid*.

[18] Specific consideration of the ethical issues involved in a conflict of conscience has been suggested by Scheinin, see Scheinin, 'The Right to Say "No": A Study under the Right to Freedom of Conscience', 75 *Archiv für Rechts- und Sozialphilosophie* (1989) 345, at 349, albeit not with reference as to whether such considerations bear on whether a refusal to perform a legal obligation for reasons of conscience encroaches on the inviolable *forum internum (*or the 'inviolable core' of the freedom of thought, conscience and religion more generally). See also Bielefeldt, 'Conscientious Objection in the Medical Sector: Towards a Holistic Human Rights Approach' in S. Klotz, H. Bielefeldt, M. Schmidhuber and A. Frewer (eds.), *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation* (transcript, 2017) 201 at 214-215.

[19] See *Eweida et al. v. UK, supra* note 10, at para 108, where the Court, referring to the refusal by the fourth applicant (McFarlane) to counsel same-sex couples in the course of his work as a counsellor employed by a private organisation providing psycho-sexual counselling, held that his refusal constituted a manifestation of his religion and belief, being 'directly motivated by his orthodox Christian beliefs about marriage and sexual relationships' (para 108). A similar line of reasoning can be seen in the Court's recent approach to objection to military service, See ECtHR *Bayatyan v. Armenia,* Appl. No. 23459/03, Judgment of 7 July 2011, at para 112. For a discussion (and critique) of earlier cases in which a conscience/religion based refusal was characterised as a manifestation of religion, see Evans, at 72-79. Discussing inter alia the cases of ECmHR *Darby v. Sweden* (Appl. no. 11581/85, Report of the Commission, 9 May 1989), (where a refusal to pay church tax was considered to have serious implications for the forum internum, although the case was eventually decided on other grounds), and ECtHR *Buscarini v. San Marino*, (Appl. no. 24645/94, Judgment of 18 February 1999)

literature[20] – is that conscientious objection (or some instances thereof) fall within the inviolable core of the manifestation of religion or belief. Such an approach would – at least in certain cases – in part serve to alleviate some of the difficulties with the *forum internum/forum externum* or belief/action dichotomy which though frequently critiqued,[21] seems nevertheless to be the settled construction of the freedom of religion or belief both in the courts and the academic literature. However, it is suggested that while such a dichotomy is to a certain extent justified on the basis of the wording of Article 9[22], it might not be the most helpful construction to maintain – at least as regards the applicability or otherwise of possible limitations to manifestation of religion or belief. Here the idea of the 'core' or 'cores' of human rights (as introduced in the previous chapter) is of use. In this regard it could be argued that rather than focusing on whether a particular matter is a manifestation of a religion or belief for the purposes of determining whether limitations could in principle be placed on that aspect (the acceptability of which would therefore need to comply with the criteria of Article 9(2)), one needs also to consider whether the given aspect falls within the inviolable core of the right to manifest religion or belief. While such an approach somewhat unsettles the existing construction, it finds some noteworthy support in the body of international human rights law and scholarship.[23] Moreover, with specific regard to conscientious objection, recent

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(where a refusal to swear an oath on the Bible to perform one's parliamentary duties properly was considered a manifestation of religion limitations on which did not satisfy Article 9(2) in the given case), and ECtHR *Valsamis* v. *Greece* (Appl. no. 21787/93, Judgment of 18 December 1996), (refusal by Jehovah's Witnesses to participate in a school military parade), Carolyn Evans critiques both the inconsistency of the Court/Commission in its approach to such refusals, but also highlights the difficulty of the *forum internum/forum externum* distinction, as well as its correct application in some of the cases discussed. For example, in *Buscarini,* where the Court held the obligation to take an oath on the Bible as described above contravened Article 9 given that it required the applicants (elected representatives) 'to swear allegiance to a particular religion' (at para 34, see C. Evans *Freedom of Religion supra* note 8, at 73), which, according to Carolyn Evans arguably interfered with the *forum internum* and should therefore have been considered non-derogable by the Court. Such an approach was however not even considered by the Court, which instead proceeded to an assessment of the acceptability of limitations under Article 9(2). See C. Evans *supra* note 8, at 73.

[20] Although see Berry, 'A 'good faith' interpretation of the right to manifest religion? The diverging approaches of the European Court of Human Rights and the UN Human Rights Committee', 37 *Legal Studies* (2017) 672, in which she – addressing the 'object and purpose' of the right to manifest religion – refers to the concept of the 'essence ' of the right (at 674), and, whilst acknowledging the permissibility of limitations to manifestations of religion, nevertheless asserts the fundamental character of that aspect of the right to freedom of thought, conscience and religion, (at 676).

[21] See also the discussion in S.I. Strong, *Transforming Religious Liberties: A New Theory of Religious Rights for National and International Legal Systems* (Cambridge University Press, 2018), at 89-92.

[22] According to C. Evans 'The wording of Article 9 itself does suggest that a distinction must be drawn between the general right to freedom of religion or belief and the right to manifest that religion or belief'. C. Evans, *Freedom of Religion, supra* note 8, at 76.

[23] Scheinin, 'Core Rights and Obligations' in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013), 527, at 532-535. Admittedly, support for the 'core' argument is primarily garnered from the jurisprudence of the Human Rights Committee, rather than from within the ECHR framework. However, this is not determinative for present purposes, where merely the possible categorisations of conscientious objection under Article 9 are posited. However, the idea of a 'core' of specific human rights is

jurisprudence of the Human Rights Committee lends some support for such an interpretation.[24] However, even anecdotally one can conceive of instances of manifestation of religion or belief regarding which it is near impossible to imagine that limitations would ever be justified under Article 9(2).[25] Such aspects of manifestation of religion or belief at least arguably fall within the 'inviolable core' of the freedom to manifest religion or belief[26] or the 'core of the freedom of thought, conscience and religion' more generally[27], although such a possible core could well extend further.[28] This aspect will be returned to at the end of this chapter, and, more fully in Chapter 6.

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not altogether alien even in the European context. For one, the limitation clause in the Charter of Fundamental Rights specifically refers to the 'essence' of rights. Furthermore, even in the context of the ECHR, there are references to the 'essence' or 'substance' of specific human rights – see, for example the discussion in Hoyano, 'What is balanced on the scales of justice? In search of the essence of the right to a fair trial' (2014) *Criminal Law Review* 4. See also the discussion in J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, (Martinus Nijhoff Publishers, 2009), 135-165. Importantly, Christoffersen observes that not all references to the 'essence' of a particular human right refer to 'an absolute essence' (or, as is the terminology used in the present research, 'an inviolable core'). Nevertheless, despite this inconsistency, he argues that there is – in the Court's jurisprudence – such a notion, albeit articulated only with regard to a few rights. The freedom of thought, conscience and religion does not feature in Christoffersen's discussion thereto (for good reason, the Court has not, in the context of Article 9 thus far referred to 'the essence' beyond the inviolability/absoluteness of the 'forum internum'), but it is submitted that such does not preclude that Article 9 contains such an absolute/inviolable core (extending also to aspects of manifestation of religion/belief).

[24] See recent views of the Human Rights Committee in respect of individual communications regarding conscientious objection, but note the split nature of the Human Rights Committee (as to the reasoning employed, not the ultimate finding of a violation) in *Young-kwan Kim et al., v. Republic of Korea*, Communication No. 2179/2012, CCPR/C/112/D/2179/2012, 14 January 2015; and *Min-Kyu Jeong et al. v. The Republic of Korea,* Communication No. 1642-1741/2007, CCPR/C/101/D/1642-1741/2007, 27 April 2011.

[25] Recall that the manifestation of religion under Article 9 refers to the freedom to 'either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.' The forum internum/externum distinction (together with Article 9(2)) in principle lead to the possibility that even private and solitary acts/omissions of religious/belief based observance could in some instances be limited. One is hard pressed to think of situations in which limitations on, for example, a private act of worship (e.g. a prayer), in the privacy of one's one home could ever be justified under Article 9(2). At least arguably, even some aspects of manifestation of religion or belief could never be justifiably limited, and would therefore fall within the 'inviolable core' of the freedom to manifest religion/belief. Whether or not in fact instances of conscientious objection (in the workplace) fall within such a hypothetical core is another matter, but the possibility at least is put forward at this stage, to be considered in more detail later.

[26] Although the issue of derogations during states of emergency is distinct from the issue of limitations, The Human Rights Committee in its General Comment 22 on Article 18 underscores the fact that 'The fundamental character of these freedoms (i.e. the content of Article 18(1)) is also reflected in the fact that this provision cannot be derogated from, even in times of public emergency', at para 1.

[27] For present purposes, it does not matter whether the freedom of thought conscience and religion is conceived of as containing a single core (which includes aspects of the manifestation of religion or belief) or whether the provision (e.g. Art. 9) is conceived of as containing a number of aspects/rights, which (or at least some of which) contain a distinct identifiable core.

[28] The construction of 'core' and 'margins' of the freedom of religion was referred to in a reference for a preliminary ruling before the CJEU regarding the nature of religious persecution in the determination of asylum claims, in C-7/11 and C-99/11 *Bundesrepublik Deutchland v. Y and Z* ECLI:EU:C:2012:518. At issue was, in short, the extent to which violations of the freedom of religion in the country of origin would amount to persecution for the purposes of asylum applications, and specifically whether it was necessary that the 'core' (understood as the 'private' and not simply as the internal dimensions) of the freedom of religion be violated – or whether also violations of the 'margin' or 'fringe' of religious freedom (public aspects) would count as religious persecution in a context in which an individual would be free to practice his religion in private, but in which he

2.2. The ECHR and the workplace: preliminary considerations

In the past, the approach of the European Court of Human Rights[29] was rather restrictive regarding the engagement of Convention rights in the workplace, holding that the so-called 'freedom to resign' was sufficient protection of an employee's ECHR rights that were claimed to have been infringed.[30] Moreover, the Court has emphasised that the Convention does not protect the right to choose a particular profession[31] and that recruitment to the public service was deliberately omitted from its scope.[32] Nevertheless, there has been a marked change in the Court's case law regarding Convention rights at work, extending most recently to include religious manifestations under Article 9.[33] Below, I will outline in brief some specific aspects regarding the application of the ECHR in the context of three broad categories of workplaces, namely public sector (where a public authority acts as employer), private sector workplaces, and religious/ ethos-based workplaces.

2.2.1. Public authorities

As an international treaty signed and ratified by States, the obligations created by the ECHR in respect of the rights protected therein are owed by those States. The ECHR creates both negative and positive obligations, that is to say that States are under a negative obligation not to interfere with the rights of individuals as protected under the Convention, and a positive obligation to ensure the effective enjoyment of those rights by individuals within their jurisdictions.[34] Therefore as regards acts of public authorities, the attributability of those acts to the state is not problematic. Some early case law dealt with the distinction between the public and private functions of public authorities, notably considering the engagement of

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was likely to face consequences if he were to do so public, including by publicly revealing his religious affiliation. However, perhaps confusingly for present purposes, the reference to the 'core'/ 'margins' of the freedom of religion referred in general to the private and public dimensions of the right, the former encompassing the so-called forum internum as well as private manifestations, while the latter encompassing public aspects of one's religion/belief.

[29] And previously also the European Commission of Human Rights.

[30] See L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, Oxford; Portland: Hart Publishing (2008), at 87.

[31] *Ibid.,* at 88, referring to ECtHR *Thlimmenos v. Greece,* Appl. No. 34369/97, Judgment of 6 April 2000, at para 41.

[32] See ECmHR *Konttinen v. Finland,* Appl. No. 24949/94, Decision of 3 December 1996 at p.6.

[33] See the application of Eweida in *Eweida et al. v. UK, supra* note 10, where a violation of the right to freedom of religion of an employee employed by a private company was found by the Court. Indeed, in *Eweida et al.* the Court recognised the incongruence between its jurisprudence of other ECHR rights in the workplace, and its jurisprudence on Article 9, at para. 83.

[34] Art. 1 ECHR provides that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section1 of this Convention.' This has been interpreted as including both negative and positive obligations, see D.J. Harris, M. O'Boyle and C.M. Buckley, *Law of the European Convention on Human Rights,* (Oxford University Press, (2nd edn.) 2009), at 18-19.

ECHR obligations to public authorities as employers.[35] In its findings, the Court held that the obligations imposed on states by the ECHR were applicable even in their capacity as employers.

2.2.2. Private employers

Private employers are not, it goes without saying, Contracting Parties to the ECHR and thus not under direct obligations created by the Convention. The actions of private employers are nevertheless engaged under the Convention system indirectly, through the operation of the positive obligations[36] owed by a state to ensure the effective implementation and protection of the rights protected by the Convention within its jurisdiction.[37] As such, while the acts of private employers are not directly attributable to the state, the state must nevertheless ensure through its positive obligations that the Convention rights of individuals in the context of the private sector workplace are not unduly interfered with. Moreover, it should be noted that due to the procedural requirements of the Court that applicants first exhaust all domestic remedies, by the time an application reaches the Court in Strasbourg, the engagement of the State is already evident, such that through the operation of the domestic courts the initial action of the employer regarding which a complaint is brought has acquired a 'stamp' directly attributable to the State.[38]

2.2.3. Religious and ethos-based organisations as employers

The position of Churches and religious/ethos-based organisations as employers is interesting for a number of reasons. On the one hand, such organisations could be considered as employers like any other, calling for no distinct approach vis-à-vis the protection afforded by

[35] See B. Rainey et al. *European Convention on Human Rights supra* note 11, at 87. See ECtHR *Swedish Engine Drivers' Union v. Sweden,* Appl. No. 5614/72, Judgment of 6 February 1976, *Schmidt and Dahlström v. Sweden* Appl. No. 5589/72, Judgment of 6 February 1976.

[36] *Ibid.*, See also *Eweida et al*. *supra* note 10, at para 84.

[37] This is also apparent from the text of Art. 52 ECHR, see B. Rainey et al *supra* note 11, at 86.

[38] In other words, for present purposes, if the substance of a complaint brought before the Court concerns an alleged violation of, say the freedom of conscience, because an employer did not accommodate a conscientious objection claimed by a worker, then typically such a complaint will first have been brought before an employment tribunal, an appeals Court etc. before reaching Strasbourg. In the present instance, for the case to have reached the European Court of Human Rights, the individual concerned must have been dissatisfied by either the judicial process or the substance of the final judgment (indicating that e.g. the decision to dismiss an individual for failure to perform a duty was considered reasonable/justified). As such, by the time the complaint at hand reaches the ECtHR, the individual concerned has reason to complain not only about the initial treatment by the employer, but also the subsequent stance of the Courts – an aspect clearly also directly attributable to the State. However, it should be noted that there is flexibility as to the general admissibility requirement of first exhausting domestic remedies (as provided in Art. 35(1)) if, for example, such domestic remedies are not in practice available or effective.

Article 9 to individual workers in such places of work. On the other hand, the Court has recognised the centrality of religious and ethos-based organisations as regards the collective dimension of the freedom of religion or belief,[39] and, as a result the necessity for such bodies to be able to act as employers in accordance with their particular ethos.[40] Thus, claims by individuals working in religious/ethos-based workplaces regarding alleged interference with their ECHR rights will often concern alleged violations of states' positive obligations to ensure the effective enjoyment of those rights. However, such claims will be dealt with slightly differently to other claims involving private employers. This is due both to the possible implications (suggested above) for the freedom of religion of belief which may arise in such cases, as well as the complex and non-uniform nature of church-state relations as well as the positions of other religious and ethos-based organisations in the various Council of Europe Member States. Indeed, the doctrine of the margin of appreciation has thus far been generously (though not indiscriminately) employed by the Court in such matters.[41]

3. Conflicts of conscience arising in workplace contexts in the jurisprudence of the European Court of Human Rights

In light of the preliminary issues discussed above, we can now proceed to consider the approach of the Court (and previously also the Commission) to conscientious objection arising in workplace context under Article 9 in more detail. However, it should be noted that rarely have such refusals to conduct working duties been raised specifically as issues of conscience, but rather more frequently as conflicts between an individual's religion and his or her work duties.[42] Nevertheless, this caveat aside, I will consider cases in which issues under Article 9 in the workplace have been raised more generally, particularly as regards conflicts between an individual's religion and workplace duties. The overall structure of the present section is as follows. Although the public/private nature of the workplace in which a Article 9

[39] See for example ECtHR *Hasan and Chaush v. Bulgaria,* Appl. No. 30985/96, Judgment of 26 October 2000, at para 62.
[40] Vickers suggests regarding the collective aspect of the freedom of religion in Article 9 that 'it is arguable that religious groups should be able to enter employment relationships in order to better organise or facilitate religious activity', in Vickers, 'Freedom of Religion and Belief, Article 9 ECHR and the EU Equality Directive', in F. Dorssement, K. Lörcher and I. Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing, 2013) 209, at 221.
[41] See for example Henrard, 'A Critical Appraisal of the Margin of Appreciation left to States Pertaining to 'Church-State Relations' Under the Jurisprudence of the European Court of Human Rights' in M-C. Foblets, K. Alidadi & J. Vrielink (eds.) *A Test of Faith? Religious Diversity and Accommodation in the European Workplace,* (Routledge, 2012) 59.
[42] Moreover, it should be noted that even so, there is a restricted body of case law dealing with such issues.

issue arises is not insignificant, in view of the Court's jurisprudence it has not as such been determinative. Therefore, while the issues identified above will be borne in mind, the present section will proceed by considering the jurisprudence of the Court as regards conflicts pertaining to Article 9 in the secular (i.e. non-religious) workplace, whether in the private or public sector.[43] Such conflicts will be subdivided (in as much as possible) according to the nature of the Article 9 issue raised. First, cases concerning conflicts between an individual's religious observance and 'normal' working hours will be discussed, followed by cases pertaining to workplace dress codes and religious attire/symbols. Finally, I will consider the category of cases most directly relevant to the focus of the present research question, namely religious/belief-based objections to specific work duties. Throughout the foregoing analysis, reference will be made, as applicable, to analogous conflicts between issues within the ambit of Article 9 and other legal obligations, as well as conflicts between other ECHR rights and workplace demands. As regards the specific case of religious or ethos-based workplaces, I will also consider conflicts between workplace demands and the right to private and family life (Article 8), given that Article 9 issues have not recently been raised before the Court in such workplace contexts. In this regard, I will reflect on whether the approach of the Court to an individual's Article 8 rights in the context of the religious/ethos-based workplace might also inform the Court's approach should conflicts involving Article 9 arise in such contexts.

[43] I use the term 'secular' here merely to refer to the non-religious nature of the workplace.

3.1. Article 9 conflicts arising in the secular workplace[44]

3.1.1. Exemptions from working hours for religious observance

A number of early cases concerning an alleged conflict between an employee's rights under Article 9 and his or her work duties in the context of the public sector workplace were dismissed by the European Commission of Human Rights (the Commission) as inadmissible due to being manifestly ill-founded. The cases concerned claims by employees regarding exemptions from normal working hours for reasons of religious observance.[45] In the oft-cited case of *Konttinen v. Finland*, the applicant claimed a violation of his right to manifest his religion (Seventh Day Adventism) by way of refraining from working during the Sabbath, which according to the teaching of his religion began at sunset on Friday. Observance of this religious dictate would have required adjustment of the applicant's working hours on five Fridays during the year. The applicant's employer – the Finnish State Railways – did not accommodate this request, but the applicant nevertheless absented himself from work on a number of occasions so as to observe the Sabbath as required by his religion, leading ultimately to his dismissal. In assessing the application, the Commission observed that although recruitment to the public service was deliberately not covered by the Convention, a public servant was not excluded from challenging his or her dismissal from employment, if such dismissal apparently infringed rights guaranteed by the ECHR.[46] However, in finding the applicants claims of a violation of his right to manifest his religion to be inadmissible, the

[44] The categories of workplace Article 9 conflicts considered below is not exhaustive, nor indeed the only way to categorize such conflicts. For one, conflicts arising out of 'mere' religious affiliation are not considered here, as with regard to the secular workplace, mere religious affiliation cannot be the basis of workplace discipline/dismissal (see ECtHR *Ivanova v. Bulgaria,* Appl. no. 52435/99, Judgment of 12 April 2007). However, the issue is discussed vis-a-vis the religious workplace, where religious affiliation gives rise to a slightly different discussion. As regards the categorisation used in the present research, I have taken a pragmatic stance, categorising conflicts as concerning either exemption from working hours, exemption from dress codes, and exemptions from specific duties, in a similar vein as Alidadi who in her study on reasonable accommodation categorises ECHR jurisprudence under Article 9 as 'religious time claims', 'religious dress' and 'other religious practices', followed by an analysis of new developments since *Eweida et al.* (K. Alidadi, *Religion, Equality and Employment in Europe: The Case for Reasonable Accommodation*, (Hart Publishing, 2017)). Hambler, in his study on religious expression in the workplace (looking at UK and ECtHR case law) categorises such religious expression as either 'passive', 'negative' or 'active' (A. Hambler, *Religious Expression in the Workplace and the Contested Role of the Law*, (Routledge, 2015). S.I. Strong in her recent work proposing a new theory for religious rights under both international and national legal systems (based on a modified Rawl's theory of justice), categorises possible religious claims broadly as self-regarding (further subdivided into 'purely' self-regarding and complex self-regarding practices) and other-regarding (further divided into four sub-categories: false other-regarding practices that either prohibit others from acting or oblige others to act in a certain way, true other-regarding practices which either prohibit others from acting or oblige them to act in a certain way), see S. I. Strong, *Transforming Religious Liberties, supra* note 21.

[45] ECmHR *Konttinen v. Finland* Appl. No. 24949/94, Decision of 3 December 1996; ECmHR *X v. UK,* Appl no. 8160/78, Decision of 12 March 1981.

[46] *Konttinen*, *ibid.,* at p. 6.

Commission agreed with the Government's argument that the applicant had not been dismissed because of his religious affiliation or observance, but rather as a result of a refusal to comply with his contractual working hours.[47] The Commission observed that such a refusal

> Even if motivated by his religious convictions, cannot as such be considered protected by Article 9 para1 (Art. 9-1). Nor has the applicant shown that he was pressured to change his religious views or prevented from manifesting his religion or belief.[48]

Furthermore, the Commission relied on the important 'freedom to resign' argument which was characteristic of the Strasbourg case law regarding the freedom of religion and belief in the workplace until recently.[49] According to this doctrine, the freedom to resign in the event of a conflict between an employee's convictions and his work duties was the ultimate guarantee of the employee's rights under Article 9.[50] A similar result was reached in *Stedman v. UK*[51] which concerned a conflict between an employee's wish to observe her religious day of rest (Sunday), and her newly amended contractual working hours which would have required her to work on Sundays on occasion. The employer in *Stedman* was a private company. Moreover, the conflict had not been foreseen at the time the applicant took up the position, but was rather introduced subsequently. [52] In her application before the European Commission of Human Rights, the applicant claimed *inter alia* that her dismissal for refusing to work on Sundays infringed her right to manifest her religion 'in worship, teaching, practice and observance'. In its assessment, the Commission maintained that the applicant had not been dismissed because of her religious beliefs as such, but rather for her refusal to work the required hours, and that 'she had been free to resign and did in effect resign from her employment.'[53] The Commission thus relied strongly on the previous decision in *Konttinen*

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[47] *Ibid.,* at p. 7. A similar decision was reached in the earlier case of *X v. UK* (*supra* note 45), which concerned a Muslim teacher who was effectively forced to resign from full-time employment due to a conflict between his religious duty to Attend Friday prayers at a Mosque and his contractual working hours.
[48] *Konttinen supra* note 45.
[49] It is noteworthy to observe that the 'freedom to resign' doctrine has not been confined to Article 9 cases. In ECtHR *Ahmed et al. v. UK*, Appl. No. 22954/93, Judgment of 2 September 1998, at issue was whether UK regulations which placed restrictions on various political activities by local government officers violated Articles 10, 11 and Article 3, Protocol 1. The Court held that the restrictions placed on the aforementioned rights were justified, and did not therefore amount to violation. With specific reference to Article 3 Protocol 1, the Court– having found no violation – added that 'furthermore, any of the applicants wishing to run for elected office is at liberty to resign from his post' (at para 75).
[50] *Ibid*.
[51] ECmHR *Stedman v. UK* Appl. No. 29107/95, D of 9 April 1997.
[52] *Stedman ibid.* Upon the change in working hours, the applicant had initially worked on a number of Sundays before informing her employer that she could no longer do so. Moreover, she refused to sign an amended contract of employment which would have included Sunday working hours.
[53] *Ibid.,* at p. 3.

and furthermore submitted that even had the applicant been employed by a public authority and dismissed on similar grounds, no infringement of Article 9 would have been found. As such, it followed that 'the United Kingdom cannot be expected to have legislation that would protect employees against such dismissals by private employers'.[54]

A number of other cases concerning conflicts between religious observance and working time warrant mention here. First, *Kosteski v. Former Yugoslav Republic of Macedonia*[55] concerned an individual employed by a public electricity company who was penalised by a reduction in salary due to absence from work, which the applicant submitted had been due to his celebration of Muslim religious holidays, which according to the Constitution and the respective law were granted as public holidays for Muslim citizens.[56] The applicant had then proceeded to challenge the reduction in salary in the domestic courts, which did not find in the applicant's favour.[57] Before the European Court of Human Rights, the applicant in essence complained that the Government's argument that he should have to substantiate his religious beliefs were an intrusion into his inner conscience. Moreover, the applicant submitted that being penalised for failure to prove his faith amounted to an interference with the manifestation of his religion, in particular his observance of a religious holiday.[58] The Government in turn argued that since the applicant had failed to provide evidence of his religious affiliation, it had been for the courts to come to a conclusion thereto on the basis of available evidence, which in the particular case at hand had led the courts to cast doubt on the applicant's sincerity.[59] In its assessment of the complaint, the European Court of Human Rights held that there had been no violation of Article 9. While noting (in paragraph 39) that in general 'the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions,' in the case at hand, the applicant had sought to enjoy a special right bestowed by law upon Muslim citizens. With specific regard to the employee-employer relationship and contracts of employment setting out the rights and obligations of each party, the Court did not consider it

[54] *Ibid*.
[55] ECtHR, Appl. No. 55170/00, Judgment of 13 April 2006.
[56] *Ibid.,* paras 8-15.
[57] *Kosteski ibid.* In the lower courts, (municipal and appellate courts), the applicant claimed that his right to freedom of religion and equality had been violated. Before the Constitutional Court, the applicant complained that he had been discriminated against on grounds of religion/belief.
[58] *Ibid.,* at paras 32-33.
[59] *Ibid.,* at para 36, the Court 'established that he had no knowledge of the Muslim faith, did not follow its diet and that he had previously been observing non-working Christian holidays'.

unreasonable for the employer to treat absence from work without prior permission or 'apparent justification' as a disciplinary matter.[60] In particular,

> Where the employee then seeks to rely on a particular exemption, it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion (…)[61]

In the case at hand, the applicant had not been prepared to substantiate his claims with evidence and as such, insofar as there had been an interference with the applicant's freedom of religion, any such interference was not disproportionate and was justified under Article 9(2). The judgment of the Court in *Kosteski* is of interest for a number of reasons. For one, the complaint arose in the context of a domestic setting in which a minority religion was accorded a specific right with regard to religious holidays at the level of legislation, the enjoyment of which was sought by an individual regarding whom there was some doubt as to the genuineness of his affiliation. While generally – as indeed admitted by the Court itself – inquiries into an individual's religious sincerity by the Courts (or other public authorities) is objectionable, it is not altogether and in all circumstances unreasonable, particularly in cases in which a specific benefit/exemption is at stake. Although it is not explicitly spelled out in *Kosteski*, it is arguably implied that the applicant sought to benefit from an exemption afforded to Muslims where there appeared good reason to doubt his sincerity. As such, while the penalty borne by the applicant as well as the subsequent inquiries into the genuineness of his religious beliefs may have amounted to an interference, on the facts, the Court held that such interference had complied with the requirements of Article 9(2).

Another case concerning a work-related absence for reasons of religious observance in a slightly different context was *Sessa v. Italy.*[62] In that case, the conflict arose not in an employer-employee context but rather with regard to the scheduling of criminal proceedings in which the applicant (a lawyer) represented one of the complainants. Specifically, the parties to the proceedings were asked to choose between two possible dates for an adjourned hearing on the immediate production of evidence, both of which fell on Jewish religious holidays. The applicant informed the presiding judge that he would be unable to attend the

[60] *Ibid.*, para 39.
[61] *Ibid*.
[62] ECtHR, *Francesco Sessa v. Italy* App. No 28790/08, Judgment 3 April 2012.

hearings on either date due to his religious obligations. The hearing was nevertheless scheduled for one of the proposed dates. In his complaint to the ECtHR, the applicant argued that the failure of the judicial authority to adjourn the hearing which conflicted with his religious obligations prevented the applicant from appearing as representative of one of the complainants. This, it was argued by the applicant, infringed his right to manifest his religion as protected under Article 9.[63] In its assessment, the majority of the Court found no violation of Article 9, particularly as the refusal to adjourn the hearing which coincided with the applicant's religious holiday had been based on law according to which adjournment of a hearing for the immediate production of evidence was warranted only if either the prosecutor or the counsel for the defendant were absent.[64] In other words, as a representative of one of the complainant parties, the applicant had not been required to be present at the hearing in question.[65] Further, the Court did not consider that the applicant had demonstrated that pressure had been exerted on him to either change his religion or prevent him from manifesting his religion.[66] As such no interference of Article 9 was found. However, the Court went on to submit that even if on the facts there had been interference of the applicant's rights under Article 9(1), such interference would have been justified under 9(2) in the interests of the proper administration of justice, and that the means employed in the present case were deemed to have been proportionate in view of the aims pursued.[67] An interesting dissenting opinion submitted by three judges of the Court proposes an alternative line of reasoning. Specifically, the dissenting judges were more rigorous regarding their interpretation of the relevant Italian legislation, noting that while only the defence counsel and public prosecutor were required to be present at a hearing for the immediate production of evidence, the same law similarly provided that counsel for any complainant parties had the option of attending such a hearing.[68] Thus while such counsel's attendance was not strictly speaking required, the dissenting judges maintained that

> It is therefore up to the lawyer and no one else to decide, with an eye to his or her client's interests, whether or not to take advantage of this option; the judicial authorities may not interfere in the exercise of

[63] *Ibid.,* para 30.
[64] *Ibid.,* para 36.
[65] *Ibid*.
[66] *Ibid.,* para 37.
[67] *Ibid.,* para 38.
[68] *Ibid.*, Joint dissenting opinion of Judges Tulkens, Popovic and Keller (translation), para 6.

> individuals' defence rights or presume that the attendance of counsel is not required.[69]

Further, the dissenting judges also found fault in the proportionality assessment conducted by the majority regarding Article 9(2)[70] as to whether the interference in question had been necessary in a democratic society. Noting the Court's established case law, the dissenting judges submitted that the authorities 'when choosing between several possible means of achieving the legitimate aim pursued' must choose the means which is least restrictive of rights and freedoms.[71] In this regard, the dissenting judges referred to the notion of reasonable accommodation, submitting that in the case at hand 'the conditions were met for attempting to reach a *reasonable accommodation* of the situation,' namely, 'one that did not impose a disproportionate burden on the judicial authorities'.[72] In the view of the dissenting judges, it would have been possible, by way of a few concessions, to satisfy the requirements of the administration of justice while also avoiding interference with the applicant's rights under Article 9. Such a conclusion was supported *inter alia* by the speedy manner in which the applicant had informed the judicial authorities of the impending conflict, some four months in advance of the hearing and immediately upon being informed of the possible dates. Furthermore, the dissenting judges considered any disruption to the running of the public judicial service due to the adjournment of the hearing to be minimal and as such 'as the small price to be paid in order to ensure respect for freedom of religion in a multicultural society'.[73] Moreover, the dissenting judges noted that the proceedings at hand did not appear to be urgent as would have been the case had the proceedings concerned detention measures, in which case 'it would have been for the applicant to make some concessions', by, for example, arranging for a replacement to be present at the hearing.[74]

The above cases demonstrate – with a notable degree of consistency across the public/private divide – that exemptions from contractual working hours for reasons of religious observance have not been protected under the Article 9 jurisprudence thus far. While the dissenting opinion in *Sessa* could be said to 'open a window'[75] for reasonable accommodation of

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[69] *Ibid*.
[70] On the presumption that there had been an interference with the applicant's right to manifest his religion.
[71] *Sessa, dissenting opinion, supra* note 68, para 9.
[72] *Ibid.* para 10.
[73] *Ibid.,* para 13.
[74] *Ibid.,* para 14.
[75] Ouald Chaib & Peroni, 'Francesco Sessa v. Italy: A Dilemma Majority Religion Members will Probably not Face', https://strasbourgobservers.com/2012/04/05/francesco-sessa-v-italy-a-dilemma-majority-religion-members-will-probably-not-face/ .

religion/belief based requests in the workplace, a cautious approach is warranted for a number of reasons. First, it is not clear that the dissenting opinion is indicative of future developments in the case law, albeit a possible sign of a more nuanced approach to such claims. Second, *Sessa* did not concern contractual hours, but rather, what appeared to be a non-urgent scheduling matter with regard to criminal proceedings. Whether or not such a dissenting opinion would also be expressed with regard to exemptions sought from regular contractual working hours remains to be seen. An interesting point of comparison to the cases discussed above concerns exemptions from or adjustment to existing working time for reasons of childcare/parental leave in regard to the right to private and family life (Article 8 ECHR). The case of *Konstantin Markin v. Russia*[76] concerned a rejected application for parental leave from the military. Specifically, the applicant – who was serving in the military – had sought three years' parental leave to look after his three children whose sole carer he was. His application for parental leave was nevertheless rejected, although female service members would have been entitled to such. In his complaint to the European Court of Human Rights, the applicant alleged that his rights under Article 14 taken together with Article 8 had been violated, the Court (both Section and Grand Chamber) finding in his favour. Interestingly, in the First Section judgment, the Court explicitly rejected a 'freedom to resign' type argument as put forward by the respondent Government, whereby it was claimed that the applicant serviceman would have been free to resign from the army in order to take care of his children.[77] The First Section considered such an argument particularly questionable, 'given the difficulty in directly transferring essentially military qualifications and experiences to civilian life'[78]. While *Markin* was essentially (and evidently) a case of gender based discrimination in the sphere of parental leave, the case is not without all significance for Article 9 jurisprudence.[79]

[76] ECtHR *Konstantin Markin v. Russia*, Appl. No. 30078/06, Judgment of 7 October 2010,

[77] *Konstantin Markin ibid.,* at para 58: "The Court is particularly struck by the Constitutional Court's intimation that a serviceman wishing to take personal care of his children was free to resign from the armed forces. Servicemen are thereby forced to make a difficult choice between caring for their new-born children and pursuing their military career, no such choice being faced by servicewomen. The Court reiterates in this respect the unique nature of the armed forces and, consequently, the difficulty in directly transferring essentially military qualifications and experience to civilian life. It is therefore clear that, if they choose to resign from military service to be able to take care of their new-born children, servicemen would encounter difficulties in obtaining civilian posts in their areas of specialisation which would reflect the seniority and status that they had achieved in the armed forces (see, *mutatis mutandis*, *Smith and Grady*, cited above, § 92). In view of the above consideration, the Court finds that the reasons adduced by the Constitutional Court provide insufficient justification for imposing much stronger restrictions on the family life of servicemen than on that of servicewomen. Accordingly, convincing and weighty reasons have not been offered by the Government to justify the difference in treatment between male and female military personnel as regards entitlement to parental leave."

[78] *Ibid*.

[79] However, it should be noted that in *Markin* itself the Court emphasized the special nature of the armed forces, which while not beyond the scope of the ECHR, had special implications for the protection afforded by certain

For one, as observed by Ouald Chaib[80], the stance of the Court in *Markin* is in stark contrast to the 'freedom to resign' formulation as espoused in *Konttinen.*[81] Indeed, as will be discussed below, the Court has moved to a more nuanced approach as regards (at least) certain aspects falling within the ambit of Article 9 as might arise in the workplace context. Whether or not – or indeed to what extent – such nuance might extend to adjustments to working time for religion/belief based reasons is open to question.

3.1.2.Exemption from workplace dress codes

Another common form of conflict between religious freedom and workplace demands involve work attire.[82] Although frequently such conflicts involve a sought adjustment to workplace dress codes such that an individual could dress in accordance with some religious dictate in the course of their work (such as a headscarf/other head covering or other religious jewellery/symbol), such conflicts could also arise from a sought exemption to an ostensibly neutral 'culturally conventional' dress code.[83] Likewise, exemption could be sought from a dress code which might carry with it religious connotations for those who would be required to abide by it.[84] The possible variants of such conflicts are many, further complicated by the

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rights to service members. Specifically, the Court recalled its established case law on several occasions that 'the rights of military personnel under Articles 5, 9, 10 and 11 of the Convention may in certain circumstances be restricted to a greater degree than would be permissible in the case of civilians' (at para 135).

[80] Notably before the Eweida et al judgments, see Ouald Chaib, 27 October 2010, 'Konstantin Markin: One more applause for the court. This time from the perspective of religious minority rights.' https://strasbourgobservers.com/2010/10/27/konstantin-markin-one-more-applause-to-the-court-this-time-from-a-religious-perspective/ (accessed 23 January 2018).

[81] Also, Alidadi notes the significance of *Markin* as an early indication of the Court's willingness to start 'chipping away at the 'freedom to resign' jurisprudence' which had previously marked the Court's case law vis-a-vis Article 9 in the workplace, K. Alidadi, *Religion, Equality and Employment in Europe: The Case for Reasonable Accommodation,* (Hart Publishing, 2017), at 56-57.

[82] Indeed conflicts related to the wearing of religious attire is by no means limited to workplace contexts, but has arisen most notably in education (e.g. ECtHR *Leyla Şahin v. Turkey*, Appl. no. 44774/98, Judgment of 10 November 2005; ECtHR *Gamaleddyn v. France*, Appl. no. 18527/08, Decision of 30 June 2009; ECtHR *Aktas v. France*, Appl. no. 43563/08, Decision of 30 June 2009; ECtHR *Kervanci v. France,* Appl. no. 31646/04, Judgment of 4 December 2008; ECtHR *Dogru v. France,* Appl. no. 27058/05, Judgment of 4 December 2008. where restrictions on the right to wear religious attire/symbols in education settings was not considered to exceed the State's margin of appreciation in view of a constitutional principle of secularity/laicite, thus finding no violation of Article 9), in specific 'public' space contexts (ECtHR *Hamidović v. Bosnia and Herzegovina*, Appl. no. 57792/15, Judgment of 5 December 2017; ECtHR *Lachiri v. Belgium*, Appl. no. 3413/09, Judgment of 18 September 2018, where restriction on the right of a witness to a criminal trial to wear a head covering in court was held to infringe Article 9) and 'general' public contexts (ECtHR *S.A.S. v. France*, Appl. no. 43835/11, Judgment of 1 July 2014, where a ban on the wearing of a full-face veil in public was not considered to have exceeded the respondent State's margin of appreciation, thus finding no violation of Article 9) . However, with a view to the research question at hand, I focus here on conflicts arising vis-a-vis religious attire in the workplace context.

[83] In other words, a religious objection to a conventional work dress code might also concern an objection to wearing a particular article of clothing.

[84] For example, a few years ago such a conflict arose between Air France's female flight attendants and their employer airline when, following the lifting of sanctions against Iran, Air France resumed flights to Tehran in 2016. However, female flight attendants would have been required to wear a headscarf upon arrival in Tehran, as

categorisation of certain clothing conventions as either religious and/or cultural, as well as the very question of whether 'neutrality' is possible[85], and the categorisation of such a claim as either positive or negative.[86] Nevertheless, the European Court of Human Rights has, on a number of occasions, had the opportunity to consider such cases. Notably, in *Dahlab v. Switzerland*[87] – a case concerning a Swiss primary school teacher who wished to wear an Islamic headscarf at work – the European Court of Human Rights dismissed her claim based on Article 9 and Article 14 as manifestly ill-founded. In reaching its decision, the Court placed emphasis inter alia on the age-range of the children taught by the applicant (children between four to eight years of age), and the possible proselytizing effect which the wearing of such a religious symbol could have. As such, considering all the factors at stake, the Court concluded that the applicant's dismissal for wearing a headscarf had 'been necessary in a democratic society', regarding which the respondent State had not exceeded its margin of appreciation. A similar inadmissibility decision was reached in *Kurtulmus v. Turkey*[88] which concerned the wearing of the Islamic headscarf by a University teacher. Even though the 'tender age' of her students was not a factor[89], the Court nevertheless concluded that in light of the respondent state's commitment to secularism and neutrality in the provision of public services – taken together with the decision in *Sahin* regarding the prohibition on the wearing of the headscarf by students on University premises – the State had not exceeded its margin of appreciation in dismissing the applicant in *Kurtulmus* for her failure to remove her headscarf. A more recent case pertaining to the wearing of a headscarf in the context of public sector

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well as the Airline's long-sleeved jacket and trousers instead of a knee-length dress. A number of female flight attendants opposed this requirement. The conflict was promptly solved by staffing the Tehran flights on a voluntary basis such that those who opposed the adjusted dress code could refuse to work on Tehran-bound flights and be reassigned to other routes without incurring any sanctions or loss of pay. Interestingly, according to newspaper reports, a similar rule had been in operation vis-a-vis flights to destinations such as Saudi Arabia, where, moreover, female crew members were required to wear abayas. See https://www.theguardian.com/world/2016/apr/04/air-france-allows-female-cabin-crew-to-opt-out-of-iran-route-in-headscarf-row (last accessed 1 February 2018), and http://time.com/4280495/air-france-headscarf-iran/

[85] See the discussion in Strong, *'Transforming Religious Liberties' supra* note 21, at 82-3. See also Weiler, 'Je suis Achbita', 28 *European Journal of International Law* (2017) 989.

[86] While the focus of the present research is on 'conscientious objection' which was confined, at least for the purposes of this thesis, as a *refusal* to do something for reasons of conscience rather than a positive demand to act in accordance with one's conscience (in contravention of a legal prohibition to do so), the question of workplace dress codes demonstrates the difficulty of classifying such claims as either purely negative or positive. In other words, while a refusal to abide by a workplace dress code is, on the one hand, an 'objection', it is often also a positive claim to dress in a particular way. See P. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, Cambridge University Press (2005), at 133, who, commenting on the UN Human Rights Committee's views in *Karnel Singh Bhinder v. Canada,* Communication No. 208/1986, CCPR/C/37/D/208/1986, 28 November 1989, submits that the 'conceptual distinction in the case is a fine one, between restriction on the manifestation of belief (the wearing of religious headdress), and the compulsory wearing of safety equipment contrary to religious mandate.'

[87] ECtHR *Dahlab v Switzerland*, Appl. no 42393/98, Decision of 15 February 2001.

[88] ECtHR *Kurtulmus v. Turkey,* Appl no. 65500/01, Decision of 24 January 2006.

[89] Although the Court referred in its decision to this aspect in *Dahlab.*

employment, was *Ebrahimian v. France,*[90] where the applicant was a social assistant at a psychiatric ward of a public hospital in France. Due to her refusal to remove her headscarf, the applicant's contract was not renewed. The ECtHR found no violation of Article 9, thus apparently upholding a 'headscarf ban' for the entire public sector in France.[91] Cases involving employees who wished to wear the Islamic headscarf in a private sector workplace setting have not been considered by the European Court of Human Rights[92] although two such cases have recently been considered by the CJEU.[93] However, the wearing of other religious symbols was considered in the landmark *Eweida et. al* judgment, in which the complaints of the two of the applicants concerned their wish to wear a necklace with a cross. One of the applicants (Chaplin) was a nurse, who wished to wear a small cross around her neck as a witness to her Christian beliefs. However, the Court held that the refusal of her employer to allow her to do so – invoking reasons to do with health and safety – did not violate her freedom of religion.[94] On the other hand, another applicant (Eweida) complained that the temporary refusal by her private sector employer to allow her to visibly wear a small cross violated her freedom to manifest her religion. In its assessment, the Court again considered whether a fair balance had been struck between the competing interests at stake, namely the applicant's right to manifest her religion and the corporate image of the employer, as was argued by the respondent government (UK).[95] However, in finding a violation of Article 9, the Court submitted that such a fair balance had not been struck, and that the domestic courts had given too much weight to the (albeit legitimate) interest of corporate image. In its reasoning, the Court noted the nature of the applicant's desire to wear a discreet (although

[90] ECtHR *Ebrahimian v. France*, Appl. no. 64846/11, Judgment of 26 November 2015.
[91] See Brems, '*Ebrahimian v. France*: headscarf ban upheld for entire public sector', 27 November 2015, https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/ (last accessed 1 February 2018). Brems criticises this decision (as well as Strasbourg's headscarf jurisprudence in general) on a number of points (…). Moreover, she contrasts the Strasbourg approach to more nuanced lines of interpretation adopted in some domestic jurisdictions such as Belgium and
[92]The *Baby Loup* case, once again from France, would have been a case in point, but apparently an application has not been lodged before the European Court of Human Rights. Cranmer, 'France and the Islamic veil – again: *Baby-Loup*', 15 July 2014, http://www.lawandreligionuk.com/2014/07/15/france-and-the-islamic-veil-again-baby-loup/ ; Berry, 'Eroding Religious Freedom Step by Step: France and the Baby-Loup Case', 1 July 2014, https://www.ejiltalk.org/eroding-religious-freedom-step-by-step-france-and-the-baby-loup-case/ ; Hunter-Henin, 'Religion, Children and Employment: The *Baby Loup* case' in 64 *International and Comparative Law Quarterly* (2015) 717.
[93] C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* (EU:C:2017:204); C-157/15 *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (EU:C:2017:203).
[94] *Eweida et al. supra* note 10, paras 99-100.
[95] *Eweida et al. supra* note 10, at para. 94.

visible) religious symbol which in no way detracted from her professional appearance,[96] as well as the fact that no complaints had been made regarding previously authorised religious symbols or garments.[97] Significance was also placed on the subsequent amendment of the company's uniform code, permitting the wearing of religious symbols.[98] In conclusion, it had not been established that the applicant's manifestation of her religion by the wearing of a religious symbol in any significant way encroached on the rights of others, and as such a restriction thereto did not satisfy the requirements of Article 9(2).

The decision in *Eweida* has been referred to as a marginal victory for the freedom of religion'[99] as for the first time, the Strasbourg Court protected an employee's Article 9 right to manifest his or her religion in the workplace. However, caution must be employed in extending the significance of the decision unduly. First, although generally no marked differences can be observed vis-à-vis the Court's approach to employees' freedom to manifest religion or belief in the workplace depending on whether the employer is a public authority or private employer, in *Eweida* this seems to be significant. Such is apparent when contrasting the *Eweida* judgment to cases involving state employees wishing to manifest their religion by way of clothing, when such a right was not protected in the balance of interests.[100] Moreover, it is not clear to what extent the possible constitutional principle of secularism might affect even private sector workplaces. *Eweida*, after all, arose in a domestic jurisdiction in which secularism/laïcité is not elevated to a constitutional principle as it is practiced in France, and it is not clear whether/to what extent the approach of the Court might differ in such a case, or whether the margin of appreciation would have the final word. An interesting aspect to consider is the link between corporate image and client preference. The emerging antidiscrimination jurisprudence of the CJEU in the field of religion/belief suggests that customer preference cannot justify what would otherwise amount to discrimination.[101] What

[96] On this more substantive analysis, see Brems (*supra* note 91), where she notes the Court requiring evidence of any 'real encroachment on the interests of others' rather than mere reliance on abstract principles/assumptions, comparing the approach of the Court in *Eweida* to that in *Ebrahimian*.
[97] Indeed, given that some other religious garments (headscarves, turbans) were explicitly authorised, Eweida's application had a strong claim of religious discrimination. This was considered (but dismissed) by domestic courts, but, having found a violation of Article 9, not considered separately at all by the Strasbourg Court.
[98] *Eweida supra* note 10, at para 94.
[99] See McIlroy, 'A Marginal Victory for Freedom of Religion' in 2 *Oxford Journal of Law and Religion* (2013) 210.
[100] E.g. see *Dahlab v. Switzerland supra* note 87 .
[101] See the CJEU case of *Bouganoui (*C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* (EU:C:2017:204)) regarding wishes expressed by a client company regarding the religious attire worn by a consultant design engineer, and, the CJEU case of *Feryn* (C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, (EU:C:2008:397)) which concerned

is not expanded, is the inevitable link (whatever its degree) in a free market economy between corporate image (supply) and customer preference (demand).[102]

3.1.3. Objections to specific work duties

In light of the focus of the research question at hand, religious or belief-based objections to specific work duties is the most directly relevant form of conflict in the workplace pertaining to Article 9. Nevertheless, cases in which such conflicts have features have been rare. A notable example for present purposes is the case of *Pichon and Sajous v. France*[103] which concerned two French pharmacists (the applicants) who had refused to sell contraceptives to three women who had presented valid prescriptions at the applicant's pharmacy. The applicants were subsequently convicted of the offence of refusing to sell contraceptives on doctor's prescription. In their application to the European Court of Human Rights, the applicants claimed that their right to freedom of religion had been disregarded by the French courts. They claimed that the refusal to supply contraceptives amounted to a manifestation of their religious beliefs. In finding the application manifestly ill-founded, the Court submitted that Article 9 does not protect a right to behave in public in conformity with one's personal convictions, whether religious or otherwise, and that not every act 'motivated or inspired by a religion' is protected.[104] However, interestingly, in its final assessment, the Court emphasised that given that the sale of contraceptives was legal on medical prescription and could only be supplied by a pharmacy,

> The applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.[105]

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comments made by a director of a company regarding the company's customers preference not to be served by employees with an immigrant background, thus raising the issue of whether such comments amounted to discrimination based on race.

[102] Weiler, 'Je suis Achbita', 28 *European Journal of International Law* (2017) 989, linking 'corporate image' and customer wishes, and further suggesting that the stance of the CJEU in *Achbita* (C-157/15 *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (EU:C:2017:203)) might thus prove to be a circumvention of satisfying customer wishes by a (pre-emptive) 'neutrality policy' at 999, and indeed possibly of 'accommodating the prejudices of clients, prejudices which are inimical to a healthy democracy that tolerates pluralism and diversity' (at 1001).

[103] ECtHR *Pichon and Sajous v. France,* Appl no. 49813/99, Decision on admissibility, 2 October 2001.

[104] *Ibid.,* at p. 4.

[105] *Pichon and Sajous, supra* note 103, at p. 4.

As such, the reasoning of the Court is slightly different as compared with *Konttinen* discussed above. The Court hints – though does not explicitly state – that the refusal to sell contraceptives was not protected as a manifestation of religion or belief, without duly considering the nature of the act in question from the point of view of the applicants' conscience or belief. However, rather than asserting the freedom to resign argument[106], the Court emphasised the unique function of the pharmacy in the provision of a specific service, the fact that the religious beliefs of the applicants could not be imposed on those seeking that service, and the fact that the applicants were able to manifest their religious beliefs in numerous ways outside their profession. It is not entirely clear how these various factors weighed in the Court's decision. Certainly, it appears that the nature of the service provided by the pharmacy would narrow any potential scope for a 'right to refuse' on the part of applicants. This is furthermore constrained by the position of the pharmacy as the only one in town, but begs the question whether the Court's assessment would have differed had this not been the case (if the pharmacy next door would have been open and able to store and dispense the prescribed products). Be that as it may, the third line of argument – that of the applicants being able to manifest their religious beliefs in many ways outside of the professional sphere – can arguably be interpreted as trumping any potential right to refuse. However, this last line of argument is somewhat unfortunate, given that it seems to disregard or disguise the nature of the conflict at stake from the perspective of the applicants, whose claim did not concern their ability to manifest their beliefs outside of their work, but the fact that the specific act of stocking and supplying contraceptives was in fundamental conflict with those beliefs.

More recently, two cases in which religious based objections to specific work duties were at issues were considered by the Court in its *Eweida et al.* judgment. First, the application of MacFarlane concerned a man employed by a private organisation offering relationship and sexual counselling to couples. In the course of his employment, the applicant faced a conflict between his religious beliefs according to which he considered homosexual activity to be sinful[107] and his work duty to counsel same sex couples as was required by the organisation's Equal Opportunities Policy emphasising a positive duty to advance equality.[108] The applicant

[106] Notably, the applicants in *Pichon and Sajous* were not employees of a public authority but owners of a pharmacy. Thus 'resignation' from employment was not as such an option. Furthermore, while the categorisation of a workplace as within the public/private sector is not the primary angle of analysis here, it should be noted that the nature of the service provided by a pharmacy is significant, especially in a context as in *Pichon and Sajous*, being the only pharmacy in the town in question.
[107] *Eweida et. al. supra* note 10, at para 31.
[108] *Eweida et. al., supra* note 10, at para 32.

was eventually dismissed for not being able to be trusted to perform his duties in accordance with the organisation's policy.[109] In his application to the European Court of Human Rights, the applicant claimed a violation of his rights under Article 9 as well as Article 14 taken together with Article 9. In finding no violation, the Court however accepted that the applicant's refusal to counsel same sex couples constituted a manifestation of his religion or belief.[110] Given that he had been employed by a private company, the UK's positive obligations required it to secure the applicant's rights under Article 9.[111] The Court noted the importance of weighing competing interests, the severity of the consequences on the applicant as well as the fact that the applicant had voluntarily trained and sought employment with the organisation, fully aware of the implications of its Equal Opportunities Policy. Notably, the Court submitted that

> While [it] does not consider that an individual's decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the question whether or not there has been an interference with Article 9 rights, this is a matter to be weighed in the balance when assessing whether a fair balance has been struck.[112]

In concluding, however, the Court noted the importance of the employer's action in intending to secure the provision of services without discrimination, and that overall, the State enjoyed a wide margin of appreciation in balancing the applicant's right to manifest his religion or belief on the one hand and the employer's interest in securing the rights of others on the other. According to the Court, the margin of appreciation had not, on the facts of the application, been exceeded.[113]

Similarly, the application of Ladele in the *Eweida et al.* judgment, concerned a religious belief-based refusal to conduct a work duty, this time in the context of a public authority employer. Specifically, the applicant was a registrar of births, deaths and marriages employed by a UK local authority. Some time after having taken up her position, the Civil Partnership Act 2004 was passed and the applicant's work duties changed such that she was subsequently

[109] *Ibid.,* at para 38.
[110] *Ibid.,* at para 108.
[111] *Ibid*.
[112] *Ibid.,* at para 109; See also para 83 in which the applicable general principles under Art. 9 are articulated.
[113] *Ibid*.

also required to register same-sex civil partnerships, in addition to marriages.[114] The applicant found herself facing a conflict between her work duties and her religious beliefs regarding the sinfulness of same-sex unions, as she considered that it would be wrong for her to take part in the creation of partnerships equivalent to marriage between couples of the same sex.[115] Her refusal to be designated as a registrar of civil partnerships ultimately led to her dismissal by the local authority. In her application to the European Court of Human Rights, the applicant claimed that she had been discriminated against because of her religious beliefs.[116] The Court accepted that the applicant's refusal was directly motivated by her religious beliefs and thus fell within the scope of Article 9.[117] The Court found that neither the actions of the local authority employer nor the domestic courts exceeded the margin of appreciation available to them in striking a balance between competing Convention rights, and as such, found no violation of the applicant's rights under Article 14 taken together with Article 9.[118] In its assessment, the Court noted both the serious consequences of the situation for the applicant (i.e. the loss of her job) as well as the fact that having entered her position prior to the passing of the Civil Partnership Act 2004 she could not be said to have waived her right to manifest her religion or belief by refusing to participate in the creation of same-sex civil partnerships.[119] On the other hand, the majority of the Court noted the legitimacy of the local authority's policy[120], the aim of which was 'to secure the rights of others which are also

[114] Interestingly, the local authority employer was not required to designate all existing registrars of births, deaths and marriages as civil partnership registrars, it was simply required to ensure that sufficient numbers of civil partnership registrars would be available to carry out the service. Some UK local authorities allowed registrars to opt out of designation as civil partnership registrars, if they held religious objections to designation as such. See *Eweida el al supra* note 10, at para 25.
[115] *Eweida et al. supra* note 10, at para 102.
[116] i.e. Ladele did not even claim a violation of Article 9 on its own, but rather based her claim entirely on Article 14 together with Article 9, in other words, she claimed a violation of the prohibition of discrimination on grounds of religion/belief. Although the focus of the present Chapter is solely on the possible protection offered by Article 9 as such for an individual facing a conflict between his or her conscience and work duties, the application of Ladele is nevertheless considered here given that Article 9 is addressed in some depth by the Court therein. Indeed, as suggested by Hambler, 'on this occasion the Court did not engage in a structured approach to weighing up the claim under Article 14 but carried out what was in essence an Article 9(2) analysis only', in A. Hambler, *Religious Expression in the Workplace and the Contested Role of the Law*, (Routledge, 2015), at 76.
[117] *Eweida et al.* at para 103. Notably, for an Article 14 analysis, the contested issue simply has to fall under the general ambit of a provision of the ECHR, in this case Article 9, rather than more rigorous test required by Article 9 itself (- as to whether an act amounts to a manifestation of a religion or belief). However, in the present, in light of the Court's conclusions vis-a-vis the application of MacFarlane where the applicant's refusal was itself considered a manifestation of his religion or belief, it seems safe to conclude that similarly Ladele's refusal would – had the Court been called to do so – have been classified as such.
[118] *Ibid.,* at para 106.
[119] *Ibid.,* para 106.
[120] The local authority in question relied on its 'Dignity for All' equality and diversity policy according to which 'Dignity for All' should be the experience of Islington staff, residents and service users, regardless of age, gender, disability, faith, race, religion and sexuality…' see *ibid.,* at para 24.

protected under the Convention'[121]. Interestingly, it is not clear what specific rights of others referred to by the Court are. No service users were denied the registration of the civil partnership because of the applicant's objection. It has been suggested that the rights at stake concern protection from the harm to dignity caused by such objections.[122]

The Judgment in *Ladele* (and indeed *Eweida et al.* more generally) has been widely debated among scholars, with many defending the Court's decision, while others place emphasis on the temporal aspect of Ladele's conflict of conscience, namely that it was her job description (indeed the law) which changed, and not her convictions, which had been entirely compatible with her duties when she had entered her employment[123]. Alidadi goes further, suggesting that even in the case of clashing convention rights (such as one individual's right to freedom of religion and another's right to non-discrimination), a more reconciliatory approach could be adopted, so long as 'the core' of another's right was not infringed.[124] Furthermore, the judgment was not adopted unanimously, but rather Judges Vucinic and De Gaetano submitted a strongly worded dissenting opinion vis-à-vis the application of Ladele[125], raising a number of issues of particular interest for present purposes. First, the dissenting judges considered Ladele's claim not as one of freedom of religion, but freedom of conscience, which according to their submission is summarised such 'that no one should be forced to act against one's conscience'.[126] Having criticised the failure of the majority judgment to identify or engage with the issue of conscience arising from the facts of Ladele's application, the dissenting judges defined conscience as 'what enjoins a person at the appropriate moment to do good or avoid evil' and as a 'judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or

[121] *Ibid.,* para 106.
[122] McCrea suggests that the right in question is 'the right to protection from the impact on dignity inherent in the discriminatory acts even when such acts do not result in service deprivation', see McCrea, 'Religion in the Workplace: *Eweida and Others v. United Kingdom'* 77 *Modern Law Review* (2014) 277, at 283.
[123] See for example Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom'* 15 *Ecclesiastical Law Journal* (2013) 191, at 202-203, and McIlroy, 'A Marginal Victory for Freedom of Religion' in 2 *Oxford Journal of Law and Religion* (2013) 210, at 214-215.
[124] 'Such a reconciliatory approach, which rejects the forsaking of concrete rights in the name of abstract principles and laudable words of inclusion, should be supported as a principle at the supranational level. Indeed, there is no compelling reason why in the case of clashing Convention rights reasonable attempts should not be made to promote inclusion of minorities. Accommodation could still be feasible, in particular when the core of the rights of others are not at stake.' See *Alidadi supra* note 44, at 63.
[125] Another partly dissention opinion was submitted by Judges Bratza and David Thór Björgvinsson vis-à-vis the application of Eweida, regarding whom they would not have found a violation of Article 9.
[126] *Eweida et al. supra* note 10 , joint partly dissenting opinion of Judges Vucinic and De Gaetano.

has already performed'[127]. The dissenting judges recognised that while conscience may be informed by religious beliefs and convictions, this is not necessarily the case, asserting that,

> One a *genuine* and *serious* case of conscientious objection is established, the State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector) and negatively (by refraining from actions which punish the objector or discriminate against him or her).[128]

This approach was however not recognised by the majority[129], but the issue of *conscience* is one which, it has been suggested, should be given closer consideration by the Court.[130] This, however, may require applicants' claims to be identified and argued specifically as issues of conscience rather than religion, and perhaps such claims to also be factually distinct from any religious interests or connotations.

On the basis of the cases discussed above concerning refusals to conduct specific work duties for reasons of conscience (or religion), there is as yet little to go on vis-à-vis a possible 'right to refuse' under Article 9. That is not to say that such an aspect could not be derived from Article 9, but that the cases thus far dealt with by the Court have not concretely given rise to such protection. The latter decisions especially could be interpreted as leaving room for such a finding given the reliance on the margin of appreciation by the Court[131], contrasted with the inadmissibility decision in *Pichon and Sajous* on the sole basis of which no such flexibility would have been forthcoming. Taking a more broader look at conflicts between other ECHR rights and workplace demands, one is faced with some interesting observations and points of

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[127] *Ibid*.
[128] *Ibid.,* at para. 5.
[129] Indeed, McCrea criticises the dissenting opinion of Judges Vucinic and De Gaetano inter alia, because they apply their reasoning inconsistently. Specifically, McCrea observes that whereas they were willing to apply the 'conscience' reasoning (see quoted passage above) to Ladele, they were not willing to do so vis-a-vis McFarlane, who had entered his job with the foresight that the conflict of conscience could or was likely to arise. In this respect, McCrea considers the dissenting opinion to smack of the 'freedom to resign' doctrine which the dissenting judges were also rejecting. See McCrea, *'Religion in the Workplace' supra* note 122, at 286.
[130] See McIlroy, *A Marginal Victory for Freedom of Religion,* supra note 123, at 214.
[131] The Court held that state's action did not exceed the margin of appreciation in the application of Ladele, *Eweida et. al.* In other words, it is arguably implied that possible accommodation of Ladele's objection would also have been within that margin of appreciation. However, as noted by Stijn Smet, such a conclusion is, at present speculative. Smet argues that '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.' In Smet, 'Conscientious Objection under the European Convention on Human Rights: The Ugly-Duckling of a Flightless Jurisprudence', in J. Temperman, T.J. Gunn and M.D. Evans (eds.), *The European Court of Human Rights and the Freedom of Religion or Belief* (Brill Nijhoff, 2019) 282, at 292.

contrast. As indeed noted by the Court itself, the approach to other ECHR (notably 8, 10, 11) in workplace context has been more generous than has been the case with Article 9. Thus dismissals on the basis of one's private life, or expression or association outside the workplace have given rise to findings of violations of the applicable ECHR rights. However, as submitted by McCrea, one must be careful with such analogies. Specifically, in cases such as *Smith and Grady v. UK*,[132] and *Redfearn v UK*,[133] the applicants were not claiming adjustments of their work duties in any form on the basis of those rights.[134] Rather, in those cases employers were seeking to invoke aspects of the applicants' life outside of work as a basis of disciplinary measures/dismissal. A slightly more conceptually analogous situation was raised in cases involving the applicants' negative freedom of association and 'closed shop' agreements in the employment context. There, the Court/Commission have protected the applicants' right not to join a trade union even when such was prima facie required by the employer. However, even there – in contrast to the focus of the present research – the right sought by the applicants was not adjustment of work duties as such, but exception from a formal requirement (which apparently had no implication for the actual work duties performed).[135] In such cases, the Court has looked closely at the substance of the complaints,

[132] ECtHR *Smith and Grady v. United Kingdom*, Appl. nos. 33985/96 and 33986/96, Judgment of 27 September 1999.
[133] ECtHR *Redfearn v. United Kingdom*, Appl. no. 47335/06, Judgment of 6 November 2012.
[134] McCrea, *supra* note 122, at 280. 'Regulating the out of work conduct of an employee raises very different issues from those raised in *Eweida* where all four applicants were claiming a right to behave in particular ways on the job. Employers have a much stronger interest in regulating on the job behaviour.'
[135] The case of ECtHR *Young, Webster and James v. UK Young, Webster and James v. United Kingdom*, (Appl. nos. 7601/76, 7806/77, Judgment of 13 August 1982) concerned a 'closed-shop' agreement between the British Railways Board and three trade unions introduced in 1975 according to which membership of one of the three unions became a condition of employment. All of the applicants had already prior to the agreement been employed by British Rail. Interestingly, the agreement contained an exemption from the membership requirement vis-a-vis 'existing employees who genuinely objects on grounds of religious belief to being a member of any trade union whatsoever or on any reasonable grounds to being a member of a particular Trade Union'. However, this exemption was not applicable to the applicants, who, despite being existing employees objected to membership in the relevant Trade Unions essentially for political reasons and more generally due to the importance they attached to an individual's freedom of choice in such matters. While at the heart of the issue before the Court was more generally whether a negative right to freedom of association was at all protected by Article 11 (and to what extent/relative weight as compared with its positive aspect), the Court nevertheless proceeded to consider the severe consequences borne by the applicants in view of their refusal to join the required unions. Specifically in finding an interference with Article 11, the Court submitted that 'a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union. In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11 (art. 11). For this reason alone, there has been an interference with that freedom as regards each of the three applicants' (at para 55). The Court concluded that the aforementioned interference with the applicants' (negative) freedom of association was not necessary in a democratic society, and therefore infringed their rights under Article11.

at times apparently reaching a seemingly opposing conclusion.[136] Nevertheless the significance for present purposes is worthy of note. Even formal (neutral) requirements are subject to the Court's scrutiny. It is not inconceivable that such scrutiny could also be extended to also cover actual work duties in the future.[137]

3.2. Article 9 conflicts in the religious/ethos-based workplace

It has already been suggested that the religious/ethos-based workplace warrant specific attention for present purposes, given some of their particular features. First, one could not consistently classify all religious or ethos-based workplaces as falling within either the public or private sector across all Council of Europe states, given that in some of those states certain religious organisations (specifically an established Church) are for many purposes akin to public authorities, with ministers classified as civil servants.[138] However, clearly this is not the case in many states, and indeed with regard to most religious/ethos-based organisations who act as employers. Nevertheless, even in states with no established religion, many religious/ethos-based organisations are implicated in the delivery of certain public services (such as education and healthcare), and for this reason too, categorisation as purely within either the public or private sector is not altogether simple. Indeed, even indisputably private corporations may have a strong religious/ethos-based element which is focal to their enterprise (e.g. vegan bakery, kosher catering company, halal supermarket, Christian bookshop).[139] However, perhaps most significantly, religious and ethos-based organisation are closely linked to the exercise of the freedom of religion or belief as protected in Article 9, and their ability to act as employers is an important facet of the collective dimension of religious freedom. As such, potential conflicts which arise pertaining to an individual's Article 9 rights

[136] At least in the context of compulsory membership of certain types of professional associations. See ECmHR *Revert and Legallais v France* (Appl. nos. 14331/88, 14332/88, Decision of 8 September 1989) where it was held that compulsory membership in 'Ordre des architects' did not raise an issue under Article 11 (the organisation in question was a public law body for architects in France, charged with certain public service responsibilities vis-à-vis architects), and did not violate Article 9 (the applicants having argued that compulsory membership in the said body infringed both their freedom not to join an association, and their freedom of conscience due to what the applicants considered as the body's lack of ideological neutrality and political stances).

[137] For example, such scrutiny could serve at the least to detect work duties introduced with the intention or effect of excluding certain otherwise qualified and capable employees from a workplace.

[138] See ECmHR *Knudsen* Appl. No. 11045/84, Decision of 8 March 1985, where objecting priest himself distinguished between 'public' and 'religious' duties of his position.

[139] From the jurisprudence of the ECHR for example, ECtHR *Cha'are Shalom Ve Tsedek v. France,* Appl. no. 27417/95, Judgment of 27 June 2000) concerned a Jewish liturgical association, at least some of the activities of which were considered as commercial (levying a slaughter tax on meat obtained from animals slaughtered according to the strict religious requirements).

(or indeed other ECHR rights) in the religious/ethos-based workplace can necessitate a slightly different approach as would be the case in the secular workplace.

Early ECHR jurisprudence pertaining to conflicts of conscience/belief in the context of a religious workplace involved clergy objecting to a change in traditional church doctrine[140] or otherwise objecting to work duties for reasons of conscience.[141] In those cases church autonomy[142] prevailed and the applications were declared inadmissible. The Court did not question the doctrine of the employer church, and the freedom to resign argument was yet again asserted as the ultimate guarantee of employees' rights under Article 9, should an employee consider the conflict which they faced to have been of such severity.[143]

More recent cases involving church employees have mainly involved claims regarding the right to private and family under Article 8. The only case in which a violation of Article 9 was claimed by an employee involved a kindergarten teacher employed by a local parish in Germany, who was dismissed due to her membership in another religious organisation, the views of which were incompatible with those of her employer church.[144] No violation of Article 9 was found, the Court basing its findings on the thorough balancing of competing interests employed by the German courts, the fact that the applicant had been able to effectively challenge her dismissal in the domestic courts in the first place, and the fact that the applicant new or should have known that her membership in the religious organisation in question was incompatible with her duties as a church employee.[145]

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[140] ECmHR *Karlsson v Sweden*, Appl. No 12356/86, Decision of 8 September 1988; ECmHR *Williamson v UK*, Appl. No. 27008/95, Decision of 17 May 1995. Both of the above cases concerned objections by clergymen to the ordination of women, and the changed Church doctrine in that regard.

[141] ECmHR *Knudsen v Norway,* Appl. No. 11045/84, Decision of 8 March 1985; *Knudsen* concerned an objection by a Norwegian Lutheran priest who, following the enactment of some (secular) legislation concerning abortion, protested by refusing to conduct those duties which he considered to be state/public functions, while agreeing to continue those duties which were purely religious in nature. In that case, the Commission did not consider the applicant's act of refusal to be a manifestation of his beliefs, and the refusal was therefore not covered by Article 9 and the application was declared manifestly ill-founded. See also ECmHR *X v. Denmark* Appl. no. 7374/76, Decision of 8 March 1976.

[142] In particular, the autonomy of the church to determine its own doctrine and policy regarding objectors.

[143] See *Knudsen supra* note 141 at p. 258 and *Karlsson supra* note 140, at p 3.

[144] ECtHR *Siebenhaar v Germany*, Appl. No. 18136/02, Judgment of 3 February 2011.

[145] Here, it should be noted, the religious nature of the applicant's employer is of key significance. In the secular workplace context, dismissal for mere religious affiliation has been held to violate Article 9 (*Ivanova v. Bulgaria supra* note 44*),* and similarly, in cases involving political affiliation, dismissal for membership of a political party (even where such membership might be considered problematic in view of the particular work duties of the applicant), has been held to violate Article 11, see *Redfearn v UK supra* note 133, and Peroni '*Redfearn v. United Kingdom*: Protection against Dismissals on Account of Political Belief or Affiliation', 11 December 2012, https://strasbourgobservers.com/2012/12/11/redfearn-v-the-united-kingdom-protection-against-dismissals-on-account-of-political-belief-or-affiliation/; Letsas, 'Redfearn v. UK: Even Racists Have the Right to

Other significant recent cases involving church employees' have invoked the employees' rights under Article 8 ECHR. In *Schüth v Germany,*[146] the Strasbourg Court found that an employee's dismissal for reasons pertaining to his private life violated his rights under Article 8. In another not dissimilar case of *Obst v Germany,*[147] the opposite outcome was reached by the Court. The distinguishing factor between these two decisions seems to have been the nature of the position held by the employee in the employer church.[148] Interestingly, in *Schüth*, the Court also placed importance on the very limited employment opportunities available to the applicant after his dismissal.[149]

The more recent case of *Fernández-Martínez v. Spain*[150] also raised somewhat similar issues, although in that case the applicant was a former Roman Catholic priest who had sought dispensation from the obligation of celibacy, and, having received no response to this request, had nevertheless proceeded to marry and subsequently had five children with his wife. The complaint arose from the non-renewal of the applicant's contract as a teacher of Catholic religion and ethics after some publicity that was given to his family situation as well as his membership of a movement which called into question certain tenets of official Catholic teaching. Significantly, however, the non-renewal of his contract had not resulted from his family situation as such[151], but rather followed the publication of a newspaper article featuring the applicant and his family. The Grand Chamber found, by a very narrow margin of 9 to 8, no violation of the applicant's right to private and family life under Article 8. The majority emphasised the proclamatory nature of the applicant's position as a teacher of Catholic religion and ethics to adolescents and the duty of loyalty he owed to the Church, while the dissenting judges focused on some of the specific (and somewhat peculiar) circumstances of

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Freedom of Thought', 13 November 2012 https://ukconstitutionallaw.org/2012/11/13/george-letsas-redfearn-v-uk-even-racists-have-the-right-to-freedom-of-thought/ .

[146] ECtHR *Schüth v Germany*, Appl. No. 1620/03, Judgment of 23 September 2010.

[147] ECtHR *Obst v Germany,* Appl. No. 425/03, Judgment of 23 September 2010.

[148] Schüth was employed as an organist in a Catholic parish in Germany, Obst in turn held the position of director of public relations in Europe in the Church of Jesus Christ of the Latter Day Saints. In both cases, the employees had engaged in extra-marital affairs and had fathered children with women to whom they were not married. In both instances, such conduct contravened the official teaching of the respective churches.

[149] *Schüth* supra note 146, at para 73, see also Ouald Chaib, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights', in Alidadi et al. (eds.) *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, (Ashgate, 2012) 33, at 52.

[150] ECtHR *Fernández Martínez v. Spain*, Appl. No. 56030/07, Judgment of 12 June 2014.

[151] This had already been known by the Church, on whom his appointment as a teacher of Catholic religion and ethics in a public school was dependent.

the case in finding a violation.[152] While the outcome of the case could be interpreted as support of 'church autonomy' as the prevailing interest in such disputes, a closer reading of the Grand Chamber judgment hints at a more nuanced approach by the Court. As observed by Stijn Smet, whereas the Chamber judgment was strongly weighted in favour of church autonomy[153], the Grand Chamber looked more closely at the substance of an 'autonomy' based argument by a religious community in such cases[154], while at the same time discounting 'a right of dissent within a religious community' as protected under Article 9.[155]

For the present analysis, these recent cases may imply a number of significant issues. First, although the autonomy of religious organisations is protected by the ECHR, it is not beyond review. This is most evident in cases not directly raising issues under Article 9, but rather the area of private and family life. Second, although the cases involving Article 8 discussed above do not directly engage with the focus of the present research (i.e. conflicts of conscience)[156], they point to a convergence of some aspects of rights protected under both Article 8 and Article 9, and the difficulty in drawing strict distinctions between a church's claims of autonomy on doctrinal matters and aspects of a worker's[157] private life which may be at odds with that doctrine. This can be seen clearly in the case of *Fernández Martínez* where the issue at stake – from the point of view of both the applicant and the relevant authority – was

[152] See *Fernández Martínez v. Spain, supra* note 150, Joint dissenting opinion of Judges Spielmann, Sajò and Lemmens.

[153] *Fernández Martínez v. Spain,* Appl. no. 56030/07, Judgment (third section) of 15 May 2012, at para 84:'the requirements of the principles of religious freedom and neutrality preclude it from carrying out any further examination of the necessity and proportionality of the non-renewal decision, its role being confined to verifying that neither the fundamental principles of domestic law nor the applicant's dignity have been compromised.'

[154] *Fernández Martínez v. Spain*, *supra* note 150 (Grand Chamber Judgment of 12 June 2014) para 132 (emphasis added) : 'a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 of the Convention (…) The national courts must [conduct] an in-depth examination of the circumstances of the case and **a thorough balancing exercise between the competing interests at stake**' (emphasis in original). See Smet, 'Fernández Martínez v Spain: the Grand Chamber putting the breaks on the 'Ministerial Exception' for Europe?' 23 June 2014, https://strasbourgobservers.com/2014/06/23/fernandez-martinez-v-spain-the-grand-chamber-putting-the-breaks-on-the-ministerial-exception-for-europe/
(2 February 2018).

[155] Rather confirming the 'right to resign'-like 'right to leave' a religious community as the relevant facet of Article 9 vis-à-vis an individual dissenter within such a community. Notably, the Grand Chamber's findings regarding Article 9 were not relevant for the specific case of *Fernández Martínez v. Spain*.

[156] At least, that is to say, the Article 8 claims discussed above have not been articulated in such a manner. It is, however, conceivable that they could at least in some circumstances be articulated as such. Indeed such was argued by the applicant in *Fernández Martínez* (*supra* note 153 at para 3), but was not considered separately by the Grand Chamber.

[157] Although note here the possible problematic nature of classifying individuals as workers/employees. The status of religious leaders/teachers/ministers may in various domestic and religious settings may not be easily thus classified.

arguably at once a question of private and family life *as well as* doctrine.[158] While an assessment of doctrine as such is, by its own admission, beyond the competence of the Court, it has proven to be prepared to engage with an assessment of the possible practical implications of such doctrine on employees. It might be argued that in doing so, the Court does *in fact* engage in a review of religious doctrine, whether it intends to or not, understood in this broader way.[159]

4. Discussion: conscientious objection in the workplace under Article 9

4.1. Towards an approach to Article 9 -based exemptions in the workplace?

This chapter set out to analyse and understand whether an employee/worker faced with a conflict between conscience and work duties enjoys any effective protection under the freedom of thought, conscience and religion as protected in Article 9 ECHR, and whether any particular applicable norms therein could be identified. I proceeded to analyse the ECHR case law regarding exemptions based on Article 9 (and Article 8) in the workplace more generally, with regard to both secular and religious/ethos-based workplaces. In this final section, I will consider whether, on the basis of the Court's jurisprudence, we can speak of 'an approach' of the European Court of Human Rights to conflicts of conscience in the workplace, or at least regarding religious or conscience-based exemptions. Given the limited number of cases to draw on, any such an analysis must be marked with caution vis-à-vis drawing any general conclusions. However, with these caveats in mind, the following trends in the Court's approach can be observed.

First, there has been a marked change in the Court's approach as regards the blanket nature of the 'freedom to resign' doctrine, upon which earlier cases raising issues under Article 9 in the workplace context were habitually declared inadmissible. However, following the Court's judgments in *Eweida et al.*, the fact that an individual has 'voluntarily' entered a workplace is no longer decisive, but rather one issue to be considered along with others as claims are assessed. As such, it can be confidently asserted that workers do not waive their Article 9

[158] See Grand Chamber judgment in *Fernández Martínez supra* note 150, where the Court submitted, in para 138, that 'a heightened duty of loyalty' of a teacher of religious education (in the Spanish context where teachers of Catholic religion and ethics were appointed by the diocese) was 'justified by the fact that, in order to remain credible, religion must be taught by a person whose way of life and public statements are not flagrantly at odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers'.

[159] This in turn harks back to the problematic 'belief/practice' dichotomy, discussed earlier in this chapter and in Chapter 2.

rights when entering the workplace, even when a potential conflict between personal moral convictions and work duties can be foreseen.

Second, whether the workplace in which an alleged conflict between an individual's Article 9 rights and work duties arises is within the public or private sector does not seem to weigh greatly on the outcomes of such applications.[160] In both cases, as observed above, an employee's Article 9 rights can be engaged. The identity of the employer does, however, play a significant role with regard to the assessment of competing interest (my third observation). Specifically, a legitimate interest invoked by a private company – such as 'corporate image' - will not, post *Eweida et al.,* trump an employee's right to manifest his or her religion in the workplace in a discreet way. However, notably *Eweida* did not concern a claim for exemption from any work duty as such, but rather a modest exemption to the company's uniform rules, and as such should be narrowly interpreted for present purposes. State or public authority 'neutrality' might, on the other hand very well outweigh an individual employee's right to religious manifestation in the workplace. The weight attached to such 'neutrality' when claimed by a private employer remains to be seen.[161] At this nascent stage of the development of post-Eweida jurisprudence on Article 9 in the workplace, it is difficult to formulate any too specific a conclusion as to the Court's likely approach. At a general level, it can be expected that the Court will look closely at the substance of the various competing interests, as indeed it has done in some recent Article 9 cases more generally.[162] One interesting aspect to consider is the interplay between corporate image and customer preference, particular with regard to any corporate image based on 'neutrality'. In the EU context, the CJEU has recently

[160] Although the Court (and earlier, the Commission) takes note of the type of obligation engaged on the part of the State in such cases, i.e. either positive (in the case of private employers) or positive and negative, in the case of public authorities.

[161] See CJEU cases *Bouganoui* (C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* (EU:C:2017:204)) and *Achbita* (C-157/15 *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (EU:C:2017:203)), as well as the discussion on *Baby-Loup* referenced above, at note 92.

[162] See for example *Osmanoglu and Kocabas v. Switzerland* (Appl. no. 29086/12, Judgment of 10 January 2017) where imposition of a fine on the parents of a primary school pupil for not allowing her to take part in mixed swimming lessons was held not to have infringed the applicants' freedom of religion under Article 9. In reaching its conclusion, the Court noted, inter alia, that while the applicant's freedom of religion had been interfered with, such interference was justified based on Article 9(2). The Court furthermore noted the various 'mitigating' measures which had been taken by the school in question, including allowing the pupils to wear a burkini and to change and shower in separate facilities. Moreover, the amount fined was also taken into consideration. See also *Hamidović v. Bosnia and Herzegovina*, *(*Appl. no. 57792/15, Judgment of 5 December 2017) which concerned a restriction on the wearing of religious attire by a witness to a criminal trial. It was held that such a restriction violated Article 9. See Brems' comment on *Hamidović* ('Skullcap in the Courtroom: A rare case of mandatory accommodation of Islamic religious practice', 11 December 2017, available at https://strasbourgobservers.com/2017/12/11/skullcap-in-the-courtroom-a-rare-case-of-mandatory-accommodation-of-islamic-religious-practice/#more-4069.

considered the effect of customer preference, and in particular, whether a request by a customer for outward 'religious neutrality' can justify exemption from the prohibition of discrimination on grounds of religion.[163] In the ruling of the CJEU, the conclusion was that it could not. However, such a finding begs the question as to what extent even autonomously pursued 'neutrality' policies can be justified, given the inevitable link between customer preference and corporate decision-making (including vis-à-vis corporate image) in a market economy.[164] It also calls into question to the very notion of 'neutrality'[165], the interplay with cultural and religious norms and conventions, and the position of 'new' religious and/or cultural minorities.

Fourth, the temporal aspect of the conflict faced by the employee is not decisive in the Court's approach. In other words, whether in the public or private sector context, it does not bear significantly on the Court's approach whether the conflict was known to the employee (or the employer) prior to the commencement of the employment relationship, or whether the conflict arose subsequently, either as a result of the change of conviction (or gravity thereof) on the part of the worker, or due to a change in work duties by the employer.[166] In my view, this approach has both benefits and drawbacks. On the one hand, were protection to be dependent on the prior compatibility of a job with the employee's convictions, this would have unfortunate consequences for the freedom of the worker to change his or her religion or belief, which, significantly, is one of the absolute components of Article 9 and cannot be limited by States. Similarly, providing stronger protection for employees who had been

[163] See C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* (EU:C:2017:204).

[164] As noted by Weiler (commenting on the CJEU case of *Achbita*, while referring also to *Bougnaoui*), a corporate image of neutrality could indeed be driven by customer wishes, but moreover, a company might well pre-empt possible 'customer preference' and thus seemingly pursue an autonomous neutrality policy. I take the point here to be the near impossibility of wholly divorcing corporate image and customer preference (however driven) – at least at the level of principle. Weiler, 'Je suis Achbita' 27 *EJIL (*2018), *supra* note 102, at 999. See also (at 1004-5), 'After all, the motives of the consumers which inform the company's definition of 'neutrality' might be the very base prejudice and bigotry which the Directive was intended to combat?'.

[165] As is often observed, even seemingly neutral conventions are rarely such, not least from a minority perspective for whom such neutrality gives rise (for some reason or other) to a particular tension/conflict. Moreover, as noted by Weiler (*ibid.,*), even in the context of the constitutional traditions of EU member states, one can find competing notions of neutrality (at 1003) – such as the French laicité (no direct or indirect state-sponsored endorsement of *any* religion in the public space) or alternatively, an equally distributed endorsement thereof (e.g. state sponsoring/supporting various religious and secular institutions, such as schools). Moreover, Weiler notes that the metric of neutrality must anyhow be derived from somewhere/ on some basis such that, for example, a company might pursue a policy of neutrality vis-a-vis religion and (for good measure) political and philosophical convictions, but not, on the other hand, an 'aesthetic neutrality' (at 1004), demanding, ultimately a choice on the part of the company. This in turn begs the question whether the company is free to adopt any 'neutrality' metric it chooses (at 1004).

[166] See Leigh and Hambler, 'Religious Symbols, Conscience and the Rights of Others' in 3 *Oxford Journal of Law and Religion* (2014) 2, at 9.

employed in a position prior to a change in duties which brought about a previously unforeseen conflict of conscience could place employees holding equally sincere and serious moral convictions in a substantially different position in the context of the same workplace. Although such a difference in treatment might be justified on 'reasonable and objective grounds' (i.e. the time of employment), this does not alter the fact that the nature of the conviction held, as well as the conflict experienced, might be equally severe, while one employee enjoys strong protection and the other may have to face severe consequences for such a dismissal. On the other hand, the approach as it stands seems to offer no protection for either employee in such a situation, unless the State chooses, within its margin of appreciation, to provide such protection.[167]

Fifth, the protection of the autonomy of churches or religious/ethos-based organisations is strong, albeit not beyond review. Such autonomy is strongest in respect of conflicts involving an employee's claims of freedom of religion, in which the individual's beliefs are in tension or conflict with that of the employer organisation. The Court does not review the orthodoxy of an religious/ethos-based organisation's beliefs as such, nor should the national courts do so.[168] However, such autonomy is not regarded as so sacrosanct in situations in which an employee faces a conflict between his or her right to private and family life and the ethos of the organisation in question. This is apparent from the cases of *Schüth* and *Obst* as well as the very narrowly decided application of *Fernández Martínez*. These cases demonstrate that where tensions with official church[169] doctrine resulting from matters falling within the sphere of private and family life of an employee arise, arguments based on Church autonomy will not go unreviewed and indeed will not always prevail. In such cases, much will depend on the nature of the position held by the employee and its proximity with the proclamatory mission of the employer church/organisation. However, the extent to which this less rigid approach

[167] The Court's approach to Article 9 conflicts in the workplace arising due to a change in work duties/job description/other requirements can be contrasted to the reasoning in *Young, James and Webster v. UK*, referred to above (at note 135) concerning a closed shop agreement introduced at a subsequent point in the employment relationship. There the Court did place considerable weight on both the chronology of the facts (as well as the consequences, namely loss of job and livelihood), in assessing whether there had been an interference with Article 11: 'However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union. In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11 (art. 11). For this reason alone, there has been an interference with that freedom as regards each of the three applicants.' (At para 55).

[168] See *Hasan and Chaush, supra* note 39, at para 78.

[169] The cases in point concerned churches, but clearly the same reasoning would apply to other religious (and ethos-based) institutions.

employed by the Court might imply similar protection for employees of Churches or religious/ethos-based organisations facing a conflict raising issues solely under Article 9 in the course of their employment is not clear. It may well be that such organisations retain a very high level of autonomy in such cases. If this is so (and to some extent, even if it isn't), the current approach can be understood with taking a comprehensive view of the overall picture. Save for the discretion of the State, employees facing a conflict of conscience in the secular (whether public or private workplace) enjoy at present very limited level of protection vis-à-vis Article 9 rights, even if a less rigid stance has been adopted by the Court in recent years. This, it seems, is at least to some extent complemented by a relatively high level of autonomy enjoyed by the religious and ethos-based employers.[170] The implication is that persons holding such beliefs as might lead to conflicts in the secular workplace are best off seeking employment among organisations holding to the same convictions/ethos or forming such organisations with other like-minded individuals. Whether or not this best advances the aims of a pluralist and tolerant society repeatedly endorsed by the Strasbourg Court is an issue worthy of serious reflection. A definitive answer to this is, however, beyond the scope of the present endeavour.

4.2. Beyond the *forum internum/externum* dichotomy: Reconceptualizing the freedom of thought, conscience and religion around an 'inalienable core'

Despite some identifiable markers in the jurisprudence of the European Court of Human Rights on Article 9 conflicts in the workplace as discussed above, a number of important issues remain unresolved.[171] However, I will confine myself at present to the issue of the

[170] While the present thesis is focused on the protection of conscientious objection in the workplace under Art. 9 ECHR, it should be noted that for States which are also Member States of the European Union also EU legislation applies. Specifically, the Employment Equality Directive 2000/78/EC (Council Directive establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16) provides what appears to be the *possibility* that in the context of occupational activities in such organisations, difference in treatment based on religion or belief will not be deemed to be discriminatory under the Directive where such is based on a 'genuine, legitimate and justified occupational requirement' (Article 4(2)). Although an in-depth discussion of the Employment Equality Directive and its approach to the position of religious or ethos-based organisations is beyond the scope of the present thesis, it is arguable that the optional nature of Article 4(2) (and its 'standstill' nature) may be at odds with the jurisprudence on the autonomy of religious organisations under the ECHR.

[171] For example, the extent to which 'neutrality/secularism/laicité should justify limiting Article 9 rights in the workplace (and indeed, what conception of 'neutrality' is adopted) or, relatedly, the scope of the 'freedom from religion' under Article 9; a further question relates to the claim that the approach of the ECtHR favours some religions over others, (see Berry '*A 'good faith' interpretation of the right to manifest religion?' supra* note 20, who argues that the Court's approach has treated claims based on Christianity more favourably as compared with minority religions) and the notion of minority religions (and how those are delineated in a society whose

theoretical construct of the freedom of thought, conscience and religion, as already introduced earlier in the chapter. Specifically, I will consider the possibility and usefulness moving away from the existing 'forum internum/externum' structure of the freedom of thought, conscience and religion, instead reconceptualising the right around an 'inviolable core'.

While it is not disputed that the forum externum/internum dichotomy is justified (at least to an extent) on the basis of the wording of Article 9, it is suggested here that it has acquired too rigid a structure and too stubborn a place in the Court's jurisprudence (and to an extent, in the academic literature). Combine this structure with the door it opens to limitations (including proportionality/balancing) and the frequent resort to the margin of appreciation by the Court (further compounded by the significant variance in approaches to religions within various states), and it is no surprise that we are left with an unfortunate combination of a lack of legal clarity – vulnerable to accusations of inconsistency - and confusion with regard to the protection offered by Article 9 in many settings, and in particular the workplace. As a result, the Court's apparent recognition of and commitment to religious freedom and religious pluralism/diversity ring somewhat hollow. Instead, the freedom of religion could be reconceptualised under 'an inalienable core' which, while clearly encompassing the 'forum internum' is not entirely limited to such. While the idea of a 'core' or 'essence' of a human right has been developed under the jurisprudence of the UN Human rights monitoring bodies,[172] it also finds support in the work of the ECtHR.[173] Indeed, the 'core' theory of human rights was introduced in Chapter 2, and it is argued in this thesis that the 'core' of the freedom of thought, conscience and religion also impacts its traditional construct based on the *forum internum/externum* dichotomy. In short, it is suggested here that this *internum/externum* dichotomy seems to have had the effect of limiting any rigorous analysis of the 'essence' or 'core' of the freedom of thought, conscience and religion beyond the *forum internum* (which itself is lacking in clarity). However, beyond the arguably restrictive significance of the *forum internum* from the point of view of rights beneficiaries[174], it is also

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religious dynamics are in flux), as well as the effect of the resort to the margin of appreciation (and the associated issue of 'European consensus' in the Court's jurisprudence).

[172] See particularly the Human Rights Committee as discussed in Scheinin, 'Core Rights and Obligations' in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, (Oxford University Press, 2013), 527, at 532-535. See also Charter of Fundamental Rights which refers to the 'essence' of rights, at Article 52(1).

[173] See the discussion in Chapter 2 at 3.2.1.

[174] While, as it has already been mentioned, protection of the 'forum internum' is not wholly irrelevant as it protects, for example, from state indoctrination, it is also the case that the Court (and Commission) have been far more likely to assess applications under the permissibility of limitations (which are only applicable to 'manifestations of religion or belief). As noted by Hill and Barnes regarding applications raising Article 9, 'vast preponderance of applications which reached the Court concern this external aspect', Hill and Barnes,

not warranted upon a close (and good faith) reading of the text of Article 9. As suggested by Berry, the drafters of the UDHR for example deliberately included the right to manifest religion or belief within the freedom of thought, conscience and religion, as mere protection of the right to hold a belief was not considered sufficient.[175] Moreover, while general statements as to 'the rights and freedoms of others', and the non-absolute nature of the manifestation of religion are regularly made, it is often bypassed that the 'manifestation' of religion or belief as protected under Article 9(1) refers to manifestations in both 'private and public'. Aside from the difficulty of conceiving when it might possibly be justified for the state to restrict, for example, private prayer[176], given that also public manifestation is *prima facie* protected, it should also follow that even such public manifestation does not *inherently* encroach on the rights and freedoms of others.[177] Indeed, there has been a step away from this *internum/externum* dichotomy in, for example, the jurisprudence of the CJEU with regard to asylum claims due to religious persecution.[178] The aspects identified here should at least justify exploring this alternate conceptualisation of the freedom of religion further (as will be done in greater detail in Chapter 6). For present purposes, it suffices to introduce the idea that the inviolable core of the freedom of thought, conscience and religion encompasses, but is not limited to (the perhaps out-dated idea) of the forum internum. In other words, at least some aspects of the freedom to manifest religion or belief will also fall within the inviolable core.

What are the implications of the above proposal as regards a possible right to conscientious objection in the workplace context? At this stage, it is important to point out that such a reconceptualization would not necessarily translate into a positive 'right to conscientious objection' in the workplace context, at least not in an unfettered manner.[179] However, it would – as will be argued more fully in Chapter 6 – have implications for how claims of genuine conscientious objections arising in the workplace are addressed and resolved. In this regard it will be recalled that one way of conceptualizing the 'core' of a human rights provision (such

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'Limitations on Freedom of Religion and Belief in the Jurisprudence of the European Court of Human Rights in the Quarter Century Since Its Judgment in *Kokkinakis v. Greece*', in 12 *Religion & Human Rights* (2017), 174, at 176.

[175] Berry, '*A 'good faith' interpretation of the right to manifest religion' supra* note 20, at 676.

[176] An example used by Cohen, in Cohen, 'Article 9 of the European Convention on Human Rights and Protected Goods', in 12 *Ecclesiastical Law Journal* (2010), 180-201.

[177] Berry (*supra* note 20, at 690), writing with regard to the presence of religious symbols in the public sphere in particular submits that 'As the right to manifest religion explicitly encompasses public manifestations, the mere presence of religion in the public sphere cannot per se constitute a threat to 'the rights and freedoms of others'.

[178] C-7/11 and C-99/11 *Bundesrepublik Deutchland v. Y and Z* ECLI:EU:C:2012:518

[179] i.e. such a 'right to conscientious objection' would not necessarily entail an automatic right to accommodation , that is, a right to maintain one's job and a right to exemption from all such duties as conflict with the worker's conscience.

as Article 9) employs the qualitative distinction among norms between rules and principles,[180] and identifies 'rules' as comprising the 'core' or 'essence', as distinguished from norms under the same provision which are principles. From the legal analysis carried out in the present Chapter, it can be argued that where 'accommodation' of an objection has been sought, the Court has approached the matter as a matter of 'competing principles' in which the norms or interests in tension are weighed and balanced to reach a solution, particularly since *Eweida et al*. However, given that the Court engages in balancing to reach its conclusion – and in light of slight variation in the case law considered – it cannot be ruled out that in a particular context the Court would reach a finding that not accommodating a particular objection would indeed violate Article 9. In this regard, a number of factors can arguably be identified in the case law considered in the present chapter which would serve to strengthen a claim for accommodation of an objection.[181] Moreover, arguably some 'rules' can also be identified under Article 9 which would apply also in the workplace context. Particularly the prohibition of 'coercion' regarding religion or belief (as introduced in Chapter 2) might have some implications for claims of conscientious objection arising in the workplace. Although the cases thus far have not been assessed in terms of the prohibition of coercion, it can be argued that the previous 'right to resign' doctrine as the 'ultimate guarantor' of the freedom of religion as espoused by the Court can be understood as a facet of the assessment of 'coercion'. In other words, where an individual has the option of removing themselves from the situation of giving rise to the conflict of conscience, the prohibition of coercion under the freedom of thought, conscience and religion would not be violated. However, similarly, the prohibition of coercion might therefore apply at least to restrict how an individual raising a conscientious objection in the workplace is dealt with (and what consequences as a result of conscientious objection are acceptable and sufficiently non-punitive as to not amount to 'coercion'[182]), even if accommodation of the objection is not required in the circumstances.

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[180] As articulated by Robert Alexy (R. Alexy, *A Theory of Constitutional Rights,* trans. J. Rivers, Oxford; New York: Oxford University Press, 2002, at 44-69).

[181] Such factors might include the foreseeability of the conflict, the nature of the job in question, the possible consequences endured by the individual voicing the objection etc.

[182] The non-punitive nature of any consequence is linked to the aspect of 'coercion' vis-a-vis religion/belief, which indisputably does fall within 'the core' – see Scheinin, writing with regard to religious attire, Scheinin, 'International Human Rights Law and the Islamic Headscarf: A Short Note on the Positions of the European Court of Human Rights and the Human Rights Committee' in W. Cole Durham, Jr, R. Torfs, D. Kirkham, C. Scott (eds.), *Islam, Europe and Emerging Legal Issues,* Farnham; Burlington: Ashgate (2012), 83-86 at 85-86. Interestingly, here Scheinin suggests that exclusion from University for failure to comply with a headscarf ban might amount to coercion and thus be an impermissible sanction in the enforcement of a permissible restriction (writing under the jurisprudence of the HRC). While recognizing significant differences between university students and employees/workers, we can ask to what extent exclusion from employment for similar reasons also amount to coercion (the earlier reference to *Young, James and Webster* (*supra* note 135) already referred to loss

In conclusion, while the European Court of Human Rights has not engaged extensively with the question of conscientious objection in the workplace, the case law considered in the present chapter give at least some indication as to the applicable norms (and their types) under Article 9. These, together with the findings of Chapters 4 and 5 below, will form the basis of the theoretical argument regarding the structure of Article 9 and its implication for claims of conscientious objection in the workplace advanced more fully in Chapter 6.

of a job and livelihood as 'compulsion')? On the other hand, the ECtHR has (at least previously) taken the stance that adhering to one's religion/belief/conscience need not be cost-free. For a discussion of 'coercion' in respect of the freedom of thought, conscience and religion (including disputable aspects thereof), see H. Bielefeldt, N. Ghanea and M. Wiener, *Freedom of Religion or Belief: An International Law Commentary*, (Oxford University Press, 2016) at 73-91.

CHAPTER 4 : Conscientious objection in the healthcare profession

1. Introduction

When speaking of conscientious objection in the workplace context, perhaps the most widely known instance thereof pertains to moral objections by some healthcare professionals to certain procedures (typically in the field of reproductive medicine) which they would otherwise be required to conduct. In fact, many domestic jurisdictions recognise and protect the right of healthcare professionals to be exempted from participation in such procedures to which they object[1]. However, while the discussions on conscientious objection in healthcare typically focus on particular instances, such as objection to abortion, conscientious objection in healthcare can cover a variety of situations and procedures, as will be introduced below. At the same time, there is significant debate on whether conscientious objection in the healthcare profession is acceptable in the first place, often in light of the practical problems that widespread exercise of conscientious objection can have on the availability of certain healthcare services. On occasion, such debates also concern whether conscientious objection in healthcare should be allowed in contexts where it is denied. Other debates focus more on the philosophical and ethical justification (or lack thereof) for conscientious objection in the healthcare profession.[2] For the purposes of the present thesis, focusing as it does on the extent of the protection of conscientious objection in the workplace under the existing legal standards, it is significant to note that the issue of conscientious objection in healthcare has

[1] The present thesis does not endeavour to undertake a comprehensive comparative legal study of the phenomenon, even though domestic law examples of the approach to conscientious objection in the health care profession will be drawn on, as appropriate. For present purposes it suffices to recognise the relatively widespread existence of such 'conscience clauses', often pertaining to particular procedures (e.g. abortion, euthanasia), see for example EU Network of Independent Experts on Fundamental Rights, Opinion No. 4-2005: The Rights to Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See, 14 December 2005.

[2] The active debate regarding conscientious objection in the healthcare context is evidenced, for one, by the number of 'special issues' of academic journals dedicated to the debate in recent years. See for example (in chronological order), 123 *International Journal of Gynecology and Obstetrics* (2013), Issue S3: 'Conscientious objection to the provision of reproductive healthcare'; 28 *Bioethics* (2014), 'Special Issue: Let Conscience Be Their Guide? Conscientious Refusals in Health Care'; 23 *Medical Law Review* (2015) 'Special Issue: Conscience and Proper Medical Treatment'; 26 *Cambridge Quarterly of Healthcare Ethics* (2017), 'Special Section: Conscientious objection in Healthcare: Problems and Perspectives'; 43 *Journal of Medical Ethics* (2017).

not, as yet, been directly adjudicated at the European Court of Human Rights (the Court) under the freedom of thought, conscience and religion.[3] On the other hand, the question of conscientious objection in healthcare contexts has featured in a number of cases before both the Court and the European Committee on Social Rights, as well as in international human rights law sources. Moreover, there is a significant body of normative guidance on the question in a number of professional ethical codes, as well as in the domestic legal sources mentioned above. In short, despite a lack of certainty as to whether conscientious objection in healthcare is in fact protected under the freedom of thought, conscience and religion in Article 9, there are a number of legal and quasi-legal sources to draw on in order to try to articulate the possible extent and nature of such protection. The purpose of the present chapter is to do precisely that: identify norms in the regulation of conscientious objection in healthcare, with a view to understanding the approach to the issue that might conceivably be adopted under Article 9 when the Court is eventually called upon to do so.

This chapter will therefore proceed as follows. Section 2 will introduce the question of conscientious objection in healthcare in more detail, presenting a number examples of such objections, and introducing the surrounding debate on the acceptability of such objection in the first place. Section 3 will turn to consider the existing standards of protection for conscientious objection in healthcare by looking at sources of international and regional human rights law including relevant jurisprudence on the issue. Section 4 in turn will consider some examples of professional ethical codes which have addressed the issue of conscientious objection in healthcare, with a view to identifying possible norms which might also be applicable at the international/regional level, albeit with all the caution that such an approach warrants.[4] Finally, section 5 concludes by tentatively identifying a number of norms applicable to the assessment of claims of conscientious objection in the healthcare context under the freedom of thought, conscience and religion as protected in Article 9 ECHR. These

[3] However, at the time of writing, there is a case pending before the European Court of Human Rights on the issue of whether failure to recruit a midwife who, in the context of a job interview, expressed her unwillingness to participate in abortions for reasons of conscience infringed her rights under Article 9. See 'Swedish midwife takes case to ECHR over anti-abortion discrimination' available at http://www.euractiv.com/section/health-consumers/news/swedish-midwife-to-eu-court-over-anti-abortion-discrimination/ (last accessed 11 July 2019).

[4] By this is simply meant the necessary caution to be exercised in transposing norms from a domestic legal system onto an international/regional system, when, in the context of the European Convention of Human Rights, it is the domestic law which is assessed in light of the ECHR by the European Court of Human Rights. Nevertheless, given the present state of affairs whereby the European Court of Human Rights has not as yet pronounced on the issue of conscientious objection in healthcare directly, and indeed the recourse the Court has to 'comparative law examples', there is reason to consider examples of domestic legal approaches to conscientious objection in the healthcare profession.

findings will then in turn be drawn on in Chapter 6 when the norms identified in Chapters 2-4 will be employed to propose both a reconceptualised understanding of the freedom of thought, conscience and religion and an improved legal framework for addressing claims of conscientious objection in the workplace context.

2. Conscientious objection in healthcare: key concepts, examples and controversies

2.1. Key concepts

Conscientious objection in the healthcare context is typically defined as the refusal by healthcare practitioners to provide a particular service which conflicts with their sincerely held fundamental moral convictions.[5] Many authors also include within the definition of conscientious objection the criteria of legality, safety and professional acceptability of the procedure or treatment subject to the objection.[6] For the purposes of the present research, my focus will be on the legal (and quasi-legal) approach to genuine conscientious objections held by healthcare practitioners to particular procedures which are legal in a given jurisdiction. In other words, objections to laws prohibiting a particular procedure by way of claiming a conscientious right to perform a prohibited procedure are beyond the scope of the present analysis.[7] However, even the question of 'legality', 'professional acceptability' and 'safety' are not altogether distinct and self-explanatory. Oftentimes laws do not specifically regulate the details of medical procedures,[8] but such depends also in part on professional acceptability.[9] Professional acceptability however is a factor which itself is rarely likely to be constant given advances in research and technology, on the one hand calling into question

[5] See M. Wicclair, *Conscientious Objection in Health Care: An Ethical Analysis,* (Cambridge University Press, 2011) at 1, where Wicclair submits that 'A person engages in an act of conscientious objection when she refuses to perform an action, provide a service, and so forth, on the grounds that doing so is against her conscience.'

[6] Writing on conscientious objection by medical doctors, Julian Savulescu – a bioethicist who has participated actively in the ethical debate on the acceptability of conscientious objection in medicine – has argued that 'If people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors.' In Savulescu, 'Conscientious objection in medicine', 332 *British Medical Journal* (2006) 294 at 294.

[7] See for example Mark Wicclair, in his book on the ethics of conscientious objection in healthcare in which he considers what he terms 'positive appeals to conscience', that is, 'professionals who claim to have a conscience-based obligation to *provide* professionally permitted goods or services (e.g. medications and procedures) when doing so is prohibited by law, institutional rules, employer policies, and so forth.' In M. Wicclair *supra* note 5, at 219.

[8] However, at a general level it can be said that save for some exceptions, consent of the patient is required for a particular procedure to satisfy the criteria of legality, as otherwise a medical procedure is likely to amount to some offence (assault, battery etc.).

[9] Moreover, with regard to 'professional acceptability' a key debate pertains to the concept of 'health' – defined by the World Health Organisation as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.' https://www.who.int/about/who-we-are/constitution

previously accepted forms of treatment which are subsequently found to be harmful (or more harmful than previously thought), or on the other hand, introducing new methods of treatment with their own particular ethical questions. Moreover as regards public healthcare services operating as they do on limited resources, even the provision of legal, professionally accepted and safe forms of treatment are subject to criteria as to their allocation, based, inter alia, on the availability of resources. Nevertheless, despite the complexities of the factors outlined above, the present chapter will focus on considering the various applicable norms to genuine conscience-based refusals to legal health care procedures, examples of which are introduced next.

2.2. Examples of conscientious objection in healthcare

As mentioned in the introduction of this chapter, perhaps the most widely recognised instance of conscientious objection in healthcare concerns to objections to performing or assisting in abortions. Indeed, many countries maintain legislation with some form of 'conscience clause' enabling those healthcare professionals with a moral objection to abortion to be exempt from such procedures.[10] However, even such exemptions are not always clear-cut, thus occasionally being challenged as to the reach of the protection offered, for example, in relation to the directness of involvement in a particular procedure required for the exemption to apply.[11] Some jurisdictions extend similar conscientious objection clauses to other procedures in the field of reproductive medicine.[12] Another broad category of healthcare in which conscientious objection claims arise pertains to end of life care. For example, the British General Medical Council has in its ethical guidance on the issue recognised the right of medical professionals to be exempt from withdrawing life-sustaining treatment.[13]

[10] See, EU Network of Independent Experts on Fundamental Rights, Opinion No. 4-2005, *supra* note 1.
[11] See for example the UK case of *R v. Salford Health Authority ex parte Janaway* [1988] UKHL 17, which concerned whether the 'conscience' clause in section 4(1) the UK Abortion Act 1967 extended to a doctor's secretary who objected to typing a letter referring a patient to another doctor for the purpose of evaluating whether the patient's pregnancy should be terminated. See also the more recent UK case of *Greater Glasgow Health Board v. Doogan and another* [2014] UKSC 68, which was concerned with the question whether two individuals working in a hospital in Glasgow could rely on the conscience clause in the Abortion Act 1967 vis-a-vis their roles as labour ward coordinators. Both respondents were practising Roman Catholics who considered the termination of pregnancy to be a grave offence against human life and who were of the conviction that 'any involvement in the process of termination renders them accomplices to and culpable for that grave offence.' (para 12).
[12] For example, Section 38(1) of the Human Fertilisation and Embryology Act 1990 (UK) provides 'No person who has a conscientious objection to participating in any activity governed by this Act shall be under any duty, however arising, to do so.'
[13] General Medical Council, 'Treatment and care towards the end of life: good practice in decision making,' published 20 May 2010, in force July 2010, at paras. 79-80, https://www.gmc-uk.org/-

Furthermore, where legal, there are examples of domestic legislation recognizing the right of medical/healthcare practitioners with a moral objection to be exempt from participating in euthanasia.[14] It may be unsurprising that conscientious objection in healthcare often arises in the context of questions regarding the beginning and end of life, but it is important to recognise that situations of genuine moral conflict may arise in a wide range of situations in healthcare. For example, the issue of conscientious objection in the healthcare context can potentially arise with regard to participation in some non-medically indicated procedures[15], or the examining patients of the opposite sex,[16] or patients who are intoxicated.[17] At the international level, a declaration of the World Medical Association also recognises the right of

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/media/documents/treatment-and-care-towards-the-end-of-life---english-1015_pdf-48902105.pdf (accessed 3 April 2019).

[14] The Belgian Act on Euthanasia of May 2002 provides in Chapter VI 'Special Provisions', section 14: 'No Physician may be compelled to perform euthanasia. No other person may be compelled to assist in performing euthanasia. Should the physician consulted refuse t to perform euthanasia, then he/she must inform the patient and the persons taken in confidence, if any, of this fact in a timely manner, and explain his/her reasons for such refusal. If the refusal is based on medical reasons, then these reasons are noted in the patient's medical records. At the request of the patient or the person taken in confidence, the physician who refuses to perform euthanasia must communicate the patient's medical record to the physician designated by the patient or the person taken in confidence.' Available at http://www.ethical-perspectives.be/viewpic.php?TABLE=EP&ID=59

[15] An example of such a situation is circumcision for religious reasons. See for example: British Medical Association, *Non-therapeutic male circumcision (NTMC) of children – practical guidance for doctors* (2012), available at https://www.bma.org.uk/advice/employment/ethics/children-and-young-people/non-therapeutic-male-circumcision-of-children-ethics-toolkit (last accessed 19 July 2019). The BMA guidance in turn refers to the General Medical Council's guidance on 'Personal beliefs and professional practice' (2013, available at https://www.gmc-uk.org/-/media/documents/personal-beliefs-and-medical-practice_pdf-58833376.pdf (last accessed 19 July 2019). In the case of non-therapeutic male circumcision of children, interestingly the emphasis is on the assessment of the 'best interests of the child', and the guidance distinguishes between a doctor's refusal to perform NTMC based on an assessment of the procedure not being in the best interests of the child and refusals based purely on the doctor's personal moral reasons. The guidance is, it is suggested, somewhat unclear regarding refusals to perform NTMC. On the one hand, the BMA's guidance states that where a doctor's refusal is based on an assessment of such not being in the child's best interest, 'there is arguably no obligation to refer on'. On the other hand, where the refusal is based on the doctor's moral opposition, irrespective of an assessment of the child's best interests, the GMC's guidance is to be complied with, which, inter alia provide that 'if it's not practical for a patient to arrange to see another doctor, the doctor must make sure that arrangements are made – without delay – for another suitably qualified colleague to advise, treat or refer the patient.'

A further example is the recognition of conscientious objection to 'bloodless surgery' (i.e. when a patient objects to the use of blood transfusion in surgery), see Royal College of Surgeons, *Caring for patients who refuse blood: A guide to good practice for the surgical management of Jehovah's Witnesses and other patients who refuse transfusion* (2018), available at https://www.rcseng.ac.uk/standards-and-research/standards-and-guidance/good-practice-guides/patients-who-refuse-blood/ (last accessed 11 July 2019), which provides, inter alia that 'Surgeons are duty-bound to respect patients' religious freedoms and can feel uncomfortable refusing to treat patients because of restrictions stemming from a religious belief for fear of accusation of discrimination. The emotional impact on surgeons from this type of restriction on their practice must also be recognised, as the loss of a patient who they had the means and ability to save can be very distressing. Surgeons have the right to choose not to treat patients if they feel that the restrictions placed on them by the refusal of blood products are contrary to their values as a doctor', with, however, an accompanying duty to refer the patient on to another suitably qualified doctor.

[16] Strickland, 'Conscientious objection in medical students: a questionnaire survey', 38 *Journal of Medical Ethics* (2012) 22, at 24.

[17] A questionnaire survey conducted in 2008 on medical students in the UK suggested that of the students surveyed 8.5% reported an objection to examining or treating a patient intoxicated with alcohol (although only 1.2% indicated that they would in fact refuse to perform the procedure), see Strickland, *ibid.*, (Table 2 at 24).

a healthcare professional to be exempt from treating a detainee undergoing a hunger strike, if they object to the prohibition of force-feeding such a detainee.[18] Yet another recent debate of relevance to the question of conscientious objection can be seen in the discourse on whether physicians can dismiss from their care patients who refuse vaccinations.[19] It can be seen from the foregoing that conscientious objection in healthcare is, in principle, a question far broader than conscientious objection to abortion,[20] even if such is the most common manifestation thereof. Moreover, it can be expected that with ever advancing medical technologies coupled with changing understandings of 'health', many ethically contested questions will continue to arise in the healthcare context, with the likely consequence that instances of conscientious objection will also continue to surface. The extent of protection for such conscientious objection under the freedom of thought, conscience and religion will therefore also continue to be of relevance, if also controversial. Before proceeding to analyse the existing legal approach to conscientious objection in healthcare under international, regional and professional standards, some particular points of controversy in the debate will be introduced below.

2.3. The controversial nature of conscientious objection in healthcare: some initial observations

While it is evident that the idea of conscientious objection in general evokes controversy, it is arguably the case that in the healthcare context such objection is even more contested.[21] Before proceeding to look at the legal approach to conscientious objection in healthcare under

[18] World Medical Association, WMA Declaration of Malta on Hunger Strikers (Adopted by the 43rd World Medical Assembly, St Julians, Malta, November 1991: most recently revised by the 68th WMA General Assembly, Chicago, United States, October 2017), available at https://www.wma.net/policies-post/wma-declaration-of-malta-on-hunger-strikers/ (last accessed 11 July 2019).

[19] Forbes, 29 August 2016, by Tara Haelle: 'As More Patients Refuse Vaccines, More Doctors Dismiss Them – With AAP's Blessing,' https://www.forbes.com/sites/tarahaelle/2016/08/29/as-more-parents-refuse-vaccines-more-doctors-dismiss-them-with-aaps-blessing/#702b7bb01f22 (last accessed 11 July 2019). See also Diekema, 'Physician Dismissal of Families Who Refuse Vaccination: An Ethical Assessment' 43 *Journal of Law and Medical Ethics* (2015) 654.

[20] Indeed an even wider range of possible conscientious objections in the healthcare context have been discussed in the academic literature, see for example, Douglas, 'Refusing to Treat Sexual Dysfunction in Sex Offenders', 26 *Cambridge Quarterly of Healthcare Ethics* 2017, 143; Minerva, 'Cosmetic surgery and conscientious objection,' 43 *Journal of Medical* Ethics (2017) 230; Shaw, Gardiner, Lewis et al. 'Conscientious objection to deceased organ donation by healthcare professionals' 19 *Journal of the Intensive Care Society* (2018) 43.

[21] See Bielefeldt, 'Conscientious Objection in the Medical Sector: Towards a Holistic Human Rights Approach' in S. Klotz, H. Bielefeldt, M. Schmidhuber and A. Frewer (eds.), *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation* (transcript, 2017) 201, at 201-202 on the controversial nature of conscientious objection in the healthcare context.

various normative frameworks below, the present subsection will introduce, by way of background, some of the reasons why the issue is so contested.

2.3.1.The right to health

First, the issue of conscientious objection by healthcare practitioners is seen as controversial due to the resulting tension with the right to health, which is itself protected as a human right protected either in provisions explicitly concerning the right to health (e.g. Article 11 European Social Charter) or the right to private and family life (Article 8 ECHR). As such, unlike in other workplace contexts in which the issue of conscientious objection might arise but in which the content or effect of such an objection might not necessarily have any directly conceivable consequences for the rights – or indeed the human rights – of others, the healthcare context is evidently different. Particularly in the provision of public health/medical services, conscience-based refusals by professionals to provide an otherwise legal service brings to the fore the tension inherent in conscientious objection in healthcare. On the other hand, neither health, nor the right to health as protected by human rights instruments are simple concepts. The Constitution of the World Health Organisation defines health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'[22]. The WHO definition of health has been criticised for being overly broad, and potentially medicalising all manner of obstacles to well-being.[23] The International Covenant on Economic, Social and Cultural Rights also protects the right to the highest attainable standard of physical and mental health.[24] Nevertheless we can see how, taking the broad definition of health proposed by the WHO for example, a procedure such as male circumcision for religious reasons might fall under the definition, while on the other hand not being strictly medically indicated.[25] Moreover, even given that a sought procedure genuinely

[22] Constitution of the World Health Organization, Basic Documents, 45th edn, Supplement, October 2006, at 1.
[23] Saad and Jackson, 'Testing conscientious objection by the norm of medicine', 13 *Clinical Ethics* (2018) 9, at 12-13. See also Lamb, 'Conscientious Objection: Understanding the Right of Conscience in Health and Healthcare Practice', 22 *The New Bioethics* (2016) 33, at 34.
[24] Art. 12, International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.
[25] For example, in the UK context, the British Medical Association guidance on non-therapeutic male circumcision articulates among the proposed 'Ten Good Practice Points', that a child's best interests include not only health interests but also a child's social and cultural interests.' BMA, 'Non-therapeutic male circumcision (NTMC) of children – practical guidance for doctors', London: BMA, 2019, at 6. Some similar observations can be made with regard the BMA's views on the Law and ethics of abortion, particularly in respect of sex selective abortions. The BMA's views articulate on the one hand, that terminating a pregnancy solely on account of fetal sex (with no health implications for either for the fetus or the woman) does not satisfy the legal requirements for an abortion according to the applicable law (Abortion Act 1967). Nevertheless, the BMA's views continue to suggest that in some circumstances, 'another of the legal grounds for abortion could be met as a consequence of fetal gender'. Specifically, 'as part of their assessment, doctors should consider all relevant factors, which may

does fall under the contemporary legal notion of health, it is not yet clear that a potential right to conscientious objection on the part of an individual practitioner necessarily *conflicts* with the patient's right to health, if (fulfilling the general criteria for access to some treatment), the patient is nevertheless able to access the treatment/procedure, provided by another available practitioner. Yet, as some of the cases discussed later in this chapter indicate, issues of accessibility can arise if conscientious objection to a particular procedure is exercised on a widespread scale, or if a service is sought in a geographically remote region.[26] Moreover, given that in practice conscientious objection in healthcare most often arises with respect to abortion, the exercise of conscientious objection is thus often juxtaposed against women's rights and specifically women's access to healthcare.[27] While the present chapter does not seek to focus on a particular instance of conscientious objection in healthcare but rather to ascertain the legal approach thereto at a general level, such aspects undoubtedly add to the contested nature of conscientious objection in the healthcare context.

2.3.2. Religious and political sensitivity

A further controversial aspect of the conscientious objection debate in the healthcare context pertains to the often religious basis giving rise to a particular objection. Indeed such can, to a certain extent, be said of conscientious objection in general. In societal contexts in which the role of religion is hotly debated and indeed changing, it is not surprising that invoking an exemption from an otherwise applicable duty for religious reasons, particularly in the context of public service provision, is bound to stir up debate. It comes as no surprise therefore that the issue of conscientious objection in healthcare is also a politically contested question. Without delving into political debates at the domestic level, the controversial nature of the

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include the woman's views about the effect of the gender of the fetus on her physical and mental health. Doctors may come to the conclusion, in a particular case, that the effects on the physical or mental health of the pregnant woman of having a child of a particular gender would be so severe as to provide legal and ethical justification for a termination', in BMA, *Law and ethics of abortion – BMA Views* (2014, updated 2018) at para 2.1.5.

[26] See for example J. Shaw & J. Downie, 'Welcome to the wild, wild north: conscientious objection policies governing Canada's medical, nursing, pharmacy and dental professions', 28(1) *Bioethics,* 2014, 33-46; F. Minerva, 'Conscientious objection in Italy', 41(2) *Journal of Medical Ethics*, 2015, 170-173. On the relevance of the 'frequency' of conscientious objectors (generally, not just in the healthcare context), see Smet, 'Conscientious Objection Under the European Convention on Human Rights: The Ugly Duckling of a Flightless Jurisprudence', in J. Temperman, T.J. Gunn and M.D. Evans (eds.) *The European Court of Human Rights and the Freedom of Religion or Belief* (Brill, 2019), 282, at 294.

[27] Bribosia, Isailovic & Rorive, 'Objection Ladies! Taking IPPF-EN v. Italy one step further', Working Paper 2015/5, Working Paper presented in University College Roosevelt (Utrecht University), (Middleburg 27 April 2015); Fiala & Arthur, '"Dishonourable disobedience: Why refusal to treat in reproductive healthcare is not conscientious objection' 1 *Woman,* 2014, 12-23; S. Nabaneh, M. Stevens & L. Berro Pizzarossa 'Let's call 'conscientious objection' by its name: Obstruction of access to care and abortion in South Africa' (OxHRH Blog, 24 October 2018), http://ohrh.law.ox.ac.uk/lets-call-conscientious-objection-by-its-name-obstruction-of-access-to-care-and-abortion-in-south-africa (accessed 27.6.2019).

issue is well demonstrated by a Declaration of the Parliamentary Assembly of the Council of Europe (PACE) in 2010 and the process leading up to its adoption. Initially a motion for a resolution titled 'Women's access to lawful medical care: the problem of unregulated use of conscientious objection'[28] was proposed before the PACE, for which UK MP Christine McCafferty was appointed rapporteur. The subsequent report and draft resolution, while recognising the right of an individual to conscientiously object to performing certain medical procedures, expressed concern over 'increasing and largely unregulated occurrence of this practice, especially in the field of reproductive health care' in many CoE states.[29] The draft resolution thus called for a number of steps including 'comprehensive and clear regulations that define and regulate conscientious objection', including the limitation thereof as an individual right for those 'directly involved in performing the procedure in question'[30]. Further normative provisions in the resolution included obliging healthcare professionals to provide information on all treatment options to patients, including those to which the particular professional objects, informing the patient of any conscientious objection held by the practitioner and referring the patient to another health care provider and lastly, 'to provide the desired treatment to which the patient is legally entitled despite his or her conscientious objection in cases of emergency' or when referral is not possible. In a turn demonstrative of the highly contested nature of the issue, the resolution finally adopted by the PACE was altogether dissimilar to the afore-mentioned draft resolution, finally carrying the title 'The right to conscientious objection in lawful medical care'[31]. Whereas the impetus of the draft resolution was towards limiting any right to conscientious objection to those directly participating in a given procedure, the adopted resolution covers also refusals to 'accommodate, assist, or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason.'[32] Finally, the adopted resolution sets out a number of legislative and policy goals for states, so as to ensure access to lawful medical care and protecting the right to health while also ensuring respect for the freedom of thought, conscience and religion of healthcare

[28] See Campbell, 'Conscientious Objection and the Council of Europe: The right to conscientious objection in lawful medical care, Resolution 1763 (2010), Resolution adopted by the Council of Europe's Parliamentary Assembly', 19 *Medical Law Review* (2011), 467 at 468 and at footnote 6. At 468, Campbell outlines the process leading up to the adoption of resolution 1763 referred to below.
[29] 'Women's access to lawful medical care: the problem of unregulated use of conscientious objection', Report - Social, Health and Family Affairs Committee, Rapporteur: Ms Christine McCafferty, United Kingdom, Socialist Group. Doc 12347, 20 July 2010, (henceforth 'McCafferty Report'), At p. 2, 'A Draft Resolution', para 1.
[30] *Ibid.,* paras 4; 4.1;4.1.1.
[31] Resolution 1763 (2010), text adopted by the Parliamentary Assembly on 7 October 2010 (35th Sitting).
[32] *Ibid.,* para. 1.

workers.[33] As a further testament to the contested nature of the issue of conscientious objection and the difficulty in reaching broad political consensus on the matter even in a political organ such as the PACE, the final resolution was adopted by a very narrow margin, with only around one third of delegates voting.[34] While the European Court of Human Rights has occasionally drawn on PACE resolutions in its reasoning, it is not argued here that the PACE resolution discussed carries much normative force for the purposes of the present analysis. Yet it does demonstrate both the controversial nature of the issue of conscientious objection in healthcare (particularly in the field of reproductive health care) and the lack of clarity as to whether and/or the extent to which existing international and regional legal standards actually protect the right of health care professionals to object to particular procedures on grounds of moral opposition, as will be addressed in section 3 below.

3. International and regional legal approaches to conscientious objection in healthcare

3.1. Introduction

When studying the international legal approach to conscientious objection in healthcare under the human right to freedom of thought, conscience and religion, it is hard not to notice the general lack of direct engagement with the issue. While such has been attempted in the field of politics as well as in the academic and professional ethics debates, the overall lack of direct legal assessment is arguably curious. Such a state of affairs notwithstanding, the issue of conscientious objection in healthcare has been raised in a number of contexts in the body of international human rights law, even if mostly not directly in the context of the freedom of thought, conscience and religion. As such, the present section considers how, in the contexts in which it has been raised, conscientious objection in healthcare is approached under existing human rights standards, trying thereby to discern as far as possible any identifiable legal norms. Such a task should be approached with caution for a number of reasons. First, given that conscientious objection has not been directly at issue, the distinction between descriptive and prescriptive statements/findings vis-à-vis conscientious objection in healthcare should be carefully borne in mind. In other words, a source of human rights law could address or refer to conscientious objection in healthcare primarily descriptively – describing a practice-

[33] *Ibid.,* para 4.
[34] Campbell reports that the resolution was adopted by 56 votes in favour, 51 against (with 4 abstentions), with Christine McCafferty, the appointed rapporteur voting against. See Campbell *supra* note 28. Voting results available at http://assembly.coe.int/Documents/Records/2010/E/1010071500E.htm

without thereby pronouncing on its normative status in international human rights law as a positive right. On the other hand, the same could be said of statements on problematic aspects of the exercise of conscientious objection – where again the purpose is to describe a state of affairs rather than refuting the practice thereof from a normative standpoint. Second, given that such an analysis necessitates a rather broad approach, looking at a wide range of distinct (if interrelated) normative frameworks, there is a danger of both over- or under-emphasising particular nuances that might be detected in the human rights legal approach to conscientious objection in healthcare. Perhaps the most accurate assessment in such a situation would conclude that the law, as it is, is not yet fully established. Nevertheless, the purpose of the present section is to consider, the above observations notwithstanding, the extent to which evidence for any level of protection for conscientious objection in healthcare can be garnered from existing sources of law. While the focus will be on sources of law within the Council of Europe framework, the section below will briefly consider sources on conscientious objection under the UN human rights law framework.

3.2. Conscientious objection in healthcare under International (UN) human rights standards

While the specific issue of conscientious objection to healthcare has not been assessed under UN standards on the freedom of thought, conscience and religion as protected in Article 18 of the International Covenant on Civil and Political Rights, it did feature in the drafting history of General Comment No. 22 of the Human Rights Committee.[35] While a landmark document in recognising the right to conscientious objection to military service as a derivative right under Article 18, it was also suggested during the drafting process that other forms of conscientious objections – such as that of 'doctors called upon to carry out abortions in state hospitals' should be included.[36] However, the inclusion of such a suggestion was rejected by the Chairman/Rapporteur of the Working Group[37] as susceptible to interpretation as obscurantism on the part of the Committee given that 'In the not so distant past any form of medical intervention had been considered to be contrary to God's will'.[38] This drafting history

[35] A discussion of the international developments regarding conscientious objection in healthcare is provided in H. Bielefeldt, N. Ghanea & M. Wiener, *Freedom of Religion or Belief: An International Law Commentary*, (Oxford University Press, 2016), 298-301.
[36] Minutes regarding views of Human Rights Committee member Mr. Wennergren CCPR/C/SR.1237 at para 25, see also Bielefeldt et al. *supra* note 35, at 298.
[37] Bielefeldt et al *supra* note 35, at 298.
[38] Intervention by Mr Dimitrijevic, CCPR/C/SR. 1239 at para 44, also cited in Bielefeldt et al. *supra* note 35 at 298 and EU Network of Independent Experts on Fundamental Rights, Opinion No. 4-2005: The Right to

is not, however, to say that conscience-based objections in healthcare are not covered by the freedom of thought, conscience and religion. Even in rejecting an explicit inclusion of such a right, the Chairman/Rapporteur of the Working Group acknowledged that a doctor's right to refuse procedures on the grounds of conscience could be restricted in accordance with Article 18(3). This suggests at the least, that such conscience-based refusals were considered to fall within the scope of Article 18 as manifestations of religion or belief, restrictions upon which had to comply with Article 18(3) requirements. As such, a lack of explicit mention in General Comment No. 22 as adopted does not prevent the applicability of Article 18 to healthcare professionals in the course of their work.

Conscientious objection in healthcare also features in the work of other UN treaty monitoring bodies. Most notably CEDAW has addressed the issue from the angle of discrimination against women. As such, in a number of contexts, the Committee has expressed concern regarding widespread resort to conscientious objection by healthcare professionals, and the impact of such a practice on women's access to health services.[39] In such contexts, the references to conscientious objection in healthcare have been descriptive insofar as conscientious objection is practiced. On the other hand, the statements of CEDAW include a normative element as regards the right to health and the prohibition of discrimination against women, calling for adequate regulation of the practice of conscientious objection, including by providing for an adequate system of timely referral.[40] Other UN human rights mechanisms have identified various other aspects regarding the issue of conscientious objection in healthcare, including 'the obligation of the State to have providers available who do not invoke the conscientious objection clause'[41], and the duty to ensure 'the provision of termination of pregnancy in emergency situations'[42]. Bielefeldt et al. note that the Human Rights Committee has been more reserved in its stance to widespread practice of

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Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See, 14 December 2005, at 15-16 and footnote 36.

[39] See in Bielefeldt et al. *supra* note 35, at 298-299, quoting General Recommendation No. 24 on Article 12, and concluding comments on Slovakia (CEDAW/C/SVK/CO/4, paras 28-29), Hungary (CEDAW/C/HUN/CO/7-8) and Poland (CEDAWC/POL/CO/6).

[40] Interestingly, in its concluding observations on the 5th and 6th periodic reports of Slovakia, the CEDAW committee recommends that the State party 'Ensure unimpeded and effective access to legal abortion and post-abortion services to all women in the State party, including by ensuring mandatory referrals in cases of conscientious objections by institutions, *while respecting individual conscientious objections'*, (emphasis added), Concluding observations on the combined fifth and sixth periodic reports of Slovakia, CEDAW/C/SVK/CO/5-6, 25 November 2015, at para 31 (d).

[41] The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, A/HRC/14/20/Add.3, para 85(k).

[42] Ibid.

conscientious objection, for example by requesting state parties for more information.[43] However, very recently conscientious objection in healthcare was referred to in the Human Rights Committee's General Comment No. 36 on the right to life[44], in the context of access to abortion.[45] Specifically, the General Comment provides that

> States parties should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers.[46]

Again, while it should be noted that the general comment at hand concerns the right to life under Article 6 ICCPR (rather than conscientious objection under Article 18), the initial tone of the reference above is certainly cautious vis-à-vis the practice of conscientious objection. For one, it is not entirely clear whether 'barriers caused as a result of the exercise of conscientious objection' actually implies that *any* exercise of conscientious objection itself amounts to such a barrier (i.e. one which should be removed and certainly not reintroduced), or whether it is something *about* the exercise thereof which amounts to a barrier. On the other hand, the said provision includes specific references to the work of the Human Rights Committee which may add some clarity to the issue. Specifically, with regard to the barriers 'caused as a result of the exercise of conscientious objection', the General Comment refers to two sets of concluding observations to periodic state reports of 2016, namely Poland and Colombia. However, on closer inspection, in both sets of concluding observations the Human Rights Committee is primarily concerned with some aspects of the widespread exercise of conscientious objection in the medical field, notably the lack of an effective referral mechanism.[47] As such, while the recent general comment is perhaps an indication of the

[43] Bielefeldt et al. *supra* note 35, at 299. Conscientious objection also featured in an individual complaint lodged before the Human Rights Committee, namely *VDA v. Argentina* Communication No. 1608/2007, CCPR/C/101/D/1608/2007, 29 March 2011, particularly in the arguments of the applicant. In its views, the Human Rights Committee did not address the issue of conscientious objection to abortion as exercised by medical professionals, but rather mainly approached the complaint in terms of access to remedies on the part of the respondent State.

[44] CCPR/C/GC/36 General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, adopted 30 October 2018 (Advance unedited version).

[45] *Ibid.,* para 8.

[46] *Ibid.*, (references omitted).

[47] Human Rights Committee, Concluding observations on Poland, (Concluding observations on the seventh periodic report of Poland, CCPR/C/POL/CO/7, 23 November 2016) at para 24(a): 'It should ensure women's effective access to safe legal abortion throughout the entire country and ensure that women are not obliged, as a consequence of conscientious objection or prolonged review of complaints about refusals to perform abortions, to resort to clandestine abortion that puts their lives and health at risk…. (ii)enhancing the effectiveness of the referral mechanism to ensure access to legal abortion in cases of conscientious objection by medical

increased willingness of the Human Rights Committee to engage with the issue of conscientious objection in healthcare[48], it is nevertheless still the case that a significant lack of clarity persists as regards the possible protection of conscientious objection of healthcare practitioners under UN human rights standards.[49]

3.3. Conscientious objection in healthcare in the jurisprudence of the European Court of Human Rights

Similarly to the lack of clarity evident in the current situation regarding the legal approach to conscientious objection in healthcare under international human rights standards, the European Court of Human Rights has as yet to directly engage with the issue, particularly as regards possible protection offered by Article 9. An early inadmissibility decision of relevance for the question of conscientious objection in healthcare was that of *Pichon and Sajous v France.* Specifically, the case concerned the refusal by two French pharmacists to dispense contraceptives to some women who presented valid prescriptions. The pharmacists were subsequently charged and convicted under the relevant French law and eventually filed a complaint before the European Court of Human Rights, arguing that their criminal conviction had violated their rights as guaranteed under Article 9. The Court found the complaint to have been manifestly ill-founded, noting that Article 9 does not 'always guarantee the right to behave in public in a manner governed by that belief' and that the applicants could not

> 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]

However, arguably the Court's reasoning is somewhat lacking for not having grappled with the core of the applicant's arguments, namely that selling contraceptives seriously

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practitioners'; Concluding observations on Colombia (2016) (Concluding observations on the seventh periodic report of Colombia, CCPR/C/COL/7, 17 November 2016) at para. 21, 'In particular the state party should establish an effective referral mechanism to ensure the availability of safe abortion services in cases where health-care professionals invoke the conscientious objection clause, and to ensure that those professionals who perform abortions receive adequate training'.

[48] Interestingly, see the complicated drafting history also of General Comment No. 36**:** Zilli, 'The UN Human Rights Committee's General Comment 36 on the Right to Life and the Right to Abortion', 6 March 2019, http://opiniojuris.org/2019/03/06/the-un-human-rights-committees-general-comment-36-on-the-right-to-life-and-the-right-to-abortion/

[49] See Bielefeldt et al. *supra* note 35, at 301 similarly note the obvious need for increased clarity in this area.

[50] ECtHR, *Pichon and Sajous v. France* , Application no. 49813/99, Decision on admissibility of 2 October 2001.

contravened their sincere religious beliefs. Rather, the Court suggested (having first cast doubt on whether such a refusal amounted to a manifestation of religion under Article 9 in any case), that given that the applicants' beliefs could be manifested in many ways outside their work context, no issue under Article 9 arose. Nevertheless, the applicant's inability to manifest their beliefs in general was not at issue. Rather, their argument concerned the specific act of dispensing (and stocking) contraceptives. As has been observed by a number of commentators, the Court could have reached the same result by finding the defendant State's interference with the pharmacists' right to manifest their religion/belief to have been justified under Article 9(2), while at the same time acknowledging those beliefs as falling within the scope of Article 9.[51] Such an approach would, moreover, arguably have given due consideration to the pharmacists' stated beliefs, which, it would seem, were never doubted for their sincerity, even if those beliefs were not ultimately to be given precedence. Moreover, in addition to its incomplete reasoning, the on-going relevance of *Pichon and Sajous* can further be questioned in light of more recent developments in the Court's Article 9 jurisprudence as discussed in the previous chapter.[52] Indeed, an emerging and developing body of jurisprudence vis-à-vis Article 9 rights in the workplace give some indication of at least the willingness of the Court to consider a conscience-based refusal in the healthcare workplace as falling within the scope of Article 9. Nevertheless, drawing definitive conclusions as to the particular stance which the Court would adopt in such a case are difficult for a number of reasons. First, while the landmark judgment in *Eweida et al v. UK* in 2013 significantly changed the Court's previous stance to the engagement of Article 9 rights in the workplace, it is not fully clear how the subsequent jurisprudence will develop, though certainly refusals based on religious and/moral grounds as a form of 'manifestation' of religion or belief were recognised as falling within the scope of Article 9. Nevertheless, the particular context of the

[51] This line of argument was advanced by Lamačková, who pursues – in her analysis of *Pichon and Sajous* - an interpretation of Article 9 articulated in various forms by C. Evans, J. Gunn and van Dijk and van Hoof; Lamačková, 'Conscientious Objection in Reproductive Health Care: Analysis of *Pichon and Sajous v. France*', 15 *European Journal of Health Law* (2008) 7, at 13; C. Evans, *Freedom of Religion under the European Convention on Human Rights,* Oxford: Oxford University Press, 2001, at 208; J. Gunn, 'Adjudicating Rights of Conscience under the European Convention on Human Rights, in J. D. Van der Vyver and J. Witte, Jr. (eds), *Religious Human Rights in Global Perspective: Legal Perspectives*, (Martinus Nijhoff Publishers, 1996), 305-30, at 314. Note that Lamačková's article was written before some of the significant recent developments in the Court's Article 9 jurisprudence, in particular as regards the recognition of the right to conscientious objection to military service in *Bayatyan v. Armenia,* and the applicability of Article 9 to the employment context since *Eweida et al . v. UK*. However, her observations as regards the court's reasoning in Pichon and Sajous remains pertinent. See also *P. Van Dijk and G. J.H. van Hoof, Theory and Practice of the European Convention on Human Rights*, (Kluwer Law International, 1998), at 543.

[52] See particularly the landmark judgment of *Eweida et al. v. United Kingdom*, Appl. nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013.

healthcare workplace as a site of conscience-based refusals has not been at issue as yet.[53] For reference, one of the applicants in *Eweida et al.* concerned a nurse who wished to wear a small cross at work, but whose employer did not allow her to do so on grounds of health and safety reasons. In its judgment, the Court recognised the importance of the applicant's right to manifest her religion by wearing a cross, yet it considered that the health and safety grounds cited by the employer (and confirmed by the respondent Government) as the reason for asking the applicant to remove her cross were of 'inherently greater magnitude' than reasons such as corporate image as had been cited by the employer in the analogous application of Eweida. As such, the Court did not consider that the measures of which the applicant complained had been disproportionate such as to have violated her rights under Article 9 (taken alone or together with Article 14). In short, the Court did recognise and indeed rely on the specific importance of 'health and safety' in the context of a hospital ward as warranting a restriction on the manifestation of religion by way of the wearing of a religious symbol, where in an analogous case such a restriction on manifestation was not accepted for other (corporate image) reasons.[54] On the other hand, the case of *Ebrahimian v France*[55] concerned a Muslim social worker in a public hospital in France whose contract of employment was not renewed upon her refusal to remove her headscarf, and who therefore complained to the ECtHR claiming a violation of Article 9. The Court however did not consider the non-renewal of her contract a violation of Article 9, even though the reasons invoked by the employer related to the neutrality of public service provision and the constitutional principle of secularism.[56] For present purposes however both cases firmly establish the applicability of Article 9 even to the healthcare sector, which, it could be said was somewhat dubious under the earlier inadmissibility of *Pichon and Sajous.*[57]

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[53] Smet interprets the Court's submissions in *R.R v Poland* and *P and S v Poland* (infra notes 59 and 66) together with the jurisprudence of the European Committee of Social Rights as indicating that conscientious objection to performing abortions are 'conditionally protected' under the Convention, in other words as permitted but not required by it' (See Smet *supra* note 26, at 290-291). The present author would, however, be particularly cautious in drawing conclusions (as yet) on the ECtHR's approach to conscientious objection to abortion on the aforementioned cases, given that they were not assessed under Article 9.

[54] However, see the discussion on *Eweida* in the previous chapter for why the case should not be interpreted too widely at present.

[55] ECtHR *Ebrahimian v. France*, Appl. no. 64846/11, Judgment of 26 November 2015.

[56] However, the Court did provide a detailed account of its reasoning and the specifics of the case on the basis of which it came to the conclusion that the non-renewal of the contract of employment was not a disproportionate interference of the applicant's right to manifest her religion under Article 9.

[57] Again, Smet reaches a slightly different conclusion regarding the significance of cases such as *Pichon and Sajous* and *Eweida et al*. for the purposes of discerning the Court's likely approach to conscientious objection to abortion. Specifically, with regard to cases involving conscientious objection to paying taxes, joining military commemoration parades and selling contraceptives (under *Pichon and Sajous)*, Smet, while acknowledging the possible effect of subsequent cases such as *Eweida et al* and *Bayatyan*, nevertheless concludes that 'As it stands,

The question of conscientious objection in healthcare (specifically objection to abortion by healthcare professionals) has, however, featured in a number of cases on access to abortion before the Court. Although, as was the case in the previous section, the Court is thereby not concerned with assessing the protection offered by Article 9 to conscientious objection, but rather the possible violation of Article 8 (right to private and family life) with regard to access to abortion, such cases are nevertheless of significance, and will be considered below.

First,[58] *R.R. v. Poland*[59] concerned access to prenatal diagnostic screening and abortion. Specifically, following an early scan during the applicant's pregnancy, a suspicion of some foetal malformation had arisen, prompting recommendations of further diagnostic tests by various doctors. However, the applicant had not been able to obtain a referral for such diagnostic screening until much later in her pregnancy, the legal limit for abortion having passed by the time the results of the screening were obtained. Furthermore, the applicant's earlier requests for an abortion were not acted upon. With regard to her complaint under Article 8,[60] the applicant argued that one of the underlying causes of her complaint was the unregulated practice of conscientious objection to abortion by medical practitioners, including the refusal of a hospital to provide certain lawful services on conscience-based grounds.[61] In addition, the applicant argued that in any case conscientious objection could not be invoked in respect of referrals to diagnostic services, and that a refusal to diagnose a grave condition on the grounds that the diagnosis might lead to a procedure regarding which the doctor concerned had a moral objection 'was incompatible with the very concept of conscientious objection.'[62] In its assessment under Article 8, the Court found as follows:

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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.' In Smet, *supra* note 26, at 288.

[58] An earlier case –ECtHR *Tysiąc v. Poland*, (Appl. no. 5410/03, Judgment of 20 March 2007) – also concerned access to abortion, with the applicant woman not having been able to terminate her pregnancy in circumstances in which continuing her pregnancy had severe health implications for her due to a pre-existing condition. In *Tysiac*, the issue of conscientious objection was referred to in third party submissions to the Court (paras. 52 and 100), as well as in the Court's overview of comparative sources (especially country reports (para. 49)) and concluding observations by the Human Rights Committee (para. 50). Thus, although the practice and regulation of conscientious objection to abortion by medical professionals may have featured as an underlying factor in the circumstances of the case, as the issue was not addressed by the Court in its judgment even indirectly (the case having been decided on other grounds), this case will not be discussed in detail here.

[59] ECtHR *R.R. v. Poland,* Application No. 27617/04, Judgment of 26 May 2011.

[60] The applicant also complained under Article 3, with regard to which the Court concluded that there had been a violation.

[61] *Ibid.,* para 173.

[62] *Ibid.,* para 174.

> In so far as the Government referred in their submissions to the right of physicians to refuse certain services on grounds of conscience and referred to Article 9 of the Convention, the Court reiterates that the word 'practice' used in Article 9§1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief (see *Pichon and Sajous v. France* (dec.), no. 49853/99, ECHR 2001-X). For the Court, States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.[63]

It is not entirely clear what the Court intended to convey with its oft-repeated refrain on the reach of the term 'practice' in Article 9. Specifically, the Court's statements could be interpreted as implying that conscientious objection to abortion by health care professionals did not fall under the ambit of Article 9. Notwithstanding this possibility, such an interpretation should be taken with some caution given the Court's subsequent approach as was adopted in *Eweida et al.* In any case, the latter part of the paragraph is more comprehensible. Therein the Court called for health services to be organised in such a way that the exercise of the freedom of conscience by health professionals does not prevent patient access to lawful services.[64] The case thus at least demonstrates – though does not resolve – the tension between the widespread practice of conscientious objection by medical professionals to abortion on the one hand and women's right to access abortion on the other.[65] However, beyond this it is difficult to draw many concrete conclusions from the Court's judgment in *R.R.*, particularly as regards the possible reach of Article 9 to claims of conscientious objection to abortion by healthcare professionals.

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[63] *Ibid.,* para 206.

[64] This clause of paragraph 206 is clearly normative in nature – framed in the substance of the state's human rights obligations. In contrast, the Court's statements as regards the practice of conscientious objection by doctors as such is not normative but descriptive – taking note of the practice as well as its legal basis in the domestic context – arguably without giving the practice the Court's normative stamp of approval under the ECHR. On the one hand, one could argue that reference to 'the effective exercise of the freedom of conscience of health professionals' is not accidental in its choice of words, but a reference to the basis of the practice under Article 9. However, it should be recalled that the Court was not called upon to decide upon the applicability of Article 9 to conscientious objection by healthcare professionals in *R.R* and therefore the strength of such an argument should not be overstated.

[65] It is also important to note – as was done in the Judgment – that in addition to the legal right to conscientiously object to abortion, doctors in Poland may incur criminal liability for performing abortions where legal requirements for obtaining an abortion are not satisfied., see para 194. This issue also featured significantly in *Tysiac v. Poland supra* note 58.

A second case featuring conscientious objection to abortion by doctors in Poland was the case of *P and S v. Poland*[66], which concerned access to abortion by a teenage girl who became pregnant as a result of rape. The application was lodged by the girl and her mother. With regard to the facts of the case, Polish law allowed for abortion in cases of pregnancy resulting from a criminal act, yet in the applicant's case access to abortion was made difficult in practice, although ultimately the applicant's pregnancy was terminated. In its arguments regarding the alleged violation of Article 8, the Polish Government submitted that the refusal by one hospital to perform an abortion had resulted from 'the statutory right of a doctor to refrain from performing medical services contrary to his or her conscience.'[67] Further, the government argued that although the doctors involved had failed to refer the applicant to another hospital or doctor for the abortion, this had not been to the applicant's detriment given that she had ultimately had access to an abortion at a public hospital – (albeit one at a significant distance).[68] The applicants in turn argued that the lack of an adequate legal framework regarding conscientious objection and access to lawful abortion 'had allowed doctors to deny the first applicant her right to terminate her pregnancy in a respectful, dignified and timely manner.'[69] In addition to repeating its submissions in *R.R.*,[70] the Court proceeded to state as follows:

> Polish law had acknowledged the need to ensure that doctors are not obliged to carry out services to which they object, and put in place a mechanism by which such a refusal can be expressed. The mechanism also includes elements allowing the right to conscientious objection to be reconciled with the patient's interests, by making it mandatory for such refusals to be made in writing and included in the patient's medical record and, above all, by imposing on the doctor and obligation to refer the patient to another physician competent to carry out the same service. However, it has not been shown that these procedural requirements were complied with in the present case or that the applicable laws governing the exercise of medical professions were duly respected. [71]

Compiling the Court's assessment regarding the issue of conscientious objection by medical practitioners as it featured in *P. and S.* requires some reflection. Again, as in *R.R.* it is not

[66] ECtHR *P and S v. Poland*, Application No. 57375/08, Judgment of 30 October 2012.
[67] *Ibid.,* para. 92.
[68] *Ibid*.
[69] *Ibid.,* para 93.
[70] See above note 59, citing para 206 in *R.R.*
[71] *Ibid.,* para 107.

clear whether the Court intended to suggest the inapplicability of Article 9 to the issue of conscientious objection to abortion altogether, or some aspect if it, such as institution-level objection or objections to referrals, in addition to objections to directly performing abortions. In any case, the force of such an interpretation is undermined somewhat by the developments in *Eweida et.al.* Particular care needs to be employed in determining which aspects of the Court's judgment are merely descriptive, and which are more prescriptive. For example, the statements on the Polish law on the right of conscientious objection could be read as recognising the legitimacy of the law (with an implied ECHR approval). However, a more accurate reading *of this particular case* is that the Court mostly describes the Polish law in question, while giving particular emphasis (in a more prescriptive tone) to the obligation (according to the Polish law) on objecting doctors to refer the patient to another doctor competent to provide the service.[72] This, however, is not to suggest that a right to conscientiously object to abortion (or another medical service), is not protected under Article 9, but simply an accurate interpretation of the facts of the case as well as the nature of the legal complaint which the Court was called to decide.[73]

By way of interim conclusion it can be said that the present indeterminacy of the Court's assessment of conscientious objection by medical professionals has lead to some divergence in the legal scholarship on the matter, others emphasising the Article 9 aspect[74], while others downplay the possible protection offered by Article 9 by emphasising that manifestations of religion/belief are subject to restrictions, or indeed by rejecting the applicability of Article 9

[72] This normative element is arguably implied by the use of the phrase 'above all' in para 107.

[73] Arguably a more normative stance regarding conscientious objection to abortion – and even a referral for abortion – can be seen in the partly dissenting opinion of Judge De Gaetano, who, in para. 3, referring to the judgment of the Polish Supreme Court in the case, states that 'the doctors concerned were perfectly entitled, on grounds of conscientious objection, to refuse to terminate the life of the unborn child by performing an abortion or, indeed, even to refuse to refer the applicant for an abortion.' However, even here an equally plausible interpretation would limit the statements as prescriptive of the domestic law.

[74] For example, by countering arguments against the practice of conscientious objection by emphasising the practitioners' rights under Article 9, see for example Adentire, 'The BMA's guidance on conscientious objection may be contrary to human rights law', 43 *Journal of Medical Ethics* (2017), 260-263, who, writing with reference to health care providers' right to conscientious objection in general (i.e. not just with regard to abortion or other legally recognised situations in the UK context), argues that in light of the *Eweida* judgments of the ECtHR, Article 9 'will apply to a wide array of scenarios where a professional objects on conscience grounds, to performing his or her professional duty' (at 261 and further at 262), even if such a right is not absolute (at 261). However, notwithstanding this acknowledgement, Adenitire's general argument is more strongly weighted in favour of Article 9. See also Campbell, 'Conscientious objection, health care and Article 9 of the European Court of Human Rights', 11 *Medical Law international* (2011) 284, who, writing before the *Eweida* judgments (and thus largely on the basis of *Pichon and Sajous)* argues that the protection of conscientious objection in health care is more complex than either a simple reliance on Article 9 (i.e. that it clearly protects such a right), or alternatively a very restrictive interpretation that could be drawn on the basis of *Pichon and Sajous* might suggest.

to conscientious objection in health care,[75] or by emphasising the practical implications of widespread resort to conscientious objection.[76] The somewhat cautious/indeterminate approach taken by the Court thus far in respect of conscientious objection in healthcare can be understood in light of the structure of the cases in which the issue was raised, as well as their context, both *R.R.* and *P and S* having arisen in Poland, where the practice of conscientious objection by healthcare professionals seems to have played a role in impeding access to lawful abortion.[77] On the other hand, given that the cases discussed have arisen in a single country – and in the context of access to abortion, too broad a conclusion ought not to be drawn regarding the approach of the ECtHR to conscientious objection in healthcare. Moreover, the fact that the cases in which conscientious in the healthcare profession have been raised (particularly in the context of access to abortion) often involve a tension between two ECHR provisions regarding which limitations may be permissible (specifically Article 9 and Article 8), the structure of a particular case[78] is significant. Specifically, given that such

[75] Writing specifically in respect of conscientious objection to reproductive health services by women, Thomasen submits that according to one of the common threads that can be identified in the jurisprudence of the European Court of Human Rights and the European Committee of Social Rights is that 'neither the European Convention nor the Charter entitle health care providers to claim a right to refuse reproductive health services on grounds of personal conscience', Thomasen, K. 'New ECSR decision on conscience-based refusals protects women's right to access abortion', 4 August 2015, available at: https://strasbourgobservers.com/2015/08/04/new-ecsr-decision-on-conscience-based-refusals-protects-womens-right-to-access-abortion/ (last accessed 18 September 2017). See also Zampas & Andión-Ibañez, 'Conscientious objection to sexual and reproductive health services: International Human Rights Standards and European Law and Practice', 19 *European Journal of Health Law* (2012) 231, who, at 255-256 conclude that despite developments in women's rights to sexual and reproductive healthcare services, women's access to such services is increasingly restricted by the unregulated practice of conscientious objection by health care professionals. They conclude with a number of normative suggestions at 256.

[76] Bribosia, Isailovic & Rorive, 'Objection Ladies! Taking IPPF-EN v. Italy one step further', Working Paper 2015/5, Working Paper presented in University College Roosevelt (Utrecht University), (Middleburg 27 April 2015), who, inter alia distinguish between other conscientious objection claims and conscientious objection to abortion by highlighting the gendered aspect of the latter (i.e. it always impacting women's right to access healthcare), at 3.

[77] Moreover, abortion in Poland is only lawful in a restricted number of instances. Although the European Court of Human Rights has not decisively settled questions regarding the status of the foetus or recognised an unqualified right to abortion, thus allowing a certain margin of appreciation for states as to how to regulate abortion (see *RR v Poland* at para 186), the two cases discussed pertained to facts which – from the perspective of the right to access abortion as recognised under Article 8 – were not controversial. Specifically, one case involved access to abortion following a pregnancy resulting from rape, and the other access to diagnostic services in circumstances in which a serious risk of foetal malformation was suspected. The third broad category in which access to abortion is to be guaranteed is where there is a risk to the life/health of the mother, as was at issue in *Tysiac.* See UN OHCHR, Information Series on Sexual and Reproductive Health and Rights – Abortion, available at https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf, for a summary of calls by treaty monitoring bodies to legalize abortion at least in cases of pregnancy resulting from rape or incest, where the pregnancy endangers the life and health of the mother, and in cases of foetal impairment.

[78] That is, whether a complaint is brought as an alleged violation of access to abortion under Article 8, involving a 'tension' with a healthcare practitioner's conscience claim/ the practice of conscientious objection under Article 9, or, alternatively, as an alleged violation of a healthcare practitioner's Article 9 claim involving a tension (actual or potential) with a healthcare related right under Article 8.

cases generally involve applying the 'necessity test' regarding the permissibility of limitations under the applicable provision[79], it has been argued that the 'necessity test' tends to be one-sided and 'favourable to whichever right has been invoked in Strasbourg'[80], even if such should not, by the Court's own submission, in theory be the case.[81] As such, given that the issue of conscientious objection in the healthcare context has, to date, always been framed in a particular way, some caution should be exercised in interpreting such cases. For one, it should be noted that even with regard to abortion (and other reproductive health services), some form of conscience clause is in operation in numerous member states of the Council of Europe beyond the case of Poland.[82] As such, a variety of other sources ought to considered for a broader perspective to be acquired regarding the possible protection of conscientious objection in the healthcare profession under Article 9.

3.4. Conscientious objection in healthcare in the jurisprudence of the European Committee of Social Rights

The issue of conscientious objection in healthcare – and specifically to abortion – has also been raised in collective complaints before the European Committee of Social Rights (ECSR) in recent years.[83] While many aspects of various human rights are protected under both the European Social Charter (ESC) and the ECHR, the mandate of the ECSR only extends to monitoring an interpreting the ESC. For present purposes this is significant as the issue of

[79] I.e. Art. 8(2) for Art. 8, and Art. 9(2) for Art. 9.

[80] Keller and Heri, 'The Role of the Euopean Court of Human Rights in Adjudicating Religious Exception Claims', in S. Mancini and M. Rosenfeld (eds.), *The Conscience Wars: Rethinking the Balance Between Religion, Identity, and Equality'*, Cambridge University Press, 2018), 303 at 314; Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms', 27 *Human Rights Quarterly* (2005) 294 at 304-305. According to Brems (at *ibid* 305), although, in a case of conflicting human rights, both rights are *a priori* equally fundamental and of equal weight, 'they do not come before the judge in an equal manner'. Rather, 'The right that is invoked by the applicant receives most attention, because the question to be answered by the judge is whether or not this right was violated.'

[81] *Ibid.*, citing also *Von Hannover (no. 2) v. Germany* Appl. nos. 40660/08 and 60641/08, Judgment of 7 February 2012, at para 106.

[82] Indeed, many of the problematic aspects of the exercise of conscientious objection in the (reproductive) healthcare context are not unique to Poland. Nevertheless, such is not to assert that there aren't models of protection of conscientious objection in general or in the healthcare context which could not protect both genuine conscientious objection and access to healthcare services.

[83] The ECSR is charged with monitoring the implementation of the European Social Charter (and (revised) European Social Charter)), by way of assessing periodic state reports as well as considering collected complaints submitted to it (De Schutter & Sant'Ana, 'The European Committee of Social Rights (the ECSR)' in G. De Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of Europe,* (Routledge, 2012), 71 at 77. In contrast to the ECHR (as provided in its Article 34), the European Social Charter does not provide for a right of individual complaint, but instead a collective complaints mechanism which was introduced to the Charter framework by an Additional Protocol to the European Social Charter Providing for a System of Collective Complaints adopted in 1995. The Protocol enables social partners and non-governmental organizations to lodge complaints regarding alleged violations of the Charter against states which have ratified the Protocol.

abortion has been considered within the framework of the ECHR under the right to private and family life in Article 8 (as well as under Article 3 in some cases), and, within the framework of the ESC, under the right to health in Article 11. On the other hand, while clearly falling within the general ambit of Article 9 ECHR,[84] the issue of conscientious objection in healthcare does not so clearly resonate with a specific right protected under the ESC.[85] Nevertheless, the specific question of conscientious objection to abortion by medical professionals has been at issue in a number of recent collective complaints considered by the Committee, each of which, moreover, approaches the matter from different angles. These cases are discussed below.

International Planned Parenthood Federation – European Network (IPPF-EN) v. Italy[86]

The core argument of the complainant organisation in *IPPF-EN v. Italy* claimed that the extensive practice of conscientious objection to abortion by medical professionals in Italy in practice rendered ineffective a provision of the Italian law on access to abortion obliging hospital establishments to ensure procedures regarding access to lawful abortions.[87] This in turn had a negative impact on guaranteeing the legal right of women to have access to abortion, which, it was argued, breached Article 11 (protection of health) of the Charter. In response, the Italian government argued that the complaint was unfounded, inter alia, because it could not limit the number of medical personnel raising conscientious objection while respecting the jurisprudence of the ECtHR relating to Article 9.[88] Furthermore, it was submitted by Italy that the relevant law[89] achieved 'a fair balance between the rights to life

[84] I say this, notwithstanding the Court's stance in *Pichon and Sajous*, first, due to the later development of the case law as evidenced in *Eweida et al.* as well as with regard to conscientious objection to military service *(Bayatyan),* and indeed the general jurisprudence under Article 9 which has, for one, recognized beliefs on the wrongfulness of abortion to have fallen within the ambit of Article 9. I am not, at this point, asserting an extent to which (or even whether) conscientious objection to abortion by medical professionals is protected under Article 9. Ascertaining whether such is indeed the case is the very objective of the present endeavour.

[85] Although the Charter does have much to say on workers' rights, including dignity at work and protection from 'moral harassment', and prohibiting discrimination on grounds of, inter alia, religion in respect of the rights protected in the Charter. Indeed, the EU Network of Independent Experts on Fundamental Rights in its Opinion No. 4-2005 submit, at footnote 33 at page 15 that 'It cannot be excluded, moreover, that the refusal to allow for religious conscientious objection will be seen as a violation with Article 1 para. 2 of the (revised) European Social Charter, insofar as it imposes a possibly disproportionate restriction on the right of every worker to make a living by freely choosing his employment…'.

[86] European Committee of Social Rights, *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy,* Complaint No. 87/2012, Decision on the Merits, adopted 10 September 2013,

[87] *Ibid.*, para 12.

[88] *Ibid.,* para 13, para. 92.

[89] Act no. 194/1978, 'Norms on the social protection of motherhood and the voluntary termination of pregnancy' provides in Article 9, 'Medical practitioners and other health personnel shall not be required to assist in the procedure referred to in Section 5 and 7 or in such pregnancy terminations if they raise a conscientious objection, declared in advance. Such declaration must be forwarded to the provincial medical officer and, in the case of personnel on the staff of the hospital or nursing home, to the medical director, not later that one month

and health of the woman' on the one hand, and 'the freedom of conscience of medical practitioners and other health personnel with respect to voluntary termination of pregnancy'[90] on the other. In the 'Preliminary Observations' section of its assessment, the Committee specifically emphasised – in articulating the scope of the complaint – that it was 'not called to determine whether individuals enjoy a right to obtain an abortion or whether individuals should benefit from a right to conscientious objection.' [91] However, the Committee nevertheless proceeded to submit that where abortion has been legalised in certain situations, States were under obligation to organise the health service in such a way that the exercise of conscientious objection to abortion by health professionals does not prevent access to legal medical services.[92] In its assessment of the merits, the Committee summarised the complaint as concerning the inadequacy of the provision obliging hospitals to ensure access to legal abortion as demonstrated by the high number of objecting personnel[93], articulating the key legal issue to concern the right to health and thus focusing its analysis on the action taken by the competent authorities to ensure effective access to abortion services.[94] In this regard, the Committee emphasised the need not only to take legal measures to achieve the goals in the Charter, but also to introduce such measures as to give practical effect to rights there in protected.[95] As such, the Committee considered that abortion service provision had to be organised in such a way as to meet the needs of those seeking to access the services, including by ensuring sufficient availability of non-objecting medical practitioners as and when such services were sought.[96] Furthermore, concurring with the stance of the Italian National Committee of Bioethics, the Committee considered that the statutory protection of conscientious objection should not limit or hamper the exercise of rights guaranteed in law.[97] On the other hand, the Committee agreed that the high number of objecting health professionals in Italy did not as such constitute evidence that the relevant laws regarding

following entry into force of this law or the date of qualification, or the date of the commencement of employment at an establishment required to provide services for the termination of pregnancy, or the date of the drawing up of an agreement with insurance agencies entailing the provision of such services (…)'.

[90] *IPPF EN v. Italy*, para. 93.

[91] *Ibid.,* para 68.

[92] *Ibid.,* para 69.

[93] *Ibid.,* para 160.

[94] Which, being classified in the relevant national legislation 'as a form of medical treatment that relates to the protection of health and well-being' and which was therefore considered to come within the scope of Article 11 of the Charter, *ibid* para 161, repeating in this regard the submissions of the ECtHR in *P. and S. v. Poland supra* note 66, as repeated in *R.R. v. Poland.*

[95] *Ibid.,* para 162.

[96] 'when and where they are required to provide abortion services, taking into account the fact that the number and timing of requests for abortion cannot be predicted in advance', *ibid.,* para 162.

[97] *Ibid.,* para 165.

access to abortion were implemented in an effective manner.[98] However, the Committee conceded the claim submitted by the complainant organisation that a number of serious problems persisted, as outline in paragraphs 169 (a)-(g), regarding which the Government had failed to provide any countering information.[99] As such, weighing the evidence before it, the Committee found a number of practical shortcomings in relation to access to legal abortion in Italy, particularly regarding the fact that health establishments had failed to adopt necessary measures to compensate for the high number of health practitioners who conscientiously object to abortion[100] and ensure that where lawful, abortion services could be accessed in all cases.[101] On these grounds, the Committee found Italy to be in breach of Article 11(1) of the Charter.

A number of remarks can be made regarding the Committee's decision in *IPPF EN v. Italy*. First, although the role of the practice of conscientious objection to abortion is more apparent and prominent as compared with the ECtHR cases discussed above, the crux of the issue remains somewhat inarticulate. This is evident in the way the complainant organisation specifically does not seek to limit the number of medical practitioners raising conscientious objection nor impede the right of individuals to exercise conscientious objection.[102] On the other hand, the widespread practice of conscientious objection is nevertheless foundational to the complaint. As interpreted by the Committee, although the practice of conscientious objection does not *per se* demonstrate inadequate implementation of the applicable law at stake in the complaint, it is nevertheless the *sine qua non* of the complaint: were there no such objections, there would be no complaint to be made on the facts. If indeed the complaint is not about restricting or limiting the right to conscientious objection by medical professionals,[103] then the State is left to ensure that there are enough non-objecting medical professionals 'when and where they are required to provide abortion services, taking into account the fact that the number and timing of requests for abortion cannot be predicted in advance.'[104] There is an evident ambiguity in the Committee's formulation in this regard – at

[98] *Ibid.,* para 168.
[99] *Ibid.,* para 170.
[100] *Ibid.,* para 174.
[101] *Ibid.,* para. 176.
[102] *Ibid.,* para 73.
[103] Which implies that potentially each medical practitioner could raise such an objection.
[104] *Ibid.,* para 163.

least in so far as the practical outworking of such a potentially open-ended obligation[105] is to be coupled with the apparent recognition at least of the legitimacy[106] of the individual right of health care workers to invoke conscientious objection (see para. 165). While the Committee's assessment seems to endorse the view that a right to conscientious objection does not extend to entire health care establishments (as indeed accords with Section 9(4) of the Law 194/1978), it ought to have articulated beyond its reference to work mobility how the availability of non-objecting personnel is to be guaranteed in practice. The ambiguity of the Committee's assessment is symptomatic, I suggest, of the conundrum inherent in the issue of conscientious objection to abortion[107] as well as the inadequacy of the current human rights monitoring bodies to deal with the issue given the inevitably asymmetrical structure of complaints.[108] Some of these problems were articulated in the dissenting opinion of Committee Member Luis Jimena Queseda. Some further clarification can be found in the Committee's later decisions, as discussed below.

Federation of Catholic Families in Europe (FAFCE) v. Sweden[109]

As in *IPPF –EN v. Italy,* the issue of conscientious objection to abortion by healthcare professionals was also a central aspect of *FAFCE v. Sweden*. However, significantly, the complainant organisation in FAFCE argued that the failure by Sweden to establish 'a comprehensive and clear legal and policy framework governing the practice of conscientious objection to abortion by healthcare providers' amounted to a violation the right to health as protected in Article 11 of the Charter.[110] Further, it was argued that health care providers who hold a conscientious objection to abortion are discriminated against. FAFCE submitted that while hospital managements may exempt personnel who object to abortion from participating in such procedures, such exemptions are rare and 'in general there is no right to be exempt on grounds of conscience' in Sweden. Further, it was claimed that personnel holding a

[105] i.e. the obligation to make sure that anywhere and at any time there are to be sufficient numbers of non-objecting practitioners available to perform an unpredictable number of requested abortions sought in accordance with the law.
[106] At least the recognition of the legitimacy of such a right under the relevant domestic law. As highlighted earlier, the Committee was not called on to decide on whether individuals have such a right of conscientious objection. As such, the Committee's recognition of such a right need not be interpreted as prescriptive, but merely descriptive as regards the applicable domestic law.
[107] I.e. the persistent discrepancy between the legal status of access to abortion and at least the ethical acceptability of abortion for varying proportions of given populations, including, it would seem, those who would be competent to perform abortions.
[108] In other words, human rights bodies are called to decide on whether or not there has been a violation of a given right (regarding which they have a mandate to monitor and interpret).
[109] *Federation of Catholic Families in Europe (FAFCE) v. Sweden*, Complaint no. 99/2013, Decision on the merits, adopted on 17 March 2015.
[110] *Ibid.,* para 2.

conscientious objection to abortion have been forced to take part in abortions despite their objections.[111] Moreover, the complainant organisation claimed that 'a right to conscientious objection is necessary to promote good health for health care workers.'[112] By way of response, the Swedish government contested the claim that the lack of recognition of conscientious objection to abortion fell within the scope of Article 11, but rather raised an issue under Article 9 ECHR, in respect of which the Committee had no jurisdiction.[113] Rather, in so far as the right to health was concerned, the Swedish government argued that conscientious objection by health care providers was relevant in respect of its impact on access to abortion. Further, it was emphasised that in Sweden, health care providers were under a duty to provide abortions to anyone requesting the procedure in accordance with the Abortion Act.[114] As regards health care professionals who opposed abortion, the Swedish Government argues that such persons would generally avoid employment in facilities providing abortion services. Should, however, a person holding a conscientious objection to abortion be employed in such a facility, it would be a matter for that facility's internal decision-making to determine whether he or she could be exempt from abortion-related duties.[115] Should the employee in question not be satisfied with the outcome of such decisions, he or she had the option of pursuing the matter through the courts, either on grounds of Article 9 ECHR (which moreover had been incorporated into Swedish law), or based on the prohibition of discrimination.[116] In further support of its arguments, the Swedish Government submitted that following contact with relevant employer organisations, none of those contacted gave examples of cases where freedom of conscience had been at issue in relation to the provision of abortion services.[117]

In its assessment of the complaint, the Committee stated that it did not consider Article 11 to impose on states a positive obligation to protect the right to conscientious objection for healthcare workers. Rather, it considered Article 11 to be primarily concerned with guaranteeing access to adequate healthcare, the primary beneficiaries of which in respect of the specialism of maternity healthcare were pregnant women. As such, the Committee held Article 11 to be inapplicable to the complaint insofar as it related to the issue of conscientious

[111] *Ibid.,* para 37.
[112] *Ibid.,* para 44.
[113] *Ibid.,* para 47.
[114] *Ibid.,* para 54.
[115] *Ibid.,* para 55.
[116] *Ibid*.
[117] *Ibid.,* para 56.

objection by health care professionals. Due to this finding of inapplicability, the Committee did not consider the allegation of discrimination against health care workers holding a conscientious objection either.

In contrast to *IPPF-EN v. Italy, FAFCE v. Sweden* attempted to raise the issue of conscientious objection to abortion from the point of view of the objecting healthcare professional. While such a set-up has appeared in case law at the level of national jurisdictions,[118] this seems not to have been the case at the international level prior to *FAFCE v. Sweden.* Thus, whereas cases regarding the conflict between, for example, the right to privacy and the freedom of expression have been adjudicated from both angles of the construct,[119] this had not been the case with regard to the right to access abortion and conscientious objection to abortion. However, despite its novelty in this regard, overarching conclusions ought not to be drawn from *FAFCE v. Sweden.* In particular, given the framework within which the complaint was brought, FAFCE was accordingly restricted in the legal argumentation it could employ in support of its claim. Specifically, as the ECSR is only competent to interpret the European Social Charter, rather than arguing that a failure to protect the conscientious objection of healthcare workers violated the freedom of thought, conscience and religion – as would be the more evident choice – the complainant organisation had to invoke a right protected under the Charter. As such, it was argued that there had been an violation of the right to health, including in respect of health care workers whose right to refuse to participate in abortions was not protected. Even though this may seem a far-fetched argument, it is not altogether without merit.[120] However, the Committee did not consider the possible health effects of being forced to participate in medical procedures to which one holds a deep moral objection. Instead, the Committee emphasised the ambit of the right to health

[118] See e.g. High Administrative Court (Finland), 779/32/75, 17 January 1977, in which the dismissal of a doctor who refused to perform abortions sought for social reasons, was upheld; See also for example *Doogan and Wood* (*supra* note 11) and *Janaway* (also at note 11) regarding claims of conscientious objection to abortion regarding work duties not involving direct participation in abortion procedures.

[119] For example, see *Von Hannover v. Germany*, Appl. no 59320/00, Judgment of 24 June 2004 (in which the applicant claimed that the publication of photos of her private life in the press violated Article 8 ECHR). Conversely, applications by newspapers have also been lodged in situations in which injunctions were placed on the publication of articles concerning the aspects falling within the private lives of individuals, see for example ECtHR *Axel Springer AG v. Germany*, Appl no. 39954/08, Judgment of 7 February 2012.

[120] The psychological effects of those involved in the provision of abortion services have not been extensively studied. However, Rachel M. MacNair, in a book on the psychological consequences of killing, has studied the psychological effects on abortion providers, although comprehensive research on the issue had (in 2002) yet to be conducted, and, it seems remains so. See particularly the chapter titled 'Is It Violence?: Abortion Practitioners' in 'Perpetration-Induced Traumatic Stress: The Psychological Consequences of Killing,' (Praeger, 2002), at 71-82. See also S. Goldbeck-Wood, 'Reflection is protection in abortion care: an essay by Sandy Goldbeck-Wood', 359(8131) *British Medical Journal* (2017) 5275.

which it considered to be mainly concerned with securing access to healthcare, primarily benefiting pregnant women in the field of maternal medicine. While such a line of reasoning is jurisprudentially coherent, it is somewhat undermined by a later complaint against Italy, even if the Committee's approach to conscientious objection to abortion by health care workers remained consistent. This complaint is discussed next.

Confederazione Generale Italiana del Lavoro (CGIL) v. Italy[121]

In *CGIL v. Italy,* the complainant organisation – an Italian trade union – argued that the Italian law on access to abortion, in particular its provision on conscientious objection and its implementation, breached the prohibition of discrimination in respect of the right to work of non-objecting healthcare personnel. Specifically, it was argued that such personnel are discriminated against in respect of their right to work due to their workload, career opportunities and health and safety, submitting that 'The insufficient number of medical practitioners to carry out abortion means that non-objecting medical practitioners have an excessive workload'.[122] It was further elaborated that non-objecting medical personnel were subject to both direct and indirect discrimination on grounds of belief as there were no adequate measures in place to ensure that all medical personnel could effectively exercise their rights and have access to all their rights at work. Moreover, in respect of the provision of the right to work (regarding the right to earn a living in an occupation freely entered), CGIL argued that non-objecting personnel were in practice 'forced to undertake without adequate compensation, assistance and support, a sole type of intervention, namely abortion procedures, in breach of the prohibition on forced labour'.[123] In its assessment of the alleged violation of the prohibition of discrimination in respect of the right to work, the Committee accepted that discrimination on the grounds of conscientious objection or non-objection fell within the scope of Article 1§2 of the Charter. Moreover, the Committee considered objecting and non-objecting medical practitioners to comprise 'comparable groups' for the purposes of assessing the alleged discrimination. Further, the Committee accepted the complainant organisation's evidence of various forms of work-related disadvantages faced by non-objecting practitioners,[124] in response to which the Government had provided 'virtually no evidence' to counter that provided by CGIL and failing to refute the claim that discrimination

[121] *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Complaint no. 91/2013, Decision on the merits, adopted on 12 October 2015.
[122] *Ibid.,* para 215.
[123] *Ibid.,* para 219.
[124] *Ibid.,* para 243.

was widespread.[125] As such, the Committee found there to have been a violation of Article 1§2 of the Charter.[126]

This latest development in the jurisprudence of the Committee seems further to weaken the position of healthcare workers with a conscientious objection to certain medical procedures, at least those with objections to abortion. The Committee's decision in *CGIL v. Italy* is all the more significant when juxtaposed with the earlier case of *FAFCE v. Sweden*. Although *CGIL v Italy* was not argued in terms of the right to health of non-objecting health care workers, but rather in terms of the prohibition of discrimination (on grounds of belief) in respect of the right to work, comparing these two cases presents some interesting contrasts and hypotheses. For instance, one can question whether the outcome in *FAFCE v Sweden* would have been different, had the complainant organisation alleged a violation of the prohibition of discrimination on grounds of belief (i.e. conscientious objection to abortion) in respect of the right to work. The Swedish context can be distinguished from that in Italy on the basis of the respective positions of objecting and non-objecting professionals. In Sweden, it would appear, that those holding a deep moral objection to participating in abortions are in the minority, while the opposite appears to be true in Italy.[127] Granted, one could argue that given Sweden's relatively long track record of not recognising conscience-based exemptions regarding abortions, any practitioners claiming discrimination in respect of the right to work on that basis could be said to have freely entered the profession in full knowledge of this fact, thus not, arguably, being entitled to claim any such exemption. The weakness in this argument is a lack of recognition of the absolute right to change one's religion or beliefs, including, one would assume, a belief as to the ethical acceptability of abortion or one's involvement in performing abortion procedures. Moreover, one could imagine slightly altered (or more articulated) facts in which an individual could train, qualify and practice as a healthcare practitioner (e.g. as a midwife), having entered the profession freely under circumstances in which one could reasonably have been led to believe that participation in procedures which contradicted the practitioner's deep moral convictions would not be required,[128] yet later, due

[125] *Ibid.,* para 244.
[126] *Ibid.,* para 246.
[127] If one – at least for the sake of argument – accepts that those claiming conscientious objection in fact are sincere in their beliefs.
[128] For example, the ethical guidelines of the Finnish Association of Midwives recognise that midwives are not required to participate in procedures which contradict the midwife's convictions: "Kätilö tunnistaa omaan työhönsä liittyviä eettisiä ongelmia ja osallistuu aktiivisesti niitä koskevaan yhteiskunnalliseen keskusteluun. Kätilö tiedostaa sikiötutkimuksiin, raskaudenkeskeytyksiin ja lapsettomuushoitoihin liittyvät eettiset ongelmat, erityisesti sikiön oikeuksien toteutumisen. Kätilöllä on oikeus kieltäytyä osallistumasta toimintaan, joka on

to changes in the law or ethical guidelines or allocation of tasks,[129] being faced with such an unforeseen conflict.[130] Would – it can be asked – the Committee approach such facts with similar reasoning to that employed in *CGIL v Italy*?

4. Conscientious objection in healthcare under professional ethical standards?

Medical and healthcare professions have highly developed professional ethical standards, which can be seen in codes and guidelines adopted by professional (or specialism-specific) associations or trade unions as well as regulatory bodies. My focus at present will be on professional ethical standards adopted at the international level, though admittedly some (or even significant) divergence can be expected in such codes at the domestic level. While such ethical standards do not amount to law, they have been drawn on by human rights bodies

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ristiriidassa hänen oman vakaumuksensa kanssa, kuitenkin niin, että asiakkaan hoitoa ei laiminlyödä." 'Laatua kätilötyöhön – kätilötyön eettiset ja laadulliset perusteet', 3.1. 'Kätilön ammattietiikka'. https://asiakas.kotisivukone.com/files/suomenkatiloliitto.kotisivukone.com/tiedostot/tiedolla_taidolla_tunteella.pdf

Moreover, a very recent recommendation issued by the Finnish Medical Association (Lääkäriliitto) adopted on 9 June 2017 acknowledges a doctor's 'right to conviction and conscience' (oikeus vakaumukseen ja omaantuntoon), and to refuse to participate in certain procedures/forms of treatment on that basis, which are problematic from the doctor's ethical standpoint, (Lääkärillä on oikeus vakaumukseen ja omantunnonvapauteen sekä kieltäytyä tämän perusteella tekemästä tiettyjä toimenpiteitä, jotka ovat lääkärin etiikan perusteella ongelmallisia.') https://www.laakariliitto.fi/edunvalvonta-tyoelama/suositukset/omantunnonvapauden-soveltaminen/

However, this should not affect inter alia, the patient's right to access treatment. More on this below.

Notwithstanding the above, Finnish law does not recognise a legal right to conscientious objection to abortion.

A similar provision is included in the Swedish Federation of Midwives Code of ethics: 'Barnmorskor kan avböja att delta i aktiviteter för vilka de hyser djupt moraliskt motstånd; men avseende barnmorskans individuella samvetsbetänkligheter så skall inte dessa avgörande påverka kvinnans rätt till hälsovård.' http://www.barnmorskeforbundet.se/wp-content/uploads/2014/01/Etiska-koden-for-barnmorskor-svensk-oversattning.pdf

[129] For example, in the UK context, Sheldon and Fletcher write about task allocation in abortion services, arguing that despite a common presumption that abortions performed by way of vacuum aspiration (comprising some 40% of all abortions performed in England and Wales) must be performed by doctors, a closer reading of the relevant law (Abortion Act 1967) reveals such a presumption to be unfounded. As such, Sheldon and Fletcher argue that appropriately trained midwives and nurses could, as part of multidisciplinary teams, lawfully and safely perform such abortions. Sheldon and Fletcher, 'Vacuum aspiration for induced abortion could be safely and legally performed by nurses and midwives,' *Journal of Family Planning & Reproductive Health,* Published Online First: 18 January 2017. doi: 10.1136/jfprhc-2016-101542

[130] Another way in which such a tension could manifest itself would be in respect of unemployment rights. If, for example, due to organisational/legal/professional changes a healthcare practitioner finds in practice difficult if not impossible to find employment in which such a fundamental conflict of conscience would not arise, even if in general the job market was favourable to someone in his or her profession. How would his or her status as a conscientious objection to certain medical procedures affect access to unemployment benefits? This scenario is envisaged by Scheinin in another context (arguing for stronger protection for 'the right to say no' when the normative clarity of a given legal obligation leaves room for exceptions). Writing with regard to the Finnish law on unemployment benefits (as valid in 1989), he considers whether a pacifist conviction would – for the purposes of the law – be an 'adequate cause' to refuse work in an arms factory (where the law provided that an unemployed person should lose the right to claim unemployment benefits if he or she refused work without 'adequate cause). M. Scheinin, 'The Right to Say 'No': A Study under the Right to Freedom of Conscience', 75(3) *Archiv für Rechts- und Sozialphilosophie* (1989), 345-356, at footnote 28 at 351.

notably for present purposes the European Court of Human Rights.[131] Furthermore, the medical and health care professions are highly self-regulating and alert to ethical obligations and standards, which is particularly relevant given the fast pace of medical advances as well as the inability of the law to regulate in detail every aspect of the profession. It should be noted that the purpose here is not to draw concrete conclusions as to the role of international level professional standards, as contrasted with domestic level standards for example (indeed, domestic standards will be drawn on as appropriate). Rather my intention is to focus on the status and parameters of a possible right to conscientious objection according to the profession's/specialism's own standards, particularly with a view to ascertaining the descriptive or prescriptive nature of such a right.

A useful first point of reference for the purposes of modern medicine, is the Declaration of Geneva of the World Medical Association first adopted in 1948[132], as amended over the years.[133] The Declaration consists of the oath taken upon entry into the medical profession, termed by the WMA as the modern restatement of the Hippocratic Oath[134], outlining the fundamental ethical principles and core values of physicians. The original declaration adopted in 1948 contained a clause requiring physicians to 'maintain the utmost respect for human life from the time of its conception'[135]. In subsequent amendments of the oath, this specific provision has been modified. In 1983, the reference to conception was amended to 'life from its beginning'[136], and in 2005, referring simply to 'respect for human life'[137]. Furthermore, the declaration begins with a solemn pledge to 'consecrate (one's) life to the service of humanity'

[131] See ECtHR *R.R. v. Poland,* Application No. 27617/04, Judgment of 26 May 2011, at paras 87-89.
[132] World Medical Association, Declaration of Geneva, Adopted by the General Assembly of the World Medical Association at Geneva, Switzerland, September 1948, available at https://www.wma.net/wp-content/uploads/2018/07/Decl-of-Geneva-v1948-1.pdf .
[133] The WMA Declaration of General was most recently amended by the 68th WMA General Assembly in Chicago, US, in October 2017 and is available at https://www.wma.net/policies-post/wma-declaration-of-geneva/ .
[134] There is some doubt as to the history and origin of the original 'Hippocratic Oath', but for present purposes it is interesting to note that it is generally accepted to have contained a provision forbidding the giving of an 'abortive remedy', or 'a deadly drug', Smith, 'The Hippocratic Oath and Modern Medicine', in 51 *Journal of the History of Medicine and Allied Sciences* (1996), 484-500. These provisions are highlighted here simply to draw attention to the convergence of certain (common) conscientious objections in medicine and (historical) medical ethics, even if the ethical acceptability of the Hippocratic Oath itself is strongly disputed by some, e.g. Schuklenk and Smalling, 'Why medical professionals have no moral claim to conscientious objection accommodation in liberal democracies', 43 *Journal of Medical Ethics* (2017) 234, at 235, referring to R. M. Veatch, *Hippocratic Religious and Secular Medical Ethics: The Points of Conflict*, (Georgetown University Press, 2012).
[135] WMA Declaration of Geneva (1948) *supra* note 132.
[136] WMA Declaration of Geneva, as amended by the 35th World Medical Assembly, in Venice, Italy, October 1983), available at https://www.wma.net/wp-content/uploads/2018/07/Decl-of-Geneva-v1983-1.pdf .
[137] WMA Declaration of Geneva, as editorially revised at the 170th Council session, Divonne-les-Bains, France, May 2005, available at https://www.wma.net/wp-content/uploads/2018/07/Decl-of-Geneva-v2005-1.pdf .

and to practice the medical profession 'with conscience and dignity'. While the role of such an oath as contained in the Declaration of Geneva will vary vastly between different domestic contexts, it nevertheless serves as a useful point of reference for an international level benchmark of medical ethics. More detailed stances regarding the specific question of conscientious objection and competing normative claims on the physician have been raised in other documents adopted by the WMA.

At a general level, a cursory reading of various instruments adopted by the WMA reveals a repeated recognition of the interplay of various normative frameworks, most notably between legal standards, professional ethics and the individual moral convictions of the doctor, and the tensions which may arise between these normative claims in various situations.[138] The right of a physician to withdraw from treatment has been recognised by the WMA in a number of specific instances. For one, the WMA Declaration on Therapeutic Abortion as adopted in 1970 and amended in 1983 and 2006[139], recognises 'the diversity of attitudes to the life of the unborn child' – a matter it considers to be 'a matter of individual conviction and conscience that must be respected' and concludes by recognizing the right of a physician to withdraw if his or her convictions do not allow him or her to advice or perform an abortion 'while ensuring continuity of medical care by a qualified colleague'. In a very different context, the WMA's Declaration[140] which lays out details guidelines for the management of hunger strikers, prohibits force-feeding or coerced treatment of persons who have voluntarily and in a state of mental capacity refused food. The Declaration includes a provision on physicians who are 'unable for reasons of conscience to abide by a hunger striker's refusal of treatment or artificial feeding'[141], to make such an objection clear at the outset and 'refer the hunger striker to another physician who is willing to abide by the hunger striker's refusal'. This pattern of 'a right to refuse or withdraw from treatment' for reasons of conscience coupled with the duty to

[138] See, for example, WMA Council Resolution on the Relation of Law and Ethics (Adopted by the 164th Council Session Divonne-Les-Bains, France, 2003; rescinded at the 66th WMA General Assembly, Moscow, Russia, October 2015) which provides: 'Ethical values and legal principles are usually closely related, but ethical obligations typically exceed legal duties. In some cases, the law mandates unethical conduct. The fact that the physician complied with the law does necessarily mean that the physician acted ethically. When law is in conflict with medical ethics, physicians should work to change the law. In circumstances of such conflict, ethical responsibilities supersede legal obligations'. Available at https://www.wma.net/policies-post/wma-council-resolution-on-the-relation-of-law-and-ethics/

[139] WMA Declaration on Therapeutic Abortion (Adopted by the 24th World Medical Assembly, Oslo, Norway, August 1970 and amended by the 35th World Medical Assembly, Venice, Italy, October 1983 and the 57th WMA General Assembly, Pilanesberg, South Africa, October 2006).

[140] WMA Declaration of Malta on Hunger Strikers, Adopted by the 43rd World Medical Assembly, St. Julians, Malta, November 1991 and editorially revised by the 44th World Medical Assembly, Marbella, Spain, September 1992 and revised by the 57th WMA General Assembly, Pilanesberg, South Africa, October 2006.

[141] *Ibid*.

refer the patient to another willing physician can be identified in numerous other instances of such ethical dilemmas[142]. An exception to this would – at the level of international medical ethics standards – seem to be euthanasia, regarding which the WMA has simply strongly encouraged physicians to refrain from participation (even if legalised in the domestic setting)[143].

Still at the international level, the International Federation of Gynecology and Obstetrics (FIGO), has, while also generally affirming the right to conscientious objection coupled with the duty to refer, issued some detailed guidelines on the matter. Notably, FIGO adopted a resolution in 2006 on conscientious objection[144] recognizing at the outset the ethical duty of physicians to always provide benefit and prevent harm to patients in their care[145], as well as the right of practitioners to respect for their conscientious convictions both not to undertake and to undertake the delivery of lawful services.[146] In its substantive provisions, the resolution specifies that in order for a practitioner to behave ethically, he or she must provide public notice of the services which he or she refuses to undertake on grounds of conscience, to refer patients to other practitioners who do not object to the service, and provide timely care 'when referral to other practitioners is not possible and delay would jeopardize patient's health and well-being' and in emergencies, to 'provide care regardless of practitioners' personal objections'. The FIGO standards thus include recognition of both conscientious objection (i.e. right not to participate in lawful treatment) and the right of conscientious performance (i.e. right to provide lawful treatment), the duty of prior notice, the duty to refer, as well as the duty to provide care in emergency situations and when referral is not possible.[147] Other

[142] See the examples discussed earlier in this chapter, at 2.2.
[143] WMA Resolution on Euthanasia, (Adopted by the 53rd WMA General Assembly, Washington, DC, USA, October 2002 and reaffirmed with minor revision by the 194th WMA Council Session, Bali, Indonesia, April 2013), available at https://www.wma.net/policies-post/wma-resolution-on-euthanasia/
[144] Notably not drafted specifically in terms of abortion, but rather conscientious objection in general. International Federation of Gynecology and Obstetrics (FIGO), Resolution on 'Conscientious Objection', Kuala Lumpur, 2006, available at https://www.figo.org/sites/default/files/uploads/OurWork/2006%20Resolution%20on%20Conscientious%20Objection.pdf
[145] 'Recognizing that physicians have an ethical obligation, at all times, to provide benefit and prevent harm for every patient for whom they care.' *Ibid*.
[146] Ibid., 'Acknowledging that practitioners have the right to respect for their conscientious convictions both not to undertake and to undertake the delivery of lawful practices'. *Ibid*.
[147] The FIGO resolution on conscientious objection was adopted just one month after the WMA resolution on therapeutic abortion was reaffirmed (*supra* note 139). There is a distinct difference between the emphasis of the WMA resolution, arguably more cautious regarding abortion and more sympathetic to the objecting doctor while affirming the duty to ensure continuity of care by a qualified colleague.

sources issued by FIGO support this general pattern of public notice, provision of information on all treatment options, referral[148] and treatment in emergencies.[149]

Some examples drawn from domestic settings further demonstrate and articulate the pattern of a right of conscientious objection to a particular procedure being coupled with the duty to refer the patient to another willing practitioner. An interesting example can be found in guidance issued by the UK Royal College of Surgeons on the treatment of Jehovah's witnesses and other patients who refuse blood transfusions.[150] While not specifically referring to conscientious objection, the guide does recognise that 'surgeons have the right to choose not to treat patients if they feel that the restrictions placed on them by the refusal of blood products are contrary to their values as a doctor.'[151] However, in such situations, the surgeon is to refer the patient 'to a doctor who is suitably qualified and prepared to take on the patient knowing the circumstances of this refusal of blood'[152]. The UK regulation on conscientious objection to abortion is, however, slightly different. While the Abortion Act 1967 explicitly provides for the right not to participate in treatment for reasons of conscientious objection, no accompanying provision on a duty to refer is included.[153] Likewise, the BMA's views on the

[148] Specifically not deemed as 'participation in treatment' thus considered to fall outside the scope of conscientious objection', FIGO Committee for the study of Ethical Aspects of Human Reproduction and Women's Health have issued a publication titled 'Ethical Issues in Obstetrics and Gynecology', addressing numerous ethical issues in the field including abortion and conscientious objection. The recommendations therein are, however, not binding but are intended to provide 'material for consideration and debate' regarding the ethical aspects within the discipline for FIGO member organisation and their membership. See FIGO Committee for the study of Ethical Aspects of Human Reproduction and Women's Health, Ethical Issues in Obstetrics and Gynecology, October 2015, available at https://www.figo.org/sites/default/files/uploads/wg-publications/ethics/FIGO%20Ethical%20Issues%202015.pdf4893.pdf

[149] FIGO Committee's Ethical Guidelines on Conscientious Objection (Luxor, November 2005), in *Ethical Issues in Obstetrics and Gynecology*, *supra* note 148 at 37 (see in particular paras 4,6,7 and 8); see also Ethical Aspects of Induced Abortion for Non-Medical Reasons, in *Ethical Issues in Obstetrics and Gynecology*, *supra* note 148, at 153 (see in particular para 4. Of 'Recommendations' at 155).

[150] Royal College of Surgeons, *Caring for patients who refuse blood: A guide to good practice for the surgical management of Jehovah's Witnesses and other patients who refuse transfusion* (2018), available at https://www.rcseng.ac.uk/standards-and-research/standards-and-guidance/good-practice-guides/patients-who-refuse-blood/ (last accessed 11 July 2019).

[151] *Ibid*.

[152] *Ibid*.

[153] Abortion Act 1967, section 4 provides:
'(1)Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:
Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.
(2)Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.'
(3)In any proceedings before a court in Scotland, a statement on oath by any person to the effect that he has a conscientious objection to participating in any treatment authorised by this Act shall be sufficient evidence for the purpose of discharging the burden of proof imposed upon him by subsection (1) of this section.

law and ethics of abortion[154] also lacks a specific 'duty to refer' provision with regard to the exercise of conscientious objection, although referral is mentioned.[155] The focus rather is on informing the patient (in accordance with the guidance issued by the General Medical Council) of their right to see another doctor, accompanied by sufficient information to exercise that right. On the other hand, according to the BMA views, telling the patient 'to seek a view elsewhere' is not deemed sufficient. In the context of other areas of medical practice, the issue of a doctor's possible conscientious objection has also been recognised with regard to non-therapeutic male circumcision. In the BMA's views on 'The Law and Ethics of Male Circumcision'[156], the issue of conscientious objection is addressed directly, emphasising that doctors are 'under no obligation to comply with a request to circumcise a child'.[157] It is further specified that such doctors should explain their conscientious objection to the child and his parents, and moreover, may explain the reasons for their conscientious objection if asked. Further, the BMA's views specify that where the procedure is sought for non-therapeutic reasons, 'there is arguably no ethical obligation to refer on'[158], all the while recognising that the family are free to seek another doctor, and that 'some doctors may wish to suggest an alternative practitioner'.[159] Thus, at least in the case of non-therapeutic male circumcision in the UK context, the right to conscientious objection is not accompanied by a duty to refer or even to provide information on an alternative provider. In respect of the practice of conscientious objection in medicine more generally, some support can be found in guidance issued by the BMA on 'expressions of doctor's beliefs'[160] as well as the General

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Furthermore, in the UK the Human Fertilisation and Embryology Act 1990 contains a provision (s. 38) on conscientious objection, articulating that no person with a conscientious objection shall be under any duty to participate in any of the activities provided in the Act.

[154] British Medical Association, Law and ethics of abortion – BMA Views (2014, updated 2018), available at https://www.bma.org.uk/advice/employment/ethics/ethics-a-to-z/abortion

[155] The guidance provides that 'referral need not always be a formal procedure' (*ibid.*).

[156] British Medical Association, Non-therapeutic male circumcision (NTMC) of children – practical guidance for doctors (2019), available at https://www.bma.org.uk/advice/employment/ethics/children-and-young-people/non-therapeutic-male-circumcision-of-children-ethics-toolkit/introduction

[157] *Ibid.*, at 21.

[158] *Ibid*.

[159] *Ibid*.

[160] However, some care ought to be taken regarding terminology. For example, the British Medical Association distinguishes between a legal and a moral right to conscientious objection, as well as a more general recourse to have requests of conscientious objection considered. In its Guidance on the expression of doctors' beliefs, the BMA considers that conscientious objection should ordinarily be limited to those instances in which it is recognised in legislation (abortion and fertility treatment), as well as the withdrawal of life-prolonging treatment (even though such is not expressly recognised in law). Interestingly, the BMA's guidance proceeds to provide that 'although reasonable – and lawful – requests to exercise a conscientious objection in relation to other procedures should ordinarily be considered, the BMA does not believe doctors should have a 'right' to object in these circumstances'. BMA, Expressions of doctors' beliefs, under 'Conscientious objection and medical practice' available at https://www.bma.org.uk/advice/employment/ethics/expressions-of-doctors-beliefs .

Medical Council's guidance on 'personal beliefs and medical practice'.[161] These guidelines draw a distinction between a legal and a moral right to conscientious objection, and further specify that a request of conscientious objection may be 'considered', even when such is not recognised in law.[162] The GMC further clarifies that refusal to provide a procedure must not result in direct or indirect discrimination on a patient or group of patients, and that there is no right to refuse to treat the health consequences of lifestyle choices of which the doctor disapproves.[163]

5. Conclusion: identifying norms in the regulation of conscientious objection in healthcare

5.1. Positive protection of conscientious objection in healthcare under Article 9?

5.1.1. Applicability of Article 9 to conscientious objection in the healthcare context

The application of international human rights norms to claims of conscientious objection in the healthcare profession generally as well as with regard to objections to particular procedures is marked by a significant lack of overall clarity at present. Assuming that a conscientious conviction in the field of healthcare can in general satisfy the requirements of 'belief' under Article 9[164], the recent Article 9 jurisprudence of the ECtHR strongly suggests that an objection based on such a belief also attracts the protection of Article 9, at least as a manifestation of a belief. Granted, as the jurisprudence stands at present, being a 'manifestation of a belief', an initial right of conscientious objection may be subject to limitations in accordance with Article 9(2). The regular appeal by the Court to the 'margin of appreciation' enjoyed by states in such matters might suggest that were a complaint lodged before the Court alleging that a state had failed to protect a healthcare practitioner's conscientious objection under Article 9, no violation would be found. Such might be argued on the basis of the reasoning in the Court's judgment in *Eweida et al.*[165] concerning the application by Chaplin. Specifically, where an interference with the right to manifest one's religion was justified on grounds of 'health and safety', the Court was of the view that the

[161] General Medical Council, Personal beliefs and medical practice, 25 March 2003, available at http://www.gmc-uk.org/static/documents/content/Personal_beliefs-web.pdf
[162] *Ibid*.
[163] *Ibid.*, at point 8.
[164] Note that it is argued that such a belief *can* fall within Article 9, not that such is necessarily the case. However, presuming that a belief satisfies the requirements of cogency, seriousness, coherence and importance, it is considered likely that such a belief will fall under Article 9.
[165] *Eweida and Others v. United Kingdom*, Appl. nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013.

employer hospital was best placed to make such judgments, and, as a result, found no violation of Article 9. One can surmise the same line of argumentation being employed in respect of conscientious objection in healthcare at a general level. Specifically, given that a denial of such objections – whether at the level of legislation or informal workplace practices – would likely be argued on the basis of the smooth running of healthcare provision, it is unlikely that the Court would lightly substitute its own assessment of such matters for that of the relevant local instance. On the other hand, that it would not do so lightly is not to say that it would not do so at all. Indeed, as repeatedly submitted by the Court itself, the margin of appreciation enjoyed by states goes hand in hand with 'European supervision'. In other words, resort to the margin of appreciation is not 'carte blanche' for states to conduct even highly complex and important systems such as the delivery of health and medical care as they wish. By analogy, in the area of the running of the court system the European Court of Human Rights has found violations of the ECHR including Article 9,[166] even where the reasons presented by respondent states regarding the alleged violation were in essence acceptable. As such, it is suggested that mere recourse by the respondent state to 'health and safety' or the smooth running of a public service would not, in itself, exempt from finding an interference with or violation of the Article 9 rights of a healthcare professional who objects to a particular procedure on grounds of conscience.

5.1.2. The impact of the content of the conviction upon which conscientious objection is claimed?

While the denial or restriction of conscientious objection in the healthcare profession is often argued for on the basis of the importance of the service vis-à-vis the service recipient (i.e. patient), it can also be argued that the healthcare context is of particular significance for the purpose of assessing conscientious objection claims of practitioners arising therein. Such is due to the ethically sensitive nature of many aspects of the profession, particularly those touching on the beginning and end of life. Indeed, while not all claims of conscientious objection in the healthcare field necessarily concern such aspects[167], in practice many do. Looking at the views adopted by the World Medical Association as a reference point,

[166] See most recently the cases of *Lachiri v. Belgium* (Appl. no. 3413/09, Judgment of 18 September 2018), *Hamidović v. Bosnia and Herzegovina* (Appl. no. 57792/15, Judgment of 5 December 2017). See also *Sessa v. Italy*, (discussed in Chapters 2 and 3), where although no violation of Article 9 was found, the Court did consider with some depth the respondent state's argument regarding the public interest in the smooth running of the justice system, and, indeed, did not reach its finding of non-violation unanimously.

[167] See for example objection to non-therapeutic circumcision, or objection to particular forms of surgery as discussed above.

conscientious objection is addressed in the context of abortion and force-feeding, both issues of some proximity to the protection of life.

Certainly, in light of the accepted justifications for the protection of conscientious objection to military service as will be discussed in the next chapter, the fact that a conscientious objection relates to issues of human life and death has been considered of heightened significance.[168] If this is the case in the (albeit vastly different) context of military service, then it is at least arguable that similar considerations should apply to the assessment conscientious objection in the healthcare field, particularly where intentional deprivation of life is at issue.

5.1.3. The significance of 'European consensus' vis-à-vis conscientious objection in healthcare?

A further question for consideration pertains to the value that the Court might assign to the so-called 'European consensus' regarding conscientious objection in healthcare. For example, what value would the Court place on the recognition of some form of protection of conscientious objection in the healthcare context by numerous Council of Europe member states? While evidently such protection is nor uniform, there is undeniably a broad pattern of some level of protection for exemption from procedures which present a practitioner with an irreconcilable conflict of conscience. Support for such a pattern can further be garnered from recognition of some form of protection for conscientious objection in professional codes of ethics. Interestingly, recognition of conscientious objection has also been given in professional codes of ethics in domestic systems which do not provide legal protection thereto (as noted above at footnote 128). While the purpose here is not to argue for the legal status of such codes (they are clearly not legally binding), nor indeed for their specific interpretive force in the reasoning of the European Court of Human Rights, it is nevertheless suggested that such a broad acknowledgment or recognition of conscientious objection in the healthcare context is not insignificant.

[168] See for example the Human Rights Committee's views regarding the individual communication of *Young-kwan Kim et al. v. South Korea*, (para 7.3.) 'However, the Committee considers that military service, unlike schooling or the payment of taxes implicates individuals in a self-evident level of complicity with a risk of depriving others of life'. The views expressed by the Committee in *Young-kwan* moreover can even be compared to the Committee's statements in General Comment (GC) No. 22 (General Comment No. 22: Article 18 (Freedom of thought, conscience and religion), CCPR/C/21/Rev.1/Add.4, adopted 30 July 1993) on the freedom of thought, conscience and religion where the right to conscientious objection to military service was recognised under Article 18 'inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the freedom to manifest one's religion or belief', GC 22, at para 11. Notice that the Committee in *Young-kwan* refers to the 'self-evident level of complicity with a risk of depriving others of life', in contrast to 'the obligation to use lethal force' in GC 22.

5.1.4. The applicability of the prohibition of coercion to the context of conscientious objection in healthcare?

Although on the basis of the analysis carried out in the present chapter the specific issue of 'coercion' as prohibited under Article 9 has not arisen, it is nevertheless suggested here, and more fully expounded in Chapter 6 that the prohibition of coercion vis-à-vis one's religion or belief may be of significance also in the context of conscientious objection in healthcare. In other words, as already introduced in Chapter 2 and 3, according to one identifiable norm under Article 9, the state is prohibited from coercing individuals to change their religion or belief, or (at least) coercing individuals to practice or participate in the practices of a religion of which they are not an adherent. Moreover, it has been suggested that the prohibition of coercion under the freedom of thought, conscience and religion also applies to at least some situations in which an individual is forced to act contrary to one's conscience.[169] Particularly relevant for present purposes is the first limb of the prohibition of coercion, namely coercion to change one's religion or beliefs, or indeed, more broadly construed as coercion regarding religion or belief. While it is not suggested here that the prohibition of coercion under Article 9 necessarily implies a general right of conscientious objection in the healthcare context, it is suggested that the healthcare profession does warrant particular consideration in this regard. In particular, given that many aspects of healthcare practitioners' work are ethically highly sensitive – particularly those in which human life is at stake[170], a strong case can be made that the prohibition of coercion under Article 9 is applicable. In other words, if it can be agreed that issues concerning the protection of human life are of utmost moral import[171] (even if the exact 'parameters' of life – its beginning and end are debated), it can be argued that requiring individuals to act against fundamental convictions regarding human life can be such as to amount to 'coercion'. This matter will be returned to in Chapter 6.

5.1.5. The prohibition of discrimination as a norm applicable to conscientious objection in healthcare?

One aspect of the approach of the law to conscientious objection in healthcare which has not been extensively addressed in the present chapter nor in the various legal sources is the

[169] See P. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice,* (Cambridge University Press, 2005), at 119.
[170] Bielefeldt, *supra* note 21, at 215.
[171] Bielefeldt (*ibid.,*); Scheinin, 'The Right to Say "No" *supra* note 130, at 350 submits, in the context of compiling a draft list of criteria for evaluating conflicts of conscience, that one such factor pertains to the ethical sensitiveness of the obligation subject to the objection, specifying by way of example that 'all acts in connection to human life or weapons capable of being used for terminating human life are sensitive.'

possible application of the prohibition of discrimination thereto. It could be argued, for example, that extending conscientious objection to a particular procedure only to members of a particular religion would, at first sight, be contrary to the prohibition of discrimination.[172] However, at the international level, the matter is complicated somewhat by what would appear to be a generally cautious approach to conscientious objection, as exemplified for example in the recent General Comment of the Human Rights Committee on the right to life, discussed above at 3.2.. On the other hand, in light of more general human rights law reasoning particularly regarding the state's neutrality in respect of different religions, such discrimination on grounds of religion would appear hard to justify. Although the material addressed in the present chapter does not provide a clear-cut answer to how, in practice, the prohibition of discrimination might apply in the context of conscientious objection in healthcare, it is nevertheless introduced here as at least a potentially applicable norm.[173]

5.2. Limits to the protection of conscientious objection in healthcare under Article 9?

Leaving aside for the moment the certain lack of clarity vis-à-vis the possible positive protection of conscientious objection in healthcare under the freedom of thought, conscience and religion, it is perhaps easier to identify norms as to how such a right might be limited. For one, the duty to provide care in emergencies might be one such norm, particularly evidenced in the various professional codes of ethics discussed, and reflected to in the jurisprudence indirectly raising issues of conscientious objection in healthcare. Furthermore, some duty to ensure continuity of care of a patient where a healthcare professional claims a conscientious objection to a particular procedure might be a further 'limit' to the possible right to conscientious objection. However, exactly how such a duty would be formulated remains somewhat unclear.[174] It is perhaps more apt to speak of a state's duties under the right to

[172] Indeed, as noted by Vickers, also *not* accommodating a healthcare practitioner's conscientious objection might be claimed to be indirectly discriminatory. However, drawing on both UK legislation and ECHR standards following *Eweida et al.* it is not entirely clear when not accommodating such an objection would be disproportionate and therefore indirectly discriminatory. In Vickers, 'Religious Belief and the Employment Rights of Medical Staff', 37 *Journal of Medical Law and Ethics* (2014) 37, at 44-45.

[173] It has been argued by some scholars that protecting the right of conscientious objection in healthcare inevitably privileges practitioners of particular religions, see Savulescu, 'Conscientious objection in medicine', 332 *British Medical Journal* 2006, 294-297 at 295. However, it is suggested here that the mere fact that a particular objection is more frequently raised by adherents of a particular religion does not yet make the protection of such objection discriminatory, unless others (of other religions or no religions) raising substantively the same objection are not treated equally. Note also the argument based on discrimination in the case of *CGIL v. Italy,* as regards discrimination against non-objecting medical practitioners (*supra* note 121).

[174] For example through a 'duty to refer' to another practitioner, or otherwise organizing healthcare services such as to protect access to treatment, despite conscientious objection (e.g. through publicity as to the services provided at a particular practice/ healthcare unit).

health/right to private and family life to organize healthcare provision in such a manner as to ensure sufficient availability/accessibility of services, rather than an individual health practitioner's duties. Nevertheless, ensuring the smooth running and delivery of health services may thus indirectly have an impact on the exercise of conscientious objection by practitioners, if, for example, the provision of a particular service is thereby at risk. Such situations would require ensuring sufficient availability of non-objecting personnel. However, such a duty on the part of the state is not the same as requiring individuals with a sincere conscientious objection to be forced to participate in procedures to which they object. Rather, a state may be required to ensure the adequate delivery of health services by, for example, implementing certain quotas of non-objecting practitioners, particularly in contexts where conscientious objection claims are raised in respect of specific duties.

A further 'limit' to the exercise of conscientious objection in healthcare might involve requiring some official notification of particular conscientious objection. As discussed in Chapters 2 and 3, one aspect generally considered to fall within the 'absolute' protection of the freedom of thought, conscience and religion is the right not to be forced to reveal one's religion or belief. However, when it comes to conscientious objection in healthcare, it is arguably the case that the smooth running of the health service necessitates that employees notify their employers of particular instances of conscientious objection which they hold, precisely so that adequate service delivery can be ensured. However, such would be considered an exception to the general prohibition regarding requirements to reveal one's religion or belief.

5.3. Inadequacy of the forum internum/externum construct of the freedom of thought, conscience and religion

Although there remains some inconsistency, 'conscientious objection' has generally been classified as falling under the external dimension of the freedom of thought, conscience and religion, thus opening the door to the possibility of limitations in accordance with the Article 9(2) criteria. Yet, as was already alluded to in the previous two chapters, conscientious objection as a concept does not fit neatly into either of the conceptual *fori* into which the freedom of thought, conscience and religion has traditionally been divided. Indeed, some recent interpretive lines taken by the Human Rights Committee classifying conscientious objection to military service within the 'absolute' or 'inviolable' part of the freedom of thought, conscience and religion. This is indicative of a developing understanding of the

nature of conscientious objection even within the jurisprudence of one particular human rights monitoring body.

How, on the other hand, if conscientious objection as it relates to the possible deprivation of life falls within the 'inviolable' sphere of the freedom of thought, conscience and religion (i.e. inviolable core, see Chapter 2), could such a right be subject to 'limitations' as was suggested above under section 5.2.? It is argued here that if we understand the freedom of thought, conscience and religion as a composite of identifiable norms, which moreover may be either 'rules' or 'principles' as was introduced in Chapter 2, then the notion of 'limitations' acquires a slightly modified understanding, as compared with the general notion of acceptable limitations to Article 8-11 ECHR for example. Particularly, as regards possible rule-type norms applicable to conscientious objection, 'limitations' need not imply context specific weight allocation in the process of balancing competing interests, but rather a demarcation of the rule's specific scope of application. Such an understanding both specifies what is meant by the inviolable core and arguably also diminishes its appeal by introducing the possibility of inherent limitations, that is, the demarcation of the respective scopes of application of the identified rules. Although particular rule-type norms applicable to the assessment of conscientious objection claims arising in the healthcare context have not herein been specified as yet, the possibility of such rules being identified on the basis of the analysis of the three case studies in the present thesis is left open, and will be returned to more fully in Chapter 6.

Finally, despite the arguments presented above, it must be emphasised that much remains unclear as to the possible protection of conscientious objection in healthcare under the freedom of thought, conscience and religion at present. While certain lines in the body of international human rights law, including in the Council of Europe framework suggest a rather reserved stance towards conscientious objection in the healthcare context, it is suggested here that this may be due to both procedural constraints as well as the structure of the cases presented before the various judicial organs. On the other hand, a number of human rights law reasons speak in favour of affording protection to conscientious objection in the healthcare context, or at least particular contexts therein. At the very least, it is suggested that in the general framework of Article 9 jurisprudence, taking into account the wide recognition of conscientious objection in particular contexts in professional codes of ethics would arguably suggest that an outright ban on conscientious objection in the healthcare context would be difficult to justify as compatible with Article 9. The foregoing, however, is not to

deny problems which can result from widespread exercise of conscientious objection in healthcare, as evidenced by some of the cases discussed in this chapter, particularly those in which the rights of others are at stake. Yet impacts on the (human) rights of some resulting from others exercising their human rights is certainly not a state of affairs unique to conscientious objection. The oft-quoted example of one individual's freedom of expression conflicting with another's right to privacy is not resolved by doing away with one of the rights. Rather, certain limits in the exercise of the rights concerned are identified. Similarly, the tension which may arise between a healthcare professional's conscientious objection and another's right (or indeed some public interest) need not be resolved by denying protection for conscientious objection altogether. Instead, the exercise of conscientious objection may be limited in a number of ways, for example by denying such protection in emergency situations, or by granting stronger protection the more direct a healthcare professional's participation in the procedure subject to the objection would be, or perhaps by restricting the availability of such a right of exemption to a certain number of practitioners at an early a stage as possible[175] (e.g. training, recruitment). A final theoretical framework for understanding and indeed modifying the approach to conscientious objection under the freedom of thought, conscience and religion in general will be proposed in Chapter 6, with implications also for conscientious objection in the healthcare context.

[175] Such would on the one hand minimize the likelihood of extensive exercise of conscientious objection at the level of practice, when it might have the effect of limiting access to certain services, but on the other hand, also of placing practitioners with strong moral convictions against particular procedures from 'being forced' to act contrary to those convictions, by, for example, training in another specialisation. However, it should be noted that such 'quota' systems would need to be context specific, thus taking into account the frequency with which a particular service is sought. Moreover, these quota systems would not eliminate conflicts arising as a result of a change in conviction subsequent to entering a particular specialism, or one indeed which might arise upon having initially been involved in particular procedures to which a practitioner later develops an objection, perhaps specifically as a result of having performed them.

CHAPTER 5: Selective conscientious objection in the professional military

1. Introduction

As is well known, conscientious objection was first recognised as a derivative right under the freedom of thought, conscience and religion as protected in international human rights law in the context of military service. However, much less clear is the extent to which such a right – or indeed other norms under the freedom of thought, conscience and religion – apply to claims of so-called 'selective conscientious objection'. Selective conscientious objection, as it has come to be known, refers to objections by professional military personnel to participation in particular operations or duties. As such, selective conscientious objection can be distinguished from (absolute) conscientious objection to military service in that the latter is typically an objection to armed service in its entirety, often arising in the context of some form of conscription. In other words, in (absolute) conscientious objection, the objection pertains to a law of general application, and one in which the state demands a particularly onerous and ethically controversial duty from (some) individuals. By contrast, selective conscientious objection arises in the context of the professional military, i.e. in a context in which the objector has voluntarily entered the profession. Selective conscientious objection is thus of particular relevance to the research question of the present thesis which focuses on conflicts of conscience arising in the employment context[1]. While developments in the specific nature and scope of the protection of conscientious objection at the international and regional levels is an on-going process, the aim of the present chapter is to identify as far as possible any specific norms under the freedom of thought, conscience and religion which apply to claims of selective conscientious objection. Such norms will be sought both from the

[1] However, it is acknowledged here that 'employment' in the technical sense of the term may not always be an entirely accurate descriptor of the nature of a professional service member's status. This observation notwithstanding, it is nevertheless submitted here that selective conscientious objection in the context of the professional military is sufficiently analogous to the object of my research question as to warrant inclusion in the present study. A key criterion in this regard is, as mentioned, the 'voluntary' nature of the profession, as opposed to mandatory conscription.

international human rights law standards on freedom of thought, conscience and religion, and international refugee law standards on selective conscientious objections as grounds for asylum, discussed throughout with reference to domestic law examples. This chapter will proceed with a discussion of some background considerations, namely the development of individual responsibility in international criminal law (section 2.1.). Next, I turn to consider the international human rights law standards on conscientious objection to military service (section 2.2.), including some important recent developments therein with significance for issue of selective conscientious objection (section 2.3.). In section 3, I consider norms applicable to selective conscientious objection under international refugee law under asylum procedures, followed in section 4 by some examples of domestic approaches to selective conscientious objection. Section 5 concludes with a tentative appraisal of the protection of selective conscientious objection under the freedom of thought, conscience and religion on the basis of the material presented in this chapter, with a particular view to initially identifying specific applicable norms.

2. Selective conscientious objection under international human rights law

2.1. Legal background: Individual criminal responsibility in international criminal law and the 'defence of superior orders'

The present chapter is primarily concerned with assessing the approach to selective conscientious objection in the professional military under international human rights standards on freedom of thought, conscience and religion. Nevertheless, the present section introduces the development of individual criminal responsibility in international criminal law and the 'defence of superior orders' by way of legal background pertinent to understanding the issue of selective conscientious objection. Specifically, selective conscientious objection in essence concerns refusals to follow orders[2] for reasons of 'conscience'. However typically at the domestic level, refusals to follow military orders exposes a service member to charges of insubordination or similar offences.[3] On the other hand, as the development of international criminal law demonstrates, following superior orders does not exempt an individual from

[2] Such orders might be general orders to deploy or train for a particular operation or type of duty, or indeed specific orders by a service member's superior in the military chain of command to execute a particular task.
[3] Dinstein puts it thus: 'For the sake of the maintenance of discipline within the national army, the national legal system, through the decrees of military law, imposes upon soldiers a legal duty to obey orders, and threatens them with the direst of sanctions in case or insubordination, especially in time of war and in the presence of the enemy'. Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law,* (Oxford University Press, 2012), 6.

responsibility when he or she commits serious international criminal offences in so doing. This was most clearly set out initially in the 'Nuremberg Principles' and more recently in the Rome Statute establishing the International Criminal Court.

The defence of superior orders can be defined as 'a defence which is claimed by a subordinate who commits a violation of international humanitarian law by following an order of his or her superior'.[4] For the purposes of the present analysis, the violation committed need not be limited to international humanitarian law, although in practice this may indeed most often be the case. Indeed, in his work on the defence of superior order, Dinstein observes that

> [t]he problem of committing an offence pursuant to superior orders may materialize wherever a hierarchical relationship of superiors and subordinates is in being, and on whatever occasion the subordinate, within the ambit of the relationship is duty bound to comply with the instructions of his superior.[5]

Dinstein clarifies that although as such the defence of superior orders is not confined to the issue of war crimes (and therefore to superior orders in the military contexts in armed conflicts), 'the special practical significance of the plea of obedience to superior orders is self-evident in the context of the punishment of war criminals'[6], and in that context moreover, is all the more acute. The problem, in essence, thus centres on the potential conflict arising between the imperatives of military discipline on the one hand and the supremacy of the law on the other whenever a soldier is given an illegal order.[7]

However the law approaches a soldier facing a potentially illegal order, various problems may emerge. It is therefore not surprising that historically, a number of different doctrinal approaches regarding the issue have emerged. At one end, according to the doctrine of '*respondeat superior'*, 'a soldier committing an offence in obedience to superior orders is relieved of responsibility automatically without any condition or qualification'[8], with possible criminal responsibility falling on the superior by whom an illegal order was given. At the other end of the spectrum, the doctrine of absolute liability holds that obedience to an illegal

[4] H. Takemura, *International Human Right to Conscientious Objection to Military Service and individual Duties to Disobey Manifestly Illegal Orders*, (2009), 137.
[5] Dinstein, *supra* note 3, at 1.
[6] *Ibid*.
[7] Dinstein, *supra* note 3, at 6-7.
[8] Dinstein, *supra* note 3, at 8.

order will not exempt the soldier in question from conviction. Rather, it is for each individual soldier to 'examine and weigh every superior order that was given to him', and to refuse to carry out orders to perform an illegal act.[9]

As observed by Dinstein, however, both of the doctrines which have been advanced in the face of the soldier's dilemma fail to overcome the problem at hand adequately, the former being 'incompatible with the interests of criminal law', and the latter being 'incompatible with the demands of military discipline'[10]. As such, a number of other intermediate doctrines have been proposed, such as the 'manifest illegality principle', according to which a soldier committing a criminal offence by obeying superior orders is exempt from responsibility, unless the illegality of the act was manifestly clear to the subordinate.[11] Other such intermediary doctrines include that advanced by Dinstein himself, termed 'the mens rea principle' according to which obedience to a superior order is not as such a defence in the context of criminal responsibility, but only one fact to be considered in determining whether the accused had the required *mens rea* of the offence.[12]

At the level of international law, the issue of obedience to superior orders has been considered in the context of or in conjunction with a number of notable instruments. Perhaps most famously, the Nuremberg Principles[13] provide that

> the fact that a person acted pursuant to order of his or her Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.[14]

The question of superior orders was also debated in the context of the drafting of the Genocide Convention, although no provision on superior orders was adopted in the end.[15] The Convention Against Torture on the other hand explicitly provides that 'An order from a superior officer or public authority may not be invoked as justification of torture'[16]. The Rome Statute establishing the International Criminal Court provides that in respect of crimes

[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid.,* at 9.
[12] *Ibid.,* 87-90.
[13] Adopted as accepted norms of customary international law following the war crimes trials after World War II.
[14] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Adopted by the International Law Commission of the United Nations, 1950, Principle IV.
[15] Dinstein, *supra* note 3, at 217.
[16] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85, Article 2(3).

for which the ICC has jurisdiction, obedience to orders of a superior – whether military or civilian – shall not relieve an individual of responsibility unless the individual in question was under legal obligation to follow such an order, the individual did not know that the order was illegal, and the order was not manifestly illegal.[17] The provision further stipulates that orders to commit genocide and crimes against humanity are considered as manifestly illegal.[18] Other sources of international law also refer to the issue of obedience to unlawful superior orders.[19]

For the purposes of the present research, we can begin to see the legal landscape which a claim of selective conscientious objection would occupy in international law. It can confidently be asserted that obedience to superior orders will not exempt an individual from responsibility for manifestly illegal acts – including genocide, crimes against humanity and torture. Given that the above implies an individual duty to refuse at least (manifestly) illegal orders, it has been suggested by Scheinin that if the moral choice referred to in the Principle IV of the Nürnberg Principles is to be protected in practice, then 'such a general right to refuse must be at least somewhat broader than the corresponding duty.'[20] Given that in such extreme 'dichotomous situations'[21] as might be encountered in the context of the armed forces it is unreasonable to demand an individual soldier to undertake an accurate assessment of the legality of each course of action, it would make legal sense – particularly from the perspective of the individual caught up in the dilemma – for a right to refuse 'grey zone' orders to be legally protected. Given that international human rights law has come to recognise the right to conscientious objection in the context of mandatory military service, it makes sense to further consider whether such a right can to some extent at least be extended to the professional military context, as will be discussed in more detail in the following sections.

[17] Rome Statute of the International Criminal Court 1998, 2187 UNTS 3, Article 33(1).
[18] Rome Statute, *ibid*, Article 33(2).
[19] See for example UN Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, para 26, 'Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests with the superior who gave the unlawful orders'. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Use of Force and Firearms for Law Enforcement Officials', September 1990, available at https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx
[20] Scheinin, 'Conscience and refusal' in M. Pentikäinen (ed.), '*The Right to Refuse Military Orders'*, Geneva: International Peace Bureau, (1994), 90 at 92. In a similar vein, see Lubell, 'Selective Conscientious Objection in International Law', 20 *Netherlands Quarterly of Human Rights*, 2002, 407 at 411.
[21] See Scheinin *supra* note 20, at 91.

2.2. The emergence of a right to conscientious objection to military service in international human rights law

Although the freedom of thought, conscience and religion has a clearly articulated right in the body of international human rights law from the very beginning,[22] it has taken some time for a right to conscientious objection to military service to be recognised as a self-standing aspect within the freedom of conscience and religion. Indeed, at the level of practice, many states have been slow to recognise such a right despite recognition in international human rights law.[23] Systematic studies of conscientious objection to military service in international human rights law have been conducted by others,[24] and my purpose is not to replicate that work here. Rather, I will present a brief history of the development of the right to conscientious objection in international human rights law with a particular emphasis on certain milestones therein, ending with the current level of protection provided.

Focusing for present purposes on the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), both instruments protect, in a more or less similar manner, the freedom of thought, conscience and religion, including the freedom to manifest one's religion or belief in worship, teaching, practice and observance.[25] While conscientious objection to military service is not specifically mentioned in the afore-mentioned instruments[26], reference thereto is made in the respective provisions on the prohibition of forced labour and slavery.[27] Specifically, the provisions prohibiting slavery, forced labour and servitude exclude from the ambit of forced or compulsory labour 'Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors'[28]. Hammer (writing in 2001), observes that the combination of these provisions had had the effect of curtailing the freedom of thought, conscience and religion as precluding the right of conscientious objection to

[22] As exemplified by its explicit inclusion in the Universal Declaration of Human Rights, for example.
[23] See for example the Human Rights Committee's Concluding Observations on the fourth periodic report of the Republic of Korea, CCPR/C/KOR/CO/4, 3 December 2015, at paras 44-45; Concluding Observations on the second periodic report of Armenia, CCPR/C/ARM/CO/2, 31 August 2012, at para 25; Concluding Observations on the initial report of Turkey, CCPR/C/TUR/CO/1, 13 November 2012, at para 23.
[24] See for example, Ö. H. Çinar, *Conscientious Objection to Military Service in International Human Rights Law*, (Palgrave Macmillan, 2013).
[25] See Article 18, ICCPR and Article 9 ECHR:
[26] In contrast, the Charter of Fundamental Rights of the European Union where Article 10(2) explicitly provides that 'The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.'
[27] See Article 8(3)(c)(ii) ICCPR, Article 4(3)(b) ECHR.
[28] *Ibid*. ICCPR Article 8(3)(c)(ii). The corresponding article in the ECHR (Art 4(3)(b))provides that the term 'forced or compulsory labour' shall 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'.

military service in the work of the Human Rights Committee and the ECHR judicial bodies, although such a right might have been 'tolerated' by domestic legislatures.[29] However, what exactly was the intended effect of these provisions by the original drafters is open to interpretation. Regarding the drafting of the ICCPR, Hammer presents some evidence from the drafting history in support of some competing claims.[30] On the one hand, an amendment proposed by the Philippines explicitly providing an exemption from military service for those who conscientiously objected to war on grounds of their religion was rejected by the drafters,[31] being open to interpretations that such a rejection indicated that conscientious objection to military service was not protected under the Covenant. On the other hand, Hammer also presents a more critical interpretation in light of the broader *travaux preparatoires* of the ICCPR, indicating that the phrase 'in countries where conscientious objection is recognised' was included in consideration of the fact that a number of countries did not recognize conscientious objection and not with the intention of precluding its protection under the Covenant as such.[32] Hammer further describes the varied grounds of the objections held by states to the amendment proposed by the Philippines, ranging from views according to which inclusion of the reference to conscientious objection in Article 8 in fact indicated that such a right was protected under the Covenant.[33] Others reportedly took issue with the amendment's focus on religious conscientious objection to the exclusion of secular objections,[34] while other states, most notably the US and UK, objected to the recognition of a 'specific privilege under such a general right'.[35]

Such competing interpretations of the drafting history aside, the subsequent practice has substantially clarified and developed the legal status of conscientious objection to military service under the freedom of thought, conscience and religion as recognized in the respective instruments. For one, the Human Rights Committee issued General Comment No. 22 on the freedom of thought, conscience and religion in 1993, in which it was provided as follows:

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[29] L. Hammer, *The International Human Right to Freedom of Conscience: Some suggestions for its development and application*, (AshgateDartmouth, 2001), 190.
[30] *Ibid.*, 191-193.
[31] *Ibid.*, 191.
[32] *Ibid.*, referring to the travaux preparatoires of the ICCPR, 'Draft International Covenants on Human Rights, Annotation prepared by the Secretary General; United Nations General Assembly 10th Session, 1 July 1955, A/2929. The reference to conscientious objection under the prohibition of forced or compulsory labour can be found on p. 34 at para. 23. Available at https://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/a-2929.pdf .
[33] Hammer noted that such a view was expressed by Uruguay, Hammer (2001) *supra* note 29, at 192.
[34] *Ibid.*, such a view was expressed by India.
[35] *Ibid*.

> The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.[36]

Interestingly here the Human Rights Committee recognizes 'the obligation to use lethal force' which it sees as the aspect of military service giving rise to a protectable right of conscientious objection as impacting on both (using the traditional categorisation) the *forum internum* as well as the *forum externum* aspects of the freedom of thought, conscience and religion. In its subsequent jurisprudence the Human Rights Committee has clarified that conscientious objection to military service under Article 18 applies to all state parties, not just those that have chosen to recognize such a right (in light of Article 8(3)). Thus in *Yoon et al. v. Republic of Korea,* the Committee submitted that 'Article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection.'[37] As such, the claim calling for a right to conscientious objection to military service was to be assessed

> solely in light of Article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose.[38]

This stance was repeatedly reaffirmed in the Committee's views on subsequent individual communications against the Republic of Korea, providing in its conclusions to *Jeong et al. v. Republic of Korea* that

> the right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if this cannot be reconciled with the individual's religion or belief.[39]

At the European regional level, the recognition of conscientious objection to military service under the ECHR has evolved rather more slowly, with the early case law of the European Commission of Human Rights emphasizing the integration of Article 4 in the application of

[36] General Comment No. 22: Article 18 (Freedom of thought, conscience and religion), CCPR/C/21/Rev.1/Add.4, adopted 30 July 1993, para 11.
[37] *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Communications Nos. 1321/2004 and 1322/2004, CCPR/C/88/D/1321-1322/2004, 27 January 2007, para 8.2.
[38] *Ibid*.
[39] *Min-Kyu Jeong et al. v. The Republic of Korea,* Communication No. 1642-1741/2007. CCPR/C/101/D/1642-1741/2007, 27 April 2011, at para 7.4.

Article 9. In other words, complaints claiming in substance a right to conscientious objection to military service under Article 9 systematically failed on the basis of the Commission's (and Court's) integrative interpretation of Article 9 together with Article 4.[40] However, the Grand Chamber judgment in the case of *Bayatyan v Armenia* finally reversed this previously prevalent line of jurisprudence. Having laid out the main body of case law on the matter, the Grand Chamber submitted that

> While in the interests of legal certainty, foreseeability and equality before the law the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement[41].

Moreover, the Court considered its 'or crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and affective, not theoretical and illusory'[42]. Reiterating the living nature of the ECHR which must be interpreted in light of present day conditions – including a host of resolutions at the level of the Council of Europe - the Grand Chamber submitted that in contravention of the Commission's stance, the issue of conscientious objection should be dealt with solely in light of Article 9 and not under Article 9 together with Article 4(3).[43] While recognizing that Article 9 itself did not refer specifically to conscientious objection to military service, it nevertheless considered 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 belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 (…). Whether and to what extent obligation to military service falls within the ambit of that provision must be assessed in light of the particular circumstances of the case.[44]

According to the facts of the case, the Court accepted that 'a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position'[45]. As such,

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[40] See for example ECtHR *Bayatyan v. Armenia*, Appl. no. 23459/03, Judgment of 7 July 2011, paras 93-94 for a summary of the previous line of ECHR case law on conscientious objection to military service.
[41] *Bayatyan ibid.*, at para 98.
[42] *Ibid*.
[43] *Ibid.,* para 109.
[44] *Ibid.,* para 110.
[45] *Ibid.,* para 126.

> respect on the part of the State towards the beliefs of a minority group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.[46]

Moreover, the Court had regard to the fact that at the material time the respondent state had already pledged to introduce within a defined time provision for alternative service, and as such, the applicant's conviction for failure to perform military service directly contradicted that pledge.[47] On the basis of the aforementioned grounds, the Grand Chamber found that the applicant's criminal conviction for failure to perform military service interfered with his right to manifest his religion or belief as protected in Article 9, and that such interference was not necessary in a democratic society in pursuit of the legitimate aims provided in Article 9(2).[48]

2.3. Current developments and competing interpretations of the right to conscientious objection to military service

While the recognition of conscientious objection to military service as a self-standing aspect of the freedom of thought, conscience and religion can – at least under certain conditions – be asserted with some confidence under both the ICCPR and the ECHR, the precise parameters of the right remain disputed. Indeed, some divergent lines of interpretation regarding conscientious objection to military service can be identified in the jurisprudence of the Human Rights Committee and the European Court of Human Rights respectively. With regards to the ICCPR, the recent jurisprudence of the Human Rights Committee exhibits a slightly modified approach by the majority of the Committee vis-à-vis the positioning of the right to conscientious objection to military service within Article 18. Specifically, whilst previously a lack of provision of alternative forms of service was assessed in terms of permissible limitations to the manifestation of religion or belief under Article 18(3),[49] recent jurisprudence suggests a move to considering conscientious objection to military service as

[46] *Ibid.,* para 126.
[47] *Ibid.,* para 127.
[48] *Ibid.,* para 128.
[49] See for example the Human Rights Committee's concluding observations in Yoon and Choi v. Republic of Korea, paras 8.3 and 8.4. The development of the jurisprudence of the Human Rights Committee on the issue of conscientious objection to military service is helpfully and clearly summarised in H. Bielefeldt, N. Ghanea and M. Wiener, *Freedom of Religion or Belief: An International Law Commentary*, (Oxford University Press, 2016) at 265-269.

inhering in the freedom of thought, conscience and religion.[50] Though not expressly stated, this can be interpreted as indicating that the right to conscientiously object to military service cannot be subject to any limitations. Indeed this new approach by the majority has given rise to dissenting opinions by other members of the Committee, who favour the previous approach based on the permissibility of limitations under Article 18(3), while not disagreeing as such on the outcomes reached by the majority.[51] Approaching conscientious objection to military service as an inherent facet of the freedom of thought, conscience and religion potentially has some significant consequences for conscience-based objections more generally. For one, although thus far the Human Rights Committee's jurisprudence on conscientious objection has focused on the issue of military service, the hermeneutic of inherence is not conducive confining it as such. This is particularly so given the broad parameters which the HRC has cast upon the right to conscientious objection. Thus, while originally in General Comment 22 the recognition of conscientious objection to military service was strongly versed with reference to the use of lethal force[52], the right has subsequently evolved to encompass a broader scope. In particular, although many military roles do not involve the use of lethal force, and many military contexts allow for serving in a non-combatant or unarmed capacity, the right to conscientious objection to compulsory military service has been interpreted as requiring the possibility of alternative service of a non-military nature, distinct from military organization and command.[53] Further still, the progressive stance of the Human Rights

[50] Such a stance was first articulated by the majority of the Human Rights Committee in *Jeong et al. v. Republic of Korea* (*supra* note 38) at para 7.3. ('The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion'), and, further at para 7.4. where the Committee held that 'repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibit the use of arms, is incompatible with Article 18, paragraph 1 of the Covenant'.

[51] The composition of the minority of the Committee in this regard has differed slightly from communication to communication, but the views expressed share a common basis in advocating for the previous approach to conscientious objection to military service based on an assessment of the permissibility of limitations. For example, in *Jeong et al. v. Republic of Korea,* three members of the Committee submitted that the following paragraph should have been ed in the views of the Committee: 'The Committee notes that the authors' refusal to be drafted for compulsory military service was a direct expression of their religious beliefs which, it is uncontested, were genuinely held and that the authors' subsequent conviction and sentence amounted to an infringement of their freedom of conscience and a restriction on their ability to manifest their religion or belief. The Committee finds that as the State party has not demonstrated that in the present case the restrictions in question were necessary, within the meaning of article 18, paragraph 3, it has violated article 18, paragraph 1 of the Covenant'. (*Jeong et al. supra* note 39, Appendix, para 7.4.).

[52] Specifically, para 11 of General Comment No. 22 states:, 'The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief'.

[53] Para 7.3. in *Jeong et al. v. Republic of Korea* (*supra* note 39) the Human Rights Committee held that 'A State may, if it wishes, compel the objector to undertake civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be real service to the community and compatible with respect for human rights'. An earlier resolution of the Commission on Human Rights (resolution 1989/59) on conscientious objection to military service is even more

Committee is supported by its response to a periodic report submitted by Finland, in which it called for the exemption from all forms of service (both military and alternative civilian service) at the time available only to those conscripts who were registered members of Jehovah's Witnesses to be extended to other 'absolute' conscientious objectors as well. Given this approach, it becomes conceptually increasingly incoherent to restrict the application of the right to conscientious objection to the context of military service, even though the Human Rights Committee has distinguished the right from objections to paying taxes and mandatory education, for example.[54] As such, it may be that the 'inherence' hermeneutic might lack some perhaps desirable flexibility in dealing with claims of conscientious objection in other context which an approach based on permissible limitations would ostensibly provide.[55]

On the other hand, yet another approach to conscientious objection to military service can be identified in the context of the ECHR. Although slightly slow off the mark in recognizing the right to conscientious objection to military service at all, when it finally did recognize such a right, the ECtHR's Grand Chamber judgment was welcomed as a milestone, overturning a long line of case law to the contrary.[56] However, upon closer reading some distinct features in the stance of the Grand Chamber can be distinguished from the jurisprudence of the Human Rights Committee. Specifically, in *Bayatyan* the claimant's status as member of a religious minority seems to have been of particular significance in the Court's reasoning.[57] In other words, the European Court of Human Rights was arguably more sensitive to the State's interest in maintaining a system of conscription, which, it was implied, would not be

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specific, calling on alternative service option in states maintaining a system of compulsory military service to be 'compatible with the reasons for the conscientious objection'. UN Commission on Human Rights, resolution 1989/59 on conscientious objection to military service, 8 March 1989.

[54] Muzny, '*Bayatyan v. Armenia:* The Grand Chamber Renders a Grand Judgment', 12 *Human Rights Law Review,* 2012, 135-147; M. Burbergs, 'Recognizing the right to conscientious objection - Part I – correcting a mistake', 20.7.2011, https://strasbourgobservers.com/2011/07/20/recognizing-the-right-to-conscientious-objection-%e2%80%93-part-i-%e2%80%93-correcting-a-mistake/ (accessed 27.6.2019).

[55] On the other hand, the balance between flexibility and certainty may alternatively be approached on the basis of the nature of specific norms under the freedom of thought, conscience and religion, as indeed will be argued in the present thesis most fully in Chapter 6, where the norms which are 'rules' are distinguished from 'principles'.

[56] See Muzny, *'The Grand Chamber Renders a Grand Judgment' supra* note 54.

[57] *Bayatyan supra* note 40, para 126: "The Court further reiterates that pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids nay abuse of a dominant position (see Leyla Sahin, cited above § 108). Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society."

threatened by allowing members of such minorities to perform alternative service instead. Although admittedly the European Court of Human Right's jurisprudence on conscientious objection to military service may yet evolve further,[58] at present the 'minorities' approach does not support the 'inherence' hermeneutic advanced by the Human Rights Committee.[59]

By way of preliminary conclusion it can be said that a number of aspects of the right to conscientious objection to military service remain disputed. In addition to the two distinct hermeneutical lines identified above, numerous other questions lack concrete answers at present. These include some aspects of the nature and length of alternative service, claims of discrimination based on the nature and length of alternative service, claims of discrimination based on the nature of the beliefs upon which an individual's objection is based, the status of absolute objectors, the appropriate procedure for claiming/proving conscientious objection, as well as the particular issue of selective conscientious objection as is the focus at present. Nevertheless, failure to provide for a genuinely civilian alternative to compulsory military service at all to those with deep moral objections to such service unequivocally breaches the existing human rights standards on the freedom of thought, conscience and religion. This provides a credible legal starting point for embarking on an analysis of the issue of selective conscientious objection under the freedom of thought, conscience and religion.

2.4. Selective conscientious objection under international human rights law standards: a tentative appraisal

The issue of selective conscientious objection in the professional military can be approached in a number of ways under the freedom of thought, conscience and religion. One such

[58] A recent judgment of the Court for example addressed the question of alternative civilian service, finding that certain features of such service in Armenia nevertheless led to a finding of a violation of Article 9. Specifically, the Court found that despite such service being apparently civilian (for example service in an orphanage, retirement home etc.), certain 'military features' – such as uniforms, requirements to reside at the place of service, etc. meant that Article 9 had been violated. Thus, despite the availability of alternative civilian service in Armenia, the Court considered that in addition it 'must also verify that the allowances made were appropriate for the exigencies of an individual's conscience and beliefs.' As such, despite states enjoying a certain margin of appreciation in the organization of civilian service, they have to do so such as to offer 'an alternative to military service of a genuinely civilian nature and one which was not deterrent or punitive in character.' Para 67, ECtHR *Adyan and Others v. Armenia*, Application no. 75604/11, Judgment of 12 October 2017.

[59] However, the status of the authors of individual communications as members of a minority has been recognised in some dissenting opinions in the Human Rights Committee's views. See dissenting opinion by Committee member Ms. Ruth Wedgwood in *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Communications Nos. 1321/2004 and 1322/2004, CCPR/C/88/D/1321-1322/2004, 27 January 2007, Views adopted 3 November 2006, at p. 15: 'Thus, a state party's democratic legislature would surely wish to examine whether the religious conscience of a minority of its citizens can be accommodated without a prohibitive burden on its ability to organize a national defence.'

approach would be simply to subsume selective conscientious objection under the general category of conscientious objection to military service, as, for example, implied in the UNHCR Guidelines No. 10, to be discussed in greater detail in the following section.[60] Other approaches would differentiate between selective conscientious objection and general conscientious objection to military service, for example with variation in the level of protection offered. However, the above discussions on the right to conscientious objection under the freedom of thought, conscience and religion do not, as it stands, yet shed much light on the approach to be adopted regarding selective conscientious objection.[61]

On the other hand, a number of sources of (soft) international law have touched upon the issue of selective conscientious objection. For example, resolution 33/165 of the United National General Assembly in 1978 on the 'Status of persons refusing service in military or police forces used to enforce apartheid' recognised the right of all individuals to refuse service in forces used to enforce apartheid[62] and called upon all Member States to grant asylum or safe transit to those forced to leave their country of nationality 'solely for reasons of conscientious objection to assisting in the enforcement of *apartheid* through service in the military or police forces'.[63] Lubell submits that the aforementioned resolution, while not amounting to a legal instrument is nevertheless 'evidence of the ability to muster international support for certain types of selective objection.'[64] A few years later, selective conscientious objection was addressed in a report prepared by Eide and Mubanga-Chipoya titled 'Conscientious Objection to Military Service'[65] (the report). In addition to referring to conscientious objection to military service or service in the police force in the context of

[60] In the terminology of the UNHCR Guidelines, 'conscientious objection to military service' is specifically defined as including both absolute and selective conscientious objection, UNHCR Guidelines on International Protection No. 10, HCR/GIP/13/10/Corr.1, 12 November 2014.
[61] Stijn Smet notes that since *Bayatyan* the European Court of Human Rights has somewhat curtailed the right to conscientious objection to military under Article 9, by excluding from its ambit 'partial' objections to military service, such as that at issue in ECtHR *Enver Aydemir* v. *Turkey*, Appl. no. 26012/11, Judgment of 7 June 2016, para. 79, where the applicant's objection pertained to service in a 'secular' army, and not categorically to armed service as such (see Smet, 'Conscientious Objection Under the European Convention on Human Rights: The Ugly Duckling of a Flightless Jurisprudence' in J. Temperman, T.J. Gunn and M.D. Evans (eds.), *The European Court of Human Rights and the Freedom of Religion or Belief* (Brill, 2019) 282, at 287). However, it is suggested here that the facts of *Enver Aydemir* can be distinguished from the focus of the present chapter (i.e. selective conscientious objection by professional service members).
[62] UN GA resolution 33/165, 'Status of persons refusing service in military or police forces used to enforce apartheid', 1978, at para 1.
[63] *Ibid.* para 2.
[64] Lubell, *supra* note 19, at 411.
[65] A. Eide and C. Mubanga-Chipoya, 'Conscientious Objection to Military Service', Report prepared in pursuance of resolutions 12 (XXXIV) and 1982/30 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities by Mr. Asbjørn Eide and Mr. Chama Mubanga-Chipoya, member of the Sub-Commission, New York: United Nations, 1985 (E/CN.4/Sub.2/1983/30/Rev.1).

enforcing apartheid as addressed in the aforementioned GA resolution, the Report recognised (with reference to the nature of alternative/non-combatant service) that when an individual's objection is grounded on a conviction as to the immorality of the use of armed force or 'the particular use of armed force in which the country concerned is engaged', then the possibility of serving in a non-combatant position would not be acceptable.[66] Furthermore in Chapter III of the Report, ('Conclusions and Recommendations'), the authors drew attention to the distinction between absolute and partial conscientious objection, the latter being 'based on the acceptance of the use of armed force purely for defence', while refusing service in such armed operations as are 'tantamount to aggression, occupation or repression of human rights, or where the means and methods of armed action are considered unacceptable'.[67] Both absolute and partial conscientious objection were, according to the Report, 'normally based on moral convictions of a religious or humanistic nature'.[68] Despite this commonality, the Report recognises that (at the time) states that recognised conscientious objection generally only did so in regard to the 'absolute, pacifist position'. In its final recommendations, the Report urged, inter alia, the explicit protection of certain categories of selective conscientious objectors, namely where the objection related to gross violations of international standards.[69]

Similarly in the context of the Council of Europe, a number of instruments have over the years expressed support for selective conscientious objection. One early example, as noted by Lubell, is a resolution of the Parliamentary Assembly of the Council of Europe, urging states to protect military deserters and draft evaders who refused to take part in the war in the former Yugoslavia.[70] More recently, the Committee of Ministers of the Council of Europe adopted a recommendation to Member States on the human rights of members of the armed forces,[71] accompanied by an explanatory memorandum. The recommendation inter alia specifies the right to freedom of thought, conscience and religion of members of the armed forces, which should only be subject to limitations in accordance with Article 9(2) of the ECHR, (some features of which may be specific to 'the constraints of military life').[72] Specifically, member

[66] *Ibid.,* para 62.
[67] *Ibid.,* para 145.
[68] *Ibid*.
[69] Namely apartheid (Recommendation 1(c)), genocide (Recommendation 1(d)), illegal occupation of foreign territory (Recommendation 1(e)), gross violations of human rights (Recommendation 1(f)), and in the contexts in which resort to the use of weapons of mass destruction or weapons which have been specifically outlawed is considered likely by the objector (Recommendation 1(g)).
[70] Lubell *supra* note 20, at 411, Resolution 1042, 1994.
[71] Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces, Adopted in 24 February 2010 at the 1077th meeting of the Ministers' Deputies.
[72] *Ibid.*, para H, and para 40.

of the armed forces maintain the right to change religion at any time.[73] In the context of compulsory military service, conscripts maintain the right to be granted conscientious objector status[74] and professional soldiers should 'be able to leave the armed forces for reasons of conscience'[75], and should have any such requests processed in a reasonable time, subject ultimately to review by an impartial and independent body.[76] Having left the armed forces for reasons of conscience, the recommendation provides that such ex-service members should not be subject to discrimination or prosecution for that reason.[77] Finally, the recommendation calls for service members to be informed of their rights in relation to conscientious objection and the relevant procedures.[78] The implementation of the recommendation by Member States has been monitored by way of a questionnaire and a subsequent draft report drawn up on the basis of state responses, compiled by the Steering Committee for Human Rights.[79]

The above cursory overview, together with the relevant aspects of international criminal law, international humanitarian law as well as the human right to freedom of thought, conscience and religion more generally establishes with sufficient credibility an initial case for considering selective conscientious objection as protected under the freedom of conscience and conscientious objection, or at the very least not without good reason excluding it from the ambit of such protection. On the other hand, considerations of a pragmatic kind would also suggest that protection of selective conscientious objection of professional service members who have entered the service on a voluntary basis is not altogether unqualified. The objective of the rest of this chapter is to try to discern the limits or qualifications of a possible right to selective conscientious objection from another branch of international (human rights law), namely international refugee/asylum law, as well as by considering a number of domestic law approaches to selective conscientious objection.

[73] *Ibid.,* para 40.
[74] *Ibid.,* para 41.
[75] *Ibid.,* para 42.
[76] *Ibid.,* para 44.
[77] *Ibid.,* para 45.
[78] *Ibid.,* para 46.
[79] Steering Committee for Human Rights (CDDH) CDDH(2013)003, Draft Report on the implementation of the Committee of Ministers' Recommendation CM/Rec(2010)4 on the human rights of members of the armed forces, 77th meeting, 19-22 March 2013, (Strasbourg, 27 February 2013).

3. Selective conscientious objection as a ground for asylum: emerging standards under international refugee law

On the basis of the previous sections it can be asserted that while some support can be garnered for a right to selective conscientious objection under existing international human rights law standards, the exact status or parameters of such a possible right are not altogether clear. Similarly, while examples of domestic law approaches to selective conscientious objection briefly discussed in the section 4 below give some insight into a number of possible alternatives for approaching claims of selective conscientious objection, a detectable level legal ambiguity – particularly vis-à-vis international human rights law standards – remains. Usefully for present purposes however, the issue of selective conscientious objection has been addressed to some degree by within international refugee law. Moreover, selective conscientious objection has been addressed therein in the context of both international level guidance as well as domestic, and to some extent, regional/supra-national jurisprudence. In this regard, the aim of the present section is to discern the applicable international standards regarding selective conscientious objection arising in the context of applying for international protection. In so doing, this section aims to ascertain whether or how such standards add clarity vis-à-vis the protection of selective conscientious objection in international human rights law, with an ultimate view to identifying specific norms for the purposes of the analysis of conscientious objection more generally in the final chapter of the present thesis.

This section will proceed as follows. First, the applicable legal framework of international refugee law will be introduced. Second, on the basis of the UNHCR's Guidelines No. 10, a number of key factors which strengthen a claim for asylum based on selective conscientious objection will be identified, illustrated by examples from domestic asylum jurisprudence. As will become apparent, neither the UNHCR guidelines (nor other sources) easily lend themselves to clear-cut categorisation as standards, but rather often involve the identification of various relevant factors to be considered and weighed as part of an overall assessment of an individual claim. Nevertheless, even such factors are of importance for present purposes, given that they indicate aspects of a claim which increase the likelihood of success. Finally, a short summary of the findings is included by way of conclusion.

3.1. Legal Framework

The foundational source of international refugee law is the Refugee Convention 1951[80], which provides the criteria necessary for establishing refugee status. Specifically, the Convention defines as a refugee any person who, 'due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'[81] is outside his or her country of nationality and is 'unable or unwilling' to avail him- or herself of the protection of that state. Furthermore, Article 1F excludes from refugee protection any person in respect of whom there are serious reasons to consider that he or she has 'committed a crime against peace, a war crime, or a crime against humanity' (as defined in relevant international instruments)[82], committed some other 'serious non-political crime outside the country of refuge' prior to admission to a country as a refugee,[83] or 'has been guilty of acts contrary to the purposes and principles of the United Nations'[84]. It is noteworthy here that while the above offences which disqualify from refugee status under the Convention do not necessitate that an individual is a member of the armed forces of some country, the identified offences are particularly closely associated with wrongful conduct committed by or within the framework of the military. In addition, the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status[85] specifically address the situation of deserters and individuals avoiding military service.[86] Paragraph 167 of the Handbook sets out by recognizing that desertion and draft evasion are frequently criminalized, but that penalties accruing therefrom 'are not normally regarded as persecution'.[87] However, neither does desertion or draft evasion disqualify an individual from the reach of the refugee protection.[88] On the other hand, the Handbook specifies that mere dislike of military service or fear of combat underlying the desertion or draft evasion does not suffice to qualify someone as a refugee.[89] Draft-evasion or desertion may nevertheless

[80] Convention Relating to the Status of Refugees 1951, 189 UNTS 137 (Refugee Convention).
[81] Art. 1A (2) Refugee Convention.
[82] Art. 1F (a) Refugee Convention.
[83] Art. 1F (b) Refugee Convention.
[84] Art. 1F (c) Refugee Convention.
[85] UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (UNHCR, 1979, reissued Geneva 2011). On the status of the UNHCR Handbook, see S. Singh Juss, 'The UNHCR Handbook and the Interface between 'soft law' and 'hard law' in international refugee law', in Singh Juss & Harvey (eds), *Contemporary Issues in Refugee Law,* (Edward Elgar, 2013) 31.
[86] UNHCR Handbook, *ibid.,* at 33.
[87] *Ibid.,* para 167. 'Fear of persecution and punishment for desertion does not in itself constitute well-founded fear of persecution under the definition' in the Refugee Convention.
[88] *Ibid*.
[89] *Ibid.,* para 168, although desertion or draft-evasion may be concomitant with other factors warranting qualification as a refugee.

intersect with other factors such as to constitute a well-founded fear of persecution in accordance with the Convention, if established that the individual would be subject to a disproportionately severe punishment for the offence of draft-evasion or desertion on account of his or her race, religion, nationality, membership of a particular social group or political opinion.[90] However, the Handbook also recognizes that the obligation to perform military service may also be the sole ground for seeking protection, when such would involve the individual in military activities contrary to his or her 'genuine political, religious or moral convictions, or to valid reasons of conscience.'[91] Nevertheless, this is not to say that all cases of draft evasion or desertion even when based on genuine conviction will warrant refugee status. For one, according to the UNHCR Handbook, disagreement as to the political basis of a military operation does not suffice in that regard.[92] On the other hand, paragraph 171 provides as follows:

> Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.[93]

As such, it can be seen how, according to the UNHCR Handbook, individual cases of selective conscientious objection might or might not attract international protection. In other words, a genuine claim of selective conscientious objection does not *as such* necessitate finding of persecution under the UNHCR's guidance. However, it can also be seen how, according to the guidance, some claims of selective conscientious objection might attract the protection of international refugee law. Such would be the case, for example, where an individual selective conscientious objector deserts from his or her duties to partake in hostilities condemned by the international community as contrary to the basic rules of human conduct, and would thereby be subject to punishment on the basis of his or her desertion.

In addition to the Handbook discussed above, the UNHCR has also issued guidelines addressing the issue of military service and conscientious objection more generally. Most pertinently for present purposes, the UNHCR's Guidelines on International Protection No. 10

[90] *Ibid.,* para 169.
[91] *Ibid.,* para 170.
[92] *Ibid.,* para 171.
[93] *Ibid*.

were issued in 2014 and concern claims to refugee status related to military service[94] and provide 'legal interpretive guidance for governments, legal practitioners, decision makers and the judiciary'[95]. As the most recent guidance issued on the topic, the Guidelines No. 10 will be addressed in detail here in order to determine the approach to claims of selective conscientious objection in the context of asylum processes and with the ultimate aim of identifying applicable norms/factors relevant for ascertaining the protection of selective conscientious objection also under the human right to freedom of thought, conscience and religion.

3.2. Selective conscientious objection as a ground for asylum: introduction

For present purposes, it should be noted that the UNHCR Guidelines No.10 (the Guidelines) define conscientious objection as objection to military service which 'derives from principles and reasons of conscience, including profound convictions, arising from religious, moral ethical, humanitarian or similar motives', and, moreover, specifically includes partial (or selective) conscientious objection.[96] The Guidelines make clear that central to a successful claim for refugee status is establishing a well-founded fear of persecution, which for claims raising issues of conscientious objection (whether absolute or partial), is highly context-specific. Factors of relevance for such a finding include 'the applicant's background, profile and experiences considered in light of up-to-date country of origin information.'[97] Furthermore, the Guidelines specify that account should be taken of the 'personal experiences of the applicant' in addition to the experiences of others in similar situations. On this basis, the Guidelines establish two consecutive questions to be addressed: what would be the predicament for the applicant if returned to his or her country of origin? Second, would the predicament identified on the basis of the first question amount to persecution? Interestingly, the Guidelines specify that regarding the assessment of what would be the applicants

[94] UNHCR Guidelines on International Protection No. 10: 'Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees', 12 November 2014.
[95] Guidelines No. 10 *ibid.*, front page.
[96] Guidelines No. 10 *ibid.*, para 3. Regarding conscientious objection to military service, the Guidelines specify that: 'Such an objection is not confined to absolute conscientious objectors [pacifists], that is, those who object to all use of armed force or participation in all wars. It also encompasses those who believe that "the use of force is justified in some circumstances but not in others, and that therefore it is necessary to object in those other cases" [partial or selective objection to military service]. A conscientious objection may develop over time, and thus volunteers may at some stage also raise claims based on conscientious objection, whether absolute or partial.' The quotation within the above citation is taken from the Eide and Mubanga-Chipoya report cited *supra* note 65, para. 21.
[97] Guidelines No. 10, *supra* note 94, para 13, referring to UNHCR Handbook (*supra* note 85) paras 51-53.

predicament (question 1), it is necessary to consider not only the direct consequence endured but also 'any negative indirect consequences' which may derive from 'non-military and non-State actors, for example, physical violence, severe discrimination and/or harassment by the community.' [98] Such indirect consequences have been raised in domestic asylum jurisprudence, notably in the case of *Shepherd,*[99] where among the questions referred to the CJEU was whether a 'dishonourable discharge from the army, the imposition of a prison sentence and the social ostracism and disadvantages associated therewith constitute an act of persecution' within the meaning of the EU Qualification Directive.[100] Though ultimately leaving the assessment to the national courts dealing with the issue, the CJEU did not consider (on the basis of the information in the file before it) there to have been anything to suggest that a custodial sentence between 100 days and 15 months (or possibly even up to 5 years) for desertion to have been clearly beyond what was necessary 'for the state concerned to exercise its legitimate right to maintain an armed force'[101]. With regard to the question of 'social ostracism and disadvantages associated therewith', the CJEU considered such to be 'the *consequences* of the measures, prosecution or punishment referred to in Article 9(2)(b) and (c) of Directive 2004/83'[102] which could not, therefore, 'be regarded as acts of persecution for the purpose of those provisions.'[103] The CJEU's stance, at least in the context of *Shepherd*, does not pursue the more generous interpretation suggested by the Guidelines.

The substantive assessment of 'persecution' is subdivided into five sections in the Guidelines, of which three are most relevant for present purposes. These sections aim to identify some key themes in asylum claims related to conscientious objection, and are not intended to be watertight categories but rather inevitably exhibit some overlap.[104] These sections of the assessment of persecution as outlined in the Guidelines are considered in turn below, illustrated, as applicable, by examples of domestic asylum jurisprudence.

[98] Guidelines No. 10, *ibid.,* para 15.
[99] CJEU *Andre Lawrence Shepherd v. Bundesrepublic Deutchland,* C-472, 26 February 2015.
[100] *Ibid.,* para 21(8).
[101] *Ibid.,* para 53.
[102] *Ibid.,* para 55, emphasis added. The Directive in question was Council Directive 2004/83EC OJ 2004 L 304/12 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (no longer in force, date of end of validity: 21.12.2013).
[103] *Shepherd, ibid.,* para 55.
[104] Guidelines *supra* note 94, para 16.

3.2.1. 'Objections for reasons of conscience'

The first thematic category under the assessment of 'persecution' under the Guidelines concerns objections to military service for reasons of conscience, including both absolute and selective conscientious objection. With regard to such objections, a central consideration concerns the availability of either exemption or alternative service.[105] Thus, while states are entitled to require military service, when such is done in a manner inconsistent with international law standards, persecution may arise.[106] Where neither exemption nor alternative service is available, the Guidelines require a careful assessment of the consequences for the individual in question. For example, where an individual would be forced to perform military service or take part in hostilities in violation of their conscience, or, 'risk being subjected to prosecution and disproportionate or arbitrary punishment for refusing to do so', a finding of persecution would be warranted.[107] One reading of such a standard would suggest strong support for a right to selective conscientious objection, such as in the case of an individual's objection to participation in a specific war. However, key in this regard is the assessment of what constitutes 'disproportionate punishment' for such purposes. In the subsequent paragraphs, the Guidelines address the situations where persecution would not arise, including where a deserter is offered a dishonourable discharge, unless other factors are also present.[108] However, taking these two standards together, one is left with a number of unanswered questions. At one end of the spectrum, a dishonourable discharge for selective conscientious objection would not, on its own, amount to persecution, but on the other, an overly lengthy custodial sentence for refusal to serve clearly would. Furthermore, mere lack of an alternative service option in countries where compulsory military service is only a theoretical possibility which is not enforced or which can be avoided through the payment of an administrative fee would not lead to a finding of persecution.[109] However, the threat of persecution or punishment for evading service is deemed as putting pressure on objectors to change their conviction – thus amounting to a violation of the freedom of religion and meeting the threshold of persecution.[110]

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[105] *Ibid.,* para 17.
[106] *Ibid*. However, a potential problem with such a statement is the inevitable difficulty in ascertaining the exact international standards applicable at any given time, particularly given the rapidly evolving nature of the law in this regard.
[107] *Ibid.,* para 18.
[108] *Ibid.,* para 19.
[109] *Ibid*.
[110] *Ibid.,* para 18, citing herein UN Commission on Human Rights, Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention, 20 December 2000, E/CN.4/2001/14, particularly paras 91-94, where the working group considers that 'repeated incarceration

On the other hand, the option of alternative service does not in itself preclude a finding of persecution. In this regard, the Guidelines highlight the nature of the alternative service as relevant, particularly as to whether such service is punitive in nature or length.[111] While objectively and reasonably justified disparities in the length of service are acceptable, where alternative service is merely a theoretical possibility or the procedure for requesting such service is 'arbitrary or unregulated' or only available to some, then further inquiries are required as to whether persecution is at hand. Moreover, even in cases where a procedure is available but the applicant has not availed him- or herself of the procedure, account needs to be taken of the underlying reasons for not doing so, particularly as regards whether such reasons are related to a well-founded fear of persecution for expressing his or her convictions.[112] A similar issue was raised in one of the questions referred to the CJEU in the *Shepherd* case. Specifically, the German court asked the CJEU whether the fact that the applicant had not availed himself of the ordinary procedure for conscientious objectors – even though he would have had the opportunity to do so – precluded refugee protection under the EU Qualification Directive.[113] In addressing the question, the CJEU held that in order for the applicant to qualify for refugee status, refusal to perform military service must have been the only means by which he could avoid participating in the alleged war crimes.[114] As such, unless the applicant could prove that in his specific situation no such procedure would have been available to him, a failure to avail himself of a procedure for obtaining conscientious objector status would exclude any protection under the Qualification Directive. However, in *Shepherd's* case, the CJEU did not address the actual procedure for obtaining conscientious objection status for US military personnel. As such, it should be noted that contrary to the definition of conscientious objection provided in the Guidelines, the United States Department of Defense Instruction on conscientious objection[115] specifically precludes objection to a specific war from its ambit, in line with the applicable US case law.[116] It follows that insofar as Shepherd's objection was directed specifically at US military

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in cases of conscientious objectors is directed towards changing their conviction and opinion, under threat of penalty' (para 93).

[111] Guidelines No 10. *ibid* para 20.

[112] *Ibid*.

[113] *Shepherd supra* note 99, para 21, (Council Directive 2004/83/EC, *supra* note 102).

[114] As had been argued in the case.

[115] US Department of Defense Instruction 1300.06 on Conscientious Objectors, 12 July 2017, available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130006_dodi_2017.pdf

[116] Particularly *Gillette v. United States*, 401 U.S. 437 (1971).

engagement in Iraq, it is highly unlikely that the conscientious objection procedure would have been of use to him.

3.2.2. 'Objection to military service in Conflict contrary to the Basic Rules of Human Conduct'

Many instances of selective conscientious objection have been argued using the language of 'conscience', all the while being rooted in substantive (legal) concerns regarding a particular armed conflict. The Guidelines address such objections under the heading 'Objection to Military Service in Conflict Contrary to the Basic Rules of Human Conduct', subdivided into sections on 'unlawful armed conflict' and 'means and methods of warfare'. The Guidelines recognise that such objections may be versed in terms of conscience, or indeed appeals to military codes of conduct, or legal standards (whether international humanitarian, criminal or human rights law).[117] Objections based on such legal arguments find support from the exclusion clauses under the Refugee Convention Article 1F(a) and (c).[118]

3.2.2.1. Objection to participating in an unlawful armed conflict

As has proved to be the case in practice, selective conscientious objection raised in the context of asylum claims are often argued in terms of the suspect legality (or morality) of a particular military operation or armed conflict. Such has been the case for example in the many asylum applications lodged in Canada by (former) US military personnel in response to various recent military campaigns undertaken by the United States.[119] The UNHCR Guidelines provide that where a particular armed conflict is considered to be in violation of international law (i.e. *jus ad bellum*), the individual seeking asylum need not 'be at risk of incurring individual criminal responsibility if he or she were to participate in the conflict in question'[120]. Rather, such an applicant must prove the genuineness of his or her objection and that there exists a risk of persecution because of that objection.[121]

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[117] Guidelines No. 10 *supra* note 94, para 21.
[118] As mentioned above under 3.1.
[119] For a discussion of selective conscientious objection in the context of the asylum process in Canada more generally (i.e. not just vis-a-vis US military personnel), see Le Bouthillier, 'Claims for Refugee Protection in Canada by Selective Objectors: An Evolving Jurisprudence', in A. Ellner, P. Robinson and D. Whetman (eds), *When Soldiers Say No: Selective Conscientious Objection in the Modern Military'*, (Routledge, 2016) (First published by Ashgate, 2014), 155.
[120] Such individual responsibility for crimes of aggression anyhow only arises in respect of 'persons who were in a position of authority in the State in question', Guidelines No. 10 *supra* note 94, at para 23.
[121] *Ibid*.

The Canadian asylum case of *Lebedev* raised many issues of relevance for present purposes. The case involved an asylum application by a Russian individual who had deserted the army upon being deployed to Chechnya.[122] Of particular interest for present purposes is the consideration given by the Federal Court of Canada to the issue of selective conscientious objection under international law as well as the question of the level of complicity required of a soldier in cases concerning an armed conflict of suspect legality in order for an asylum claim to be successful on that ground. With regard to the latter, Justice de Montigny considered the level of participation required of a foot soldier in an allegedly illegal war in order to warrant a successful asylum claim based on desertion/selective conscientious objection. Specifically Justice de Montigny submitted that 'the extent of "on the ground" participation in the violations of international humanitarian law does not lend itself to an easy definition and is still subject to debate.'[123] In particular, while the required level of participation required to trigger the exclusion clauses of the Refugee Convention 1951 has been understandably high (given the high cost of being excluded from international protection), the same should not be the case where asylum is claimed on the basis of desertion or objection linked to a risk of involvement with such acts.[124] In other words, in *Lebedev* Justice de Montigny called for greater flexibility in this regard.

In addition the UNHCR Guidelines recognise that those who 'enlisted prior to or during the conflict in question may also object as their knowledge of or views concerning the illegality of the use of force evolve.'[125] While the normative force of such a statement is unclear,[126] its inclusion in the Guidelines could at the least be interpreted as not excluding such soldiers from the ambit of protection, merely on the basis of the timing of their objection. Such an interpretation is not however reflected in the CJEU case of *Shepherd* where, stipulating that the applicant's refusal to perform military service must have constituted the only means by which he could avoid participating in the alleged war crimes, the CJEU drew attention to the fact that 'the applicant not only enlisted voluntarily in the armed forces at a time when they

[122] Moreover, the applicant was a conscript who had throughout objected to military service. *Vadim Lebedev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 728, [2008] 2 F.C.R. 585, Canada: Federal Court, 9 July 2007, available at: https://www.refworld.org/cases,CAN_FC,48eccdea2.html [accessed 7 May 2019]
[123] *Ibid.,* para 86.
[124] *Ibid.,* paras 88-89.
[125] Guidelines No. 10 *supra* note 94, para 23.
[126] Such a statement could, for example, be read purely as descriptive statement of possible facts.

were already involved in the conflict in Iraq but also, after carrying out one tour of duty in that country, re-enlisted in those forces.'[127]

With regard to objection to allegedly unlawful armed conflicts, a key question pertains to the assessment of the legality of such conflicts. In this regard, the Guidelines recognise that condemnation by the international community is strong evidence for a finding of illegality, but is not essential thereto.[128] As the Guidelines point out, pronouncements on the legality or otherwise of a particular operation 'are not always made, even when objectively an act of aggression has taken place'[129]. The role of condemnation by the international community has been discussed in various examples of asylum jurisprudence regarding selective conscientious objection. In some instances, such condemnation has been deduced from statements and reports by various non-governmental organizations.[130] Statements by the UN or its bodies are clearly also of interest, but in this regard courts have been mindful of the 'vagaries of international politics' which might preclude such action.[131] Rather, the legality of a conflict is to be assessed according to the objective standards of international law, specifically the prohibition of the threat or use of force, the right to individual or collective self-defence, and the authorisation of the UN Security Council for the maintenance of international peace and security.[132] The Guidelines proceed to provide that where, according to such an objective assessment a given conflict is not deemed to be unlawful under international law, a refugee claim based on arguments regarding the legality of a conflict will ordinarily fail 'unless other factors are present'. The Guidelines do not, however, explicitly affirm the inverse, that is to say that the international illegality of a conflict would in all circumstances lead to refugee protection for a selective conscientious objector. However, it is specified that where doubt as to the legality of a particular armed conflict under international law remains 'the application may be assessed (…) as a conscientious objector case.'[133] In several cases concerning

[127] *Shepherd supra* note 99, para 44.
[128] Guidelines No. 10 *supra* note 94, para 24.
[129] *Ibid*.
[130] See for example *Ciric v. Canada*, Canada: Federal Court, 13 December 1993, available at: https://www.refworld.org/cases,CAN_FC,48abd533d.html .
[131] See for example the Canadian case of *Lebedev*, discussed above *supra* note 122, at para 73, quoting the UK case of *B v. Secretary of State for the Home Department* [2003] *UKIAT* 20, paras 44-47. Mathew also comments on this aspect, submitting, for example the inherent problems in waiting for condemnation of a particular conflict by the UN Security Council, which could be slow in coming, even if such condemnation has been established by other means. See Mathew, 'Draft dodger/deserter or dissenter? Conscientious objection as grounds for refugee status', in S. Singh Juss and C. Harvey (eds.), *Contemporary Issues in Refugee Law,* (Edward Elgar Publishing Ltd., 2013) 165, at 187.
[132] Guidelines No 10, *supra* note 94, para 24.
[133] *Ibid.* para 25.

suspect/outright illegality of a particular conflict, domestic courts have reached favourable decisions in respect of selective conscientious objector asylum applicants. One such case is *Ciric*[134], a case before the Federal Court of Canada reviewing the rejected asylum decision of two individuals (a married couple), both of whom had served in the army and had refused to participate in the civil war in Yugoslavia in which they would have been forced to fight against their fellow countrymen. At issue, inter alia, was whether the conflict objected to was illegal. In this regard the Federal Court found that the immigration tribunal (the negative decision of which was under review) had ignored manifest evidence attesting to the international condemnation of the conflict,[135] and due to this and other factors, quashed the previous negative decision and referred the case back to be considered anew by a differently constituted panel.

3.2.2.2. Objection to the means and methods of warfare

A second type of objection identified under 'conflict contrary to the basic rules of human conduct' pertains to the means and methods of warfare employed by one or both of the parties to the conflict. Such objections have been expressed in a number of asylum cases concerning selective conscientious objection, either alone or in conjunction with objections as to the legality of the conflict as a whole.[136] Insofar as the asylum claim is argued on the basis of the conduct of war, the Guidelines stipulate that an assessment needs to be made regarding the likelihood of the individual in question 'being forced to participate in acts that violate standards prescribed by international law' – including international humanitarian, criminal and human rights law.[137] Several factors can be identified in this regard.

(i) developments in the understanding of war crimes and crimes against humanity

Paragraph 27 of the Guidelines sets out by recognising war crimes and crimes against humanity as particularly serious violations of international standards entailing individual responsibility under international law. In this context, developments in the understanding of

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[134] *Supra* note 130.

[135] 'Although the United Nations had not been quick to condemn the atrocities committed by all sides, Amnesty International, Helsinki Watch and ICRC all have made pronouncements which the Board should have seen as condemnation by the world community. By down-playing the woundings, killings, torture and imprisonment, the board treated the evidence before it in a capricious, perverse manner. Its conclusion was not made in regard to the totality of the evidence and was an error of law.'

[136] See for example the Canadian case of *Ciric supra* note 130 and the UK case of *Krotov (Krotov* v. *Secretary of State for the Home Department*, [2004] EWCA Civ 69), where at issue was not only the legal status of the conflict but also the means of warfare employed in its course.

[137] Guidelines No 10 *supra* note 94, para 26.

such crimes are to be taken into account. Furthermore, other violations of international humanitarian law occurring in the war (but presumably falling short of being a war crime or crime against humanity), may also be cumulatively relevant.[138] The Canadian case of *Zolfargharkahani*[139] addressed the issue of an objection based on the means and methods of warfare. At issue, *inter alia*, was the possible use of chemical weapons against the other party to the conflict, about which the applicant became aware during the course of his military training. Specifically, the applicant was an Iranian citizen who had served in the Iranian army and who had been requested to serve a further term as a paramedic in the Revolutionary Guards in a war against the Kurdish government. However, during his paramedic training it became apparent that the use of chemical weapons during the conflict was likely. While not objecting as such to participating in hostilities against his fellow compatriots, the applicant did object to doing so using chemical weapons,[140] even though as a paramedic the applicant would not himself have been required to use any weapons. Rather, his role would have been confined to treating the injured.[141] With regard to the issue of chemical weapons as such, the Federal Court of Appeal considered their use to be against customary international law – supported by the prohibition of the use of chemical weapons in numerous international instruments including the Convention on the Prohibition of the Development, Protection and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on the Destruction (both Canada and Iran having voted in favour of its adoption in the General Assembly in 1971). As such, although the applicant would have been in a non-combatant role in the conflict, he would nevertheless have been of 'material assistance to the Iranian military in assaults using chemical weapons.'[142] Indeed, the Federal Court of Appeal entertained the question (despite not pursuing it as such), whether even participating as a paramedic in military operations in which chemical weapons were used might have led 'to the appellant's exclusion from Convention refugee status for having committed a 'crime against peace, a war crime or a crime against humanity.''[143]

[138] Guidelines No. 10 *supra* note 94, para 27.
[139] *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (FCA).
[140] *Ibid.,* at '4.0 Analysis'.
[141] *Ibid*.
[142] *Ibid*.
[143] *Ibid*.

(ii) Reasonable likelihood that the individual would be forced to commit such acts

A further key factor to be considered according to the UNHCR Guidelines is the likelihood that the individual asylum applicant would be forced to commit such acts as are 'contrary to the basic rules of human conduct' through participation in a conflict. In this regard, the Guidelines highlight the importance of taking account of individual circumstances of the applicant, rather than merely focusing on the nature of the overall conflict.[144] Furthermore, assessment needs to be made regarding the role in which the applicant is expected to be placed.[145] For example, the Guidelines stipulate that assignment to a non-combatant role or in logistical or technical support only would be unlikely to give rise to a successful claim of persecution, absent other factors.[146] Domestic asylum jurisprudence serves to demonstrate how such claims could be approached. Thus, in the aforementioned case of *Zolfargharkhani,* the asylum claim was lodged by an applicant who had been training to serve as a paramedic in a branch of the Iranian armed forces.[147] However, the applicant had objected to participation in the conflict having become aware of the likely use of chemical weapons in the course of the conflict. The Canadian Federal Court of Appeal considered that even as a paramedic, the applicant would inescapably be caught up in the means of warfare objected to. Indeed as conceded by the Immigration Board's decision rejecting the initial asylum application, 'in the event that chemical warfare was engaged, not even friendly forces were immune.'[148] This was interpreted by the Federal Court of Appeal as implying that the service branch in which the applicant was based 'wanted the medical capacity to treat Iranian soldiers inadvertently caught in chemical clouds by changing winds'[149]. Furthermore, it was expected that the applicant would have been involved in the treatment of injured of Kurdish prisoners of war whom the Iranian military wanted to interrogate.[150] Both of these tasks, according to the Federal Court of Appeal, would have rendered the applicant 'of material assistance to the Iranian military in assaults using chemical weapons', such that the applicant would not have been 'able to wash his hands of guilt', contrary to what the Immigration Board in its initial decision had concluded.[151]

[144] Guidelines No. 10 *supra* note 94, para 28.
[145] *Ibid.,* paras 28-29.
[146] *Ibid.,* para 29.
[147] *Supra* note 139.
[148] As quoted *ibid.,* at 547.
[149] *Ibid*.
[150] *Ibid*.
[151] *Ibid*.

(iii) Other options for discharge

Finally, the Guidelines point out that where an individual can be discharged from service or assigned to alternative service for other reasons, 'or to have an effective remedy against superiors or the military which will be fairly examined and without retribution,' the matter will not normally – absent other factors – give rise to a finding of persecution.[152] This provision in the Guidelines is in line with some practices in domestic military settings which, it has been asserted, 'accommodate' significant numbers of selective conscientious objection claims, even if selective conscientious objection is not officially recognised.[153] However, the UNCHCR Guidelines are not comprehensive in this respect and it is unclear – particularly as regards the nature of the discharge – which alternative means of avoiding the service objected to are relevant for a finding of persecution. So while the payment of an 'administrative fee' in order to obtain exemption from service would preclude a finding of persecution, the payment of an excessive fee designed to deter conscientious objectors wouldn't.[154] It could reasonably be proposed that such 'alternative means' to avoid service must be grounded in some form of official policy (law/administrative instruction), such that arbitrary, discriminatory or illegal means would thus be excluded.

4. Examples of domestic legal approaches to selective conscientious objection

As has already been emphasised, the focus of the present Chapter has been on discerning the level of protection afforded to selective conscientious objection in the professional military at the level of international (including regional) human rights law. Likewise, however, it has been explained that the issue of selective conscientious objection has not been extensively addressed at the international level, either in human rights law instruments or jurisprudence. While the same can, to a certain extent, also be said of domestic law, some comparative law examples can nevertheless serve to demonstrate a number of different approaches which

[152] Guidelines No. 10 *supra* note 94, para 30.
[153] See for example, discussion of selective conscientious objection in the UK military context *infra* at 4.3.. Note however, the notoriously difficult nature of obtaining accurate statistics or guidance on such 'other' or 'informal' arrangements in the context of selective conscientious claims.
[154] Guidelines No. 10, *supra* note 94, para 19, see also footnote 48 of the Guidelines which provide: 'Excessive administrative fees designed to deter genuine conscientious objectors from opting for alternative service or which are considered punitive would be considered discriminatory and may on a cumulative basis meet the threshold of persecution.'

individual states can[155] take regarding the often controversial issue of selective conscientious objection. The present section looks at a number of such approaches, grouped under the broad categories of 'formal rejection of selective conscientious objection', 'formal recognition of selective conscientious objection' and 'hybrid approaches'. It goes without saying that the following brief overview is by no means comprehensive, but is nevertheless included for purposes of illustration.

4.1. Formal rejection of selective conscientious objection

One possible domestic law approach which a state might adopt vis-à-vis selective conscientious objection in the professional military is that of formal rejection. Such formal rejection could take the form of explicit provision to that effect, either in legislation or administrative instruction/procedure or case law precedent. In any case, formal rejection of selective conscientious objection would be characterised by a marked lack of ambiguity, leaving little margin of discretion for the relevant authorities regarding the protection of selective conscientious objection. A number of domestic jurisdictions illustrate this approach.[156]

For one, the United States (US) has opted to curtail the right[157] to conscientious objection such as to specifically exclude from protection and individual's objection to a particular war and, presumably, by extension, also other possible forms of selective conscientious objection. In the US, conscientious objection to military service is provided for in the Military Selective Service Act 1967, including a provision on 'persons conscientiously opposed to war', which provides that

> Nothing contained in this chapter shall be construed to require any person to be subject to combatant training and service in the armed forces of the

[155] Note that at this stage of the research, the various approaches to selective conscientious objection are approached descriptively, rather than normatively. In other words, it is not suggested here that all the approaches presented are equally permissible under international standards.

[156] However, it is not asserted here that any one jurisdiction perfectly exemplifies any particular approach. In the case of 'formal rejection' for example, it may well be that in fact informal arrangements are made to exempt or accommodate selective conscientious objectors. Such a practice will be considered under 'hybrid approaches' below.

[157] However, on whether conscientious objection to military service is considered a 'right' under US law, see Davis S.E. Jr, 'Constitutional Rights or Legislative Grace: The Status of Conscientious Objection Exemptions', 19(1) *Florida State University Law Review* (1991), 191 at 193 onwards where the origin of the idea of conscientious objection as 'legislative grace' is discussed and critiqued.

> United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.[158]

The landmark judgment of the US Supreme Court in *Gillette v. United States*[159] clarified the scope of the above provision as well as its application to selective conscientious objectors. *Gillette* concerned the petitions of two individuals who objected to participating in the Vietnam War which they considered to be unjust.[160] Gillette articulated his objection to the Vietnam War as grounded in 'humanist approach to religion'[161], his personal decision regarding military service being driven 'by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence'[162]. The other petitioner (Negre) in turn based his objection on his Catholic faith and particularly the duty to distinguish between just and unjust wars.[163] Negre had come to consider the Vietnam War as falling within the latter upon completion of his infantry training, concluding that any personal involvement therein would 'contravene his conscience' and all that he had been taught in his religious training.[164] At issue, therefore, was whether the relevant provision of the Military Selective Services Act extended to objection to participate in a particular war.[165] The Supreme Court considered the provision to refer unambiguously to 'conscientious opposition to participating personally in any war and all war'[166], thus excluding from its ambit the claims of the petitioners in *Gillette*, neither of whom categorically objected to participation in all wars. In its reasoning, the Court relied on the legislative history of the provision, asserting the legislature's focus to have been 'a claim of conscience running against war as such', rather than possible opposition to a specific war.[167]

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[158] Military Selective Service Act 1967, 24 June 1948 (62 Stat. 604, Chapter 625) §3806 (j).
[159] *Gillette v. United States*, 401 U.S. 437 (1971).
[160] Of the two petitioners, Gillette had been convicted of failure to report for induction into the armed forces, while the other petitioner (Negre) sought discharge from the army as a conscientious objector upon receiving orders to deploy to Vietnam, having already completed induction and basic training. *Ibid.,* at 439 and 440.
[161] *Ibid.,* at 439.
[162] *Ibid*.
[163] *Ibid.,* at 441.
[164] *Ibid.,* 441.
[165] It should be noted here that the claim based on the afore-mentioned legislative provision was only one aspect of the petitioners' argument. In addition, the petitioners claimed a constitutional right to conscientious objection arguing that exempting those opposed to all wars and not those opposed to a particular war was a violation of the Establishment Clause of the First Amendment of the US Constitution by discriminating on the basis of religious affiliation, as well as a violation of the Free Exercise Clause of the Fifth Amendment by placing an undue burden on a religious practice. These constitutional claims of the petitioners also failed, but are mentioned here for the sake of completion.
[166] *Ibid,*. 443.
[167] *Ibid.,* 445-446. In this regard, the Supreme Court distinguished the petitioner's claims from a 'highly abstract' reservation to participating in war such as had been the case in *Sicurella v. United States* (348 U.S. 385 (1955)), in which a Jehovah's Witness who objected to participating in secular wars but not theocratic war mandated by

Although the judgment in *Gillette* was delivered at a time of military draft as well as growing public opposition to the Vietnam War, the principled approach to selective conscientious objection has remained in the US. At present, conscientious objection to military service is regulated by Department of Defense Instruction No. 1300.06 which essentially reiterates the approach established in *Gillette,* namely that 'An individual who desires to choose the war in which he or she will participate is not a Conscientious Objector under the law' and that in order to benefit from the procedures for conscientious objection, that 'individual's objection must be to all wars rather than a specific war'.[168]

A further example of formal rejection of selective conscientious objection can be found in the approach adopted in Israel. In contrast to the US, Israel maintains a system of conscription applicable in principle to both men and women, regulated by the Defense Service Law.[169] Over the years, the Israeli military context has given rise to a number of protest movements from among the military ranks, in substance on (diverse)[170] grounds of selective conscientious objection. Some of these instances have also been adjudicated before the courts. One such case concerned some servicemen who refused to serve in the administered territories during their military service claiming both that such service would have been illegal (i.e. illegal order) and against their consciences.[171] All the petitioners were disciplined for their refusal to serve. In its final judgment, the Supreme Court of Israel was willing to accept ('without ruling on the matter'), that the interests of 'conscience, personal development and tolerance' would justify granting exemption to the selective conscientious objector and the absolute objector alike.[172] Nevertheless, in considering the conflicting interests at stake, the Court was of the view that selective and absolute conscientious objection could be distinguished, identifying a number of specific features of selective conscientious objection which justified treating such objections differently. Such features included the likelihood of selective conscientious

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Jehovah was deemed to 'possess the requisite conscientious scruples regarding war' so as to be regarded as a conscientious objector. See *Gillette ibid.,* at 446.

[168] US Department of Defense Instruction 1300.06 on Conscientious Objectors, 12 July 2017, available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130006_dodi_2017.pdf, at para 3.5.1.

[169] Defense Service Law (Consolidated Version) 5746 – 1986, available at https://mfa.gov.il/MFA/MFA-Archive/1980-1989/Pages/Defence%20Service%20Law%20-Consolidated%20Version--%205746-1.aspx (last accessed 17 May 2019). For a description of the Israeli system of conscription, see Nehushtan, 'Selective Conscientious Objection: Philosophical and Conceptual Doubts in Light of Israeli Case Law', in A. Ellner, P. Robinson and D. Whetham (eds), *When Soldiers Say No: Selective Conscientious Objection in the Modern Military,* (Routledge, 2014), 137-154 at 144.

[170] See Nehushtan *ibid.,* at 144.

[171] H.C. 7622/02 *Zonshein v. Judge Advocate General*, 23 November 2002, for English translation, see H.C. 7622/02 *Zonshein v. Judge Advocate General*, 36 *Israel Law Review* (2002) 1.

[172] *Zonshein, ibid*., para 15.

objection increasing and impacting the competing security considerations, the effects of 'loosening the ties that hold the nation together', and the difficulty in distinguishing cases of selective conscientious objection and objection based on political reasons, and the complex nature of such an assessment.[173] While the Court acknowledged that the state could only harm the conscience of a conscientious objector when substantial harm would almost certainly be done to the public interest otherwise, it considered that it had been reasonable not to grant exemptions to selective conscientious objectors in the contemporary Israeli context. Other cases since have essentially confirmed the approach established in *Zonshein.*[174]

4.2. Formal recognition of selective conscientious objection

An altogether different legal approach which a state could adopt in respect of selective conscientious objection in the military entails formal recognition or protection thereof.[175] A number of domestic legal examples illustrate an approach of formal recognition of selective conscientious objection. For one, Australia (which does not maintain a system of compulsory military service but provides for conscription in times of war)[176] accords a level of formal protection of selective conscientious objection, exempting from service in the Defence Force such 'persons whose conscientious beliefs do not allow them to participate in a particular war or particular warlike operation'[177]. The Australian example represents a rare, perhaps unique, example of explicit statutory protection of selective conscientious objection, albeit one which is of limited practical relevance given its applicability only to conscripts in a context in which

[173] *Ibid.*, para 17.

[174] *Milo v. Minister of Defense* (HCJ 2383/04 *Milo v. Minister of Defense* [2004] IsrSC 59(1) 166) concerned a woman conscript who objected to serving in the IDF as long as the occupation of the Palestinian territories continued. The objection in *Milo* was thus broader than in *Zonshein*, in which the objection focused on a particular form of service (in the administered territories), rather than in service in the IDF altogether while a particular state of affairs continued. Unlike the petitioners in *Zonshein,* Milo could draw on a provision of the Defense Service Act which in practice protected the conscience-based objections of female conscripts. In rejecting her petition, the Supreme Court of Israel relied on what could be termed motivational concerns regarding Milo's objection. While the Court considered absolute conscientious objection to be 'almost always' so-called pure conscientious objection, selective conscientious objection was considered more likely to be of the hybrid kind, comprising both conscientious as well as political /ideological elements (at para. 15, for an English translation of the judgment, see https://versa.cardozo.yu.edu/opinions/milo-v-minister-defense)As a result, Milo's claim for exemption was denied, apparently curtailing what had previously been the practice of exempting women whether their claims were based on selective or absolute objection, see Rimalt, 'Equality with a Vengeance: Female Conscientious Objectors in Pursuit of a Voice and Substantive Gender Equality', 16 *Columbia Journal of Gender and Law* (2007) 97, at 136-137.

[175] Such formal recognition could take the form of explicit legislative provision, either directed specifically at selective conscientious objection or subsumed under the protection of conscientious objection, and, for example, clarified by judicial interpretation.

[176] Defence Act 1903 (Compilation date 1 July 2018), sections 59-60 (available at https://www.legislation.gov.au/Details/C2018C00323)

[177] *Ibid.,* Section 61A(i).

conscription is only triggered in times of war. There is thus no explicit support to suggest that selective conscientious objection is available to volunteer members of the Australian military.[178]

Another example of a domestic setting offering formal protection of selective conscientious objection is that of Germany. Selective conscientious objection has surfaced in a few instances in the German military context in recent years, exhibiting a markedly more sympathetic approach than those discussed in the previous section. The German Constitution (the Basic Law for the Federal Republic of Germany) specifically protects the right to conscientious objection to military service. Specifically, Article 4 on the freedom of faith and conscience provides:

> (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable..
> (2) The undisturbed practice of religion shall be guaranteed.
> (3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by German law.[179]

According to Rose, in the context of drafting and adopting the new Constitution after the Second World War, the provision on conscientious objection was subject to intense debate, expressing *inter alia* fears about the overuse of such a clause in the event of war.[180] On the other side of the debate strong arguments were advanced precisely for conscience to be accorded protection given the immediate historical context of the country.[181] In the end, explicit protection of conscientious objection was included in the Constitution. Rose maintains that the provision on conscientious objection extended to everybody, including soldiers on active duty and voluntary recruits.[182] However selective conscientious objection

[178] Although Coleman and Coleman (and Adams) suggest that in reality 'The Australian Defence Force has tended to deal with those with moral objections to specific deployments or operations through an unofficial administrative process to obtain an internal transfer and thus avoid serving in the operation to which they have a moral objection', in Coleman and Coleman (and Adams), 'Selective Conscientious Objection in Australia', in A. Ellner, Robinson and Whetham (eds), *When Soldiers Say no: Selective Conscientious Objection in the Modern Military,* (Ashgate, 2014) 99 at 110.
[179] Basic Law for the Federal Republic of Germany, 23 May 1949, Print version as at November 2012, Article 4, available at https://www.btg-bestellservice.de/pdf/80201000.pdf
[180] Rose, 'Conscience in Lieu of Obedience: Cases of Selective Conscientious Objection in the German Bundeswehr', in Ellner, Robinson and Whetham (eds.), 'When Soldiers Say No: Selective Conscientious Objection in the Modern military', (Ashgate 2014), 177 at 177.
[181] *Ibid.*, 177-178.
[182] *Ibid.,* at 178, although at footnote 5 Rose submits that a claim of conscientious objection submitted by a professional soldier would not be an altogether easy endeavour, requiring the objector 'to meticulously expose

was not protected as such until a judgment of the Federal Administrative Court clarified the issue in 2005. The case before the Court involved an officer in the German armed forces who was asked to work on a software programme which the officer feared might be used in the course of Operation Iraqi Freedom.[183] After the initiation of combat activities in Iraq, the officer in question initially contacted an army chaplain as well as a medical officer, expressing his legal and moral concerns regarding Germany's involvement in military operations in Iraq, specifying that he could not continue his work on the software programme unless he knew that it would not be used in those operations.[184] Subsequently he informed his superiors of his reservations and ultimately also of his refusal to obey any orders which would implicate him in the operations in Iraq.[185] As a consequence, disciplinary procedures were instigated against the officer, initially resulting in a conviction for deliberate insubordination rendered by the military court, as well as a demotion in rank.[186] On appeal however, the Federal Administrative Court released the officer from the charges against him, holding that the objecting officer had not acted unlawfully in refusing to obey orders.

A number of aspects of the Federal Administrative Court's judgment in *Germany v. N* are noteworthy for present purposes. First, despite conceding the importance of the military duty of obedience and loyal service as provided in German legislation[187], this did not, according to the Court, demand blind obedience of one's superiors. Rather, as observed by Baudisch in his comment on the case, the Court held that the military was committed 'without qualification' to law and justice, including the observance of fundamental rights. As a result, orders are not considered binding if they violate human dignity, serve only political and economic gains and not the defence of Germany, or if obedience would lead to the perpetration of crimes under international law.[188] Furthermore, the Court held that an order does not bind 'if it functions as part of a war on aggression that would disturb the peaceful coexistence of nations,' or if such an order 'contravenes fundamental rules of international law such as the UN ban on the use of force'.[189] Interestingly Baudisch observes that the Court did not in fact rule on whether the aforementioned conditions were satisfied in the case at hand. Rather, it held that even a valid

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his more or less sudden change of conscience to a particular board of examiners that is in charge of granting his motion for conscientious objection'.

[183] Baudisch, 'International Decisions: *Germany v. N.* Decision No. 2 W.D. 12.04', 100 *American Journal of International Law* 2006, 911, at 911.

[184] *Ibid*.

[185] *Ibid.,* at 911. See also Rose *supra* note 180, at 187.

[186] Rose *supra* note 180, at 187, Baudisch *supra* note 183, at 911.

[187] Soldiers Act, 19 August 1975, section 11(1), as referenced in Baudisch *ibid.,* at 911.

[188] Baudisch *supra* note 183, at 912.

[189] *Ibid*.

order could be lawfully disobeyed on the basis of the freedom of conscience.[190] The Court articulated that given the context of the military operations in Iraq, it was unreasonable, in light of the constitutionally protected right of freedom of conscience, to expect the officer in question to obey the orders at issue. In this regard, the Court distinguished between the explicitly protected right of conscientious objection to military service in Article 4(3), and the freedom of conscience at issue in the case before it. While the former exempted individuals from armed service altogether, at stake in *Germany v. N* was a professional soldier who wanting to continue his employment, claimed a right 'not to be forced to act against his moral convictions in this specific situation.'[191] According to the Court, the explicit protection of conscientious objection to military service had not been intended to restrict a more general right to freedom of conscience for soldiers. Rather, the intention had been to strengthen and concretise the application of the freedom of conscience in the military context. As such, 'although the rights of a soldier might well be limited by his military obligations, the military must respect the fundamental rights of soldiers, including the right to freedom of conscience.'[192] Thus, although such an interpretation of the freedom of conscience does not entail a general right to exemption from laws, it did, according to the Court, require that in 'balancing the duty of obedience against a soldier's freedom of conscience, the ethical implications of an order have to be taken into account'.[193] Crucial in this regard is the fact that in considering the sincerity of the objector's substantive claim, the Court not only considered the personal convictions involved, but also the specific context in which the objection had emerged, notably including 'objective' legal reservations. As such the Court considered the legal status of Operation Iraqi Freedom in some detail in the light of both Security Council resolutions and Article 51 of the UN Charter as well as the status of Germany's involvement in the operations, concluding on all counts that significant doubts existed regarding the permissibility of the operations. The Court thus observed that when the objecting officer decided against obeying orders, he had 'faced the danger of being entangled in an illegal conflict' and could as such lawfully demand an alternative placement 'without violating his duties as a soldier'.[194] The Court's decision therefore relied significantly on the reasonability

[190] *Ibid*.
[191] *Ibid*.
[192] *Ibid*.
[193] *Ibid*.
[194] *Ibid.,* 914.

(objectively speaking) of the objector's claims, and not merely on the question of sincerity.[195] According to Rose, the judgment of the Federal Administrative Court thus expanded substantially 'the scope of discretion' that can be exercised by individual soldiers in the context of orders involving military operations regarding which there is at least a certain measure of legal uncertainty. As such, according to Rose, a German soldier who facing such a moral conflict in the course of his or her military duties, is able to substantiate a refusal to obey order in a sufficiently 'serious and credible manner', can refuse such orders if obeying them would implicate the soldier in 'legally 'grey area' activities'.[196] Thus, while by no means providing a license to disobey each and every order, the Federal Administrative Court's judgment can certainly be considered as falling within the category of formal recognition of selective conscientious objection, at least in certain situations.

4.3. Hybrid approaches

The final broad category of possible legal approaches to selective conscientious objection in domestic legal settings is that of 'hybrid approaches'. As the name might suggest, this last category falls somewhere between the first two categories discussed above, and indeed might encompass elements of both. Such hybrid approaches might be expected to be characterised by some level of legislative or official ambivalence (or silence) on the issue of selective conscientious objection, or perhaps more pertinently, some degree of divergence between formal and informal approaches thereto. In other words, such domestic approaches might ostensibly be reluctant to protect selective conscientious objection at the formal level, yet in practice routinely accommodate individuals claiming selective conscientious objection. For the purposes of a systematic analysis, such approaches are particularly problematic given the difficulty of obtaining facts regarding informal approaches to selective conscientious objection.

The United Kingdom provides a pertinent example of a domestic legal approach exhibiting a hybrid approach to selective conscientious objection. Although sometimes grouped together with Israel and the United States as exemplifying formal rejection of selective conscientious

[195] As observed by Baudisch, *ibid., at* 915. The Court held that 'the refusal to obey in specific situations for conscientious reasons requires that there be, in fact, serious reservations about the legality of the individual order' (*ibid*., 915-916).
[196] Rose *supra* note 180, at 187.

objection,[197] a closer examination of the UK approach supports a more nuanced conclusion.[198] Significantly for present purposes, the UK context provides a number of sources indicating both the formal approach (though official instructions, case law, journalistic sources) as well as indication of the informal approach, both of which will be considered briefly below.

To start with, the UK context exhibits 'legislative silence' regarding conscientious objection in the military context,[199] although some official guidance within the military does address the issue.[200] On the other hand, no explicit provision is made in respect of selective conscientious objection, although a number of instances of selective conscientious objection in the professional military have emerged in recent years, enabling at least some inferences to be made about the domestic approaches applied. One such example is that of Lance Corporal Vic Williams in the context of the war in Iraq in 1991. Williams went absent without leave prior to deployment to Saudi Arabia in preparation for operations in Iraq, as he held a conscience-based objection to that war. He was subsequently court-martialled and convicted of three offences related to his desertion of his unit and speaking out against the Gulf War, and was sentenced to 14 months' imprisonment.[201] According to the Amnesty International report on the case, Williams, who had served five years in the army, had left his unit as he considered the impending military operations to be unjustified and against his conscience.[202] At the time, it was reported that the procedure for claiming conscientious objector status by military personnel was classified as a restricted document to which only officers had access.[203] Indeed, Williams maintained that prior to his decision to leave his unit, he had not

[197] Gulam and O'Connor, 'Selective conscientious objection: the court martial of Flight Lieutenant Malcolm Kendall-Smith', 7 *ADF Health* 2006, 68 at 71.
[198] Deakin, 'Conscientious Objection to Military Service in Britain', in Ellner, Robinson and Whetham (eds.), *When Soldiers Say No: Selective Conscientious Objection in the Modern Military,* (Ashgate, 2014), 115 at 130 'A better reading of the available evidence is that Britain accommodates selective conscientious objectors, if they behave reasonably and do not cause political embarrassment. It does this by the subtle use of administrative procedures'.
[199] According to 'Forces Watch', 'Conscientious objection is not mentioned in either primary or secondary legislation relating to the armed forces and, of the three services, only the army sets out the procedure for registering a conscientious objection in its Queen's regulation' in ForcesWatch briefing: Conscientious Objection in the UK Armed Forces (updated February 2011), available at https://www.parliament.uk/documents/joint-committees/human-rights/Briefing_from_Forces_Watch_Conscientious_objection.pdf
[200] For example, regarding the Army, The Queen's Regulations for the Army 1975, at 9.424 (a)(7) on conditions of termination of service on compassionate grounds, where reference is made to conscientious objection, and additional instructions (AGAIs Vol 5, Instruction No. 6). The Queen's Regulations are available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440632/20150529-QR_Army_Amdt_31_Jul_2013.pdf
[201] Amnesty International Report, 'Conscientious Objection to Military Service – Vic Williams', 30 September 1991, Index Number 45/015/1991 https://www.amnesty.org/en/documents/eur45/015/1991/en/ .
[202] *Ibid*.
[203] *Ibid*.

been aware of any right to submit a claim for conscientious objection and that even upon inquiring about the matter, such information has not been supplied.[204]

More recently, various British military operations have given rise to a number of claims of selective conscientious objection.[205] One such instance involved a service member in the Royal Air Force (RAF). The case exhibited a number of particular features which should be noted at the outset. First, the individual in question (Khan) had voluntarily enlisted in the RAF, serving from 1999 to 2000 after which he had been allowed to resign and was subsequently placed in the reserve.[206] In 2003, at the time of the military intervention in Iraq, Khan was recalled into service, but claimed that he could not serve 'for family and compassionate reasons', but this claim was rejected.[207] Eventually Khan went absent without leave, and on finally being successfully contacted by a superior, he indicated that he could not return to his duties as to do so would run counter to his religion as he did not want to fight against members of his own faith.[208] He was fined by the RAF for the unauthorised absence, which Khan then proceeded to challenge, eventually lodging an appeal before the High Court. In support of his appeal, Khan argued that his conviction and punishment were wrongful and infringed his freedom of thought, conscience and religion as protected under Article 9 ECHR. Specifically, he argued that the war in Iraq was not in self-defence and that he could not fight against his fellow Muslims. The facts as accepted by the High Court indicated that although information on conscientious objection had not specifically been included in the call-up papers,[209] over the course of the events Khan had been informed of the applicable procedure, but had failed to submit an application for discharge on conscience grounds.

The questions specifically considered by the High Court included the following. First whether 'a genuine conscientious objection, general or particular, to the continued performance of military service' could amount to a defence in law – either domestic or ECHR – to the offences of desertion or absence without leave.[210] Second, whether the RAF authorities had breached legal principles either under domestic law or the ECHR by failing to bring the

[204] *Ibid*.
[205] At least some of which have been publicly reported.
[206] Deakin *Conscientious Objection to Military Service in Britain*, *supra* note 198, at 125.
[207] *Ibid*. In *Khan v. RAF Summary Appeal Court* [2004] EWHC 2230 it is specified that Khan was the sole carer of his mentally disabled mother. The judgment can be accessed at http://www.bailii.org/ew/cases/EWHC/Admin/2004/2230.html .
[208] *Ibid.,* para 4(11).
[209] *Ibid.,* paras 5 and 6.
[210] *Ibid.,* para 3(1).

possibility of claiming exemption on the basis of conscientious objection to Khan's attention at the time of his recall into service.[211] The Court accepted the genuineness of Khan's beliefs, and while recognising the role of other motivational factors for his unauthorised absence, considered his religious beliefs to have been determinative in that respect.[212] The High Court held that a failure to specifically identify conscientious objection as a grounds for claiming exemption from service in the call-up papers did not breach the freedom of thought, conscience and religion as a relevant ground for exemption was contained therein, namely 'any other grounds… for compassionate reasons'.[213] However, even assuming the application of the freedom of thought, conscience and religion as protected under Article 9(1) ECHR, the High Court did not consider there to have been any relevant 'manifestation' of the applicant's beliefs as to his conscientious objection 'until he expressed them in some way to his service', although in other circumstances it was conceded that a 'mere act of absence or desertion might suffice'.[214] However, in Khan's particular case,[215] the Court did not consider there to have been a 'manifestation of religion or belief' until he had informed his service of his belief in a formal way. In other words, the Court held that 'a volunteer cannot say that his conscience or religion has been interfered with by the state until he has made clear in some appropriate and suitably formal way that he is no longer a volunteer'.[216]

The case of *Khan* serves to at least ostensibly clarify a number of issues regarding the UK approach to selective conscientious objection in the professional military. Notwithstanding the lack of awareness of the relevant procedures for conscientious objection in the case by both subordinates and superiors, the High Court's approach seems to be indicative of an accommodating stance to selective conscientious objection under the heading of conscientious objection more generally. This is not insignificant, and can be contrasted with the altogether different approach employed in both the US and Israel, where objection to a particular war or operation is explicitly excluded from the ambit of 'conscientious objection' as defined in law. Khan's objection, as far as can be discerned from the judgment of the High Court as well as

[211] *Ibid.,* para 3(2).
[212] *Ibid.,* para 4 (30).
[213] *Ibid.,* para 93. It should be noted in this context that the judgment in Khan was delivered a good few years before the Grand Chamber judgment of the European Court of Human Rights in *Bayatyan v. Armenia* supra note 39, which was the first to definitely identify conscientious objection as an aspect protected under Article 9 ECHR.
[214] *Ibid*., para 64.
[215] That is, a case arising from an initial context of voluntary recruitment, in which exemption on compassionate grounds was possible even upon a call-up to service and the recalled service member was given opportunities to express any concerns in a context in which he should have been aware of the applicable regulations.
[216] *Ibid.*, para 66.

associated media reports, was distinctly selective. Moreover, Khan's objection was not versed in terms of doubts as to the legality of the war in question, but rather had a distinctly religious tone, focused on his opposition to fighting against fellow members of his own religion. This, it appears from the judgment of the High Court, did not preclude a successful claim of conscientious objection, with a certain measure of frustration being detectable from the Court's submissions as to why such an application had not been submitted by the applicant. Finally, the availability of conscientious objection procedures seems not to have been precluded by the fact that Khan himself would not have had to be deployed overseas. The facts as accepted by the Court indicated that Khan had retrained in the medical assistant trade and was therefore classed as a non-combatant, who, moreover had been informed that he would not be required to serve overseas unless he volunteered to do so.

Although the judgment in Khan gives some indication of an accommodating approach to the protection selective conscientious objection[217], a number of other instances of selective conscientious objection in the British military offer a different picture, often such objections ending with custodial sentences being passed for refusals to obey orders.[218] Moreover, commentators have noted the existence of an 'informal' tier of practice regarding selective conscientious objection, which means the entire extent or nature of the phenomenon is difficult to ascertain. On the one hand, such informal practices (e.g. reassignment, discharge on other grounds) may provide a practical resolution of the conflict which arises as a result of selective conscientious objection. On the other hand, the informality of such practices raises possible concerns as to accessibility of such informal procedures, and indeed whether such procedures are fair and non-discriminatory.

5. Conclusion: tentative norms, significant uncertainties

The purpose of the present chapter was to discern norms applicable to selective conscientious objection in the professional military on the basis of international human rights law, particularly the freedom of thought, conscience and religion, as well as international refugee law under which the question of selective conscientious objection has also been addressed to some degree. It goes without saying that the area of law under examination in the present

[217] At least accommodating in terms of being subsumed under the general protection of conscientious objection, if not a right to 'accommodation' as such.
[218] See for example the case of RAF doctor Malcolm Kendall-Smith, *BBC*: 'Jail for Iraq refusal RAF doctor', 13 April 2006, http://news.bbc.co.uk/2/hi/uk/4905672.stm

chapter is by no means clear and significant uncertainties remain. Nevertheless, in a dynamic area of law such as international human rights law, and in particular the law on conscientious objection, lack of clarity does not preclude the possibility of underlying norms, (rules or principles), or particular trends and factors being identified in the midst thereof. By way of concluding the present chapter, I will tentatively identify some such norms and factors which weigh in how selective conscientious objection is addressed and assessed under the applicable standards. It should be noted that while a significant proportion of the present chapter focused on the approach to selective conscientious objection under international refugee law (a distinct branch of international (human rights) law), it can nevertheless be considered of significance for informing the interpretation of the freedom of thought, conscience and religion as well.

First, one tentative norm applicable to instances of selective conscientious objection in the professional military is the right to change one's religion or belief. Specifically, there is strong support for the continued right to conscientious objection even for voluntarily enlisted professional soldiers entailing a right to exit service in the military following the development of a conscientious objection thereto. However, this norm primarily concerns a conscientious objection to military service as such, and not selective conscientious objection of the form primarily in focus for present purposes. One question for further inquiry concerns the extent to which rapid and radical changes vis-à-vis the nature of military service nevertheless might affect such a right. In other words, there may be certain material changes in the 'conditions' of service or the duties associated therewith (such as new methods of warfare) to which individuals might hold or develop a selective conscientious objection.

Second, the prohibition of coercion in matters of religion of belief may also have some practical implications for claims of selective conscientious objection. As mentioned in previous chapters, the prohibition of coercion in matters of religion or belief is traditionally understood as falling within the 'absolute' part of the freedom of thought, conscience and religion, regarding which no limitations are permitted. However, perhaps especially in the professional military context the question of what counts as coercion is not altogether self-evident. As is regularly alluded to in the literature, the armed forces operate on the basis of strict hierarchical structures with strong emphasis on military discipline and disciplinary consequences for refusal to obey orders or to fulfil some specified duty is unlikely to be considered as coercion violating the freedom of thought, conscience and religion as such.

Certainly, it would seem that if informal arrangements for either alternative service or discharge are made following an instance of selective conscientious objection, then the question of coercion would not arise. Similarly, some additional 'cost' incurred by the objection, such as an administrative charge following a claim of selective conscientious objection would not yet indicate a finding of coercion. However, as regards more serious consequences (such as criminal sanctions) it is not entirely clear where the threshold of 'coercion' for the purposes of selective conscientious objection in the professional military context under the freedom of thought, conscience and religion would be crossed. In this regard, the professional military might be conceived of as a particular context in which the application of the prohibition of coercion is somewhat more stringent than in other (workplace) contexts, at least as the law stands at present. Given the present stage of development of international human rights law regarding selective conscientious objection, the line between descriptive (*lex lata*) and normative (*lex ferenda*) is particularly unclear, and as such, more speculative conclusions regarding the precise content of the prohibition of coercion regarding religion or belief will not be made here. However, it is submitted that identifying the prohibition of coercion as a norm applicable under the freedom of thought, conscience and religion while not entirely clear is neither wholly unwarranted. Rather, what needs to be established in future jurisprudence and indeed discussed in future scholarship – are the particular exigencies of such a norm in the particular context of the professional military. This question will also be addressed in the final chapter of the present thesis.

Third, a tentative norm applicable to instances of selective conscientious objection under the freedom of thought, conscience and religion is that of non-discrimination. Particularly under the jurisprudence of the Human Rights Committee which is arguably more developed regarding conscientious objection to military service as compared with the European Court of Human Rights[219], the application of non-discrimination with respect to the freedom of thought, conscience and religion is well-established. For one, General Comment No. 22 indicates the Human Rights Committee's concern with any 'tendency to discriminate against any religion or belief for any reason'[220]. Moreover, in the context of conscientious objection to military service, General Comment No. 22 provides that 'there shall be no differentiation

[219] Developed, that is both as regards the earlier recognition of a distinct right to conscientious objection as an aspect of the freedom of thought, conscience and religion, as well as its recent lines of interpretation regarding the nature of conscientious objection as 'inherent' in the freedom of thought, conscience and religion.
[220] General Comment No. 22, *supra* note 36, para 2.

among conscientious objectors on the basis of the nature of their particular beliefs'[221] and that conscientious objectors shall not be discriminated against on the basis of not having performed military service.[222] The applicability of non-discrimination is also specified in respect of permissible restrictions to the manifestation of religion or belief such that 'restrictions may not be introduced for discriminatory purposes or applied in a discriminatory manner'.[223] How does the norm on non-discrimination under the freedom of thought, conscience and religion – particularly as articulated under the Human Rights Committee's General Comment No. 22 then apply to the question of selective conscientious objection? In the jurisprudence of the Human Rights Committee, an example of apparent discrimination in respect of conscientious objection to military service pertains to Finland. As it stands[224], only members of Jehovah's Witnesses who are subject to conscription are exempt from both military and civilian service, whereas other conscientious objectors only have the option of performing alternative civilian service. However some conscientious objectors nevertheless object to both military and civilian and service. In its concluding observations on Finland's periodic report on the implementation of the ICCPR, the Human Rights Committee has expressed concern that the 'preferential treatment accorded to Jehovah's Witnesses has not been extended to other groups of conscientious objectors'[225], presumably due to its discriminatory nature.[226] However, it is not exactly clear how the prohibition of discrimination would apply in the context of selective conscientious objection. Such an example might arise when selective conscientious objection based on some (e.g. religious) ground was protected, while no protection being offered when based on another (e.g. analogous non-religious) ground. However, a distinct feature of selective conscientious objection occurring in the domestic examples discussed briefly in the previous section is that such objections are often framed in terms of suspect international legality of a particular operation or mode of warfare. This is not to say that normatively speaking protection to such instances of selective conscientious objection should not be extended under the freedom of thought, conscience and religion, but that exactly how such objections would be addressed is

[221] *Ibid.*, para 11.
[222] *Ibid*.
[223] *Ibid.,* para 8.
[224] At the time of writing. But note that recent judgment of the Helsinki Court of Appeal according to which not exempting an absolutist objector from both military and alternative civilian service while exempting members of Jehovah's Witnesses was considered discriminatory, see press release issued by the Helsinki Court of Appeal regarding case R16/738, 23 February 2018 (in Finnish), available at https://oikeus.fi/hovioikeudet/helsinginhovioikeus/material/attachments/oikeus_hovioikeudet_helsinginhovioikeus/tiedotteet2014/2018/IfKJecmoz/Tiedote_R_16-738.pdf
[225] Concluding observations on the sixth periodic report of Finland, CCPR/C/FIN/6, 22 August 2013, at para 14.
[226] See above General Comment No. 22 *supra* note 36, para 2, para 11.

unclear. Absent international human rights law guidance on the issue, one might expect that domestic approaches to such would either lean towards interests of military discipline (i.e. selective conscientious objectors being subject to charges of desertion or insubordination etc.), or more pragmatic, informal approaches whereby alternative placements or discharges have been arranged (often outside the radar of official guidelines or public statements).

In addition to the three tentative norms applicable to selective conscientious objection as identified above, a number of other factors may also be significant in an assessment under the freedom of thought, conscience and religion. One such factor pertains to the accompanying international discourse on the legality of a particular military operation to which an individual holds a selective conscientious objection. Although as mentioned above, it is not entirely clear to what extent selective conscientious objections based on suspect international legality would be protected under the prohibition of discrimination under the freedom of thought, conscience and religion, there is support for such objectively assessed international illegality (whether or not accompanied by actual condemnation by the international community) strengthening a claim to at least refugee protection based on selective conscientious objection. Although not directly addressed under Article 18 ICCPR (or indeed Article 9 ECHR), it would be expected that similar protection under the freedom of thought, conscience or religion would also be found were such a application lodged before either the Human Rights Committee or the European Court of Human Rights.

Other factors which may serve to strengthen a claim for the protection of selective conscientious objection either under human rights law or international refugee law is the level of complicity in a particular operation in which the individual holding the selective conscientious objection would have been implicated. Such would particularly be the case when the individual selective conscientious objector would risk incurring international criminal responsibility for his or her actions.[227] Given that the threshold of individual criminal responsibility may not always be clear-cut, particularly in cases in which the level of complicity in some act is lower, it can nevertheless be surmised that a claim for selective conscientious objection would be stronger the more direct the involvement of the individual in a particular act.

[227] See discussion earlier at 3.5.

A further factor which may be considered significant in the assessment of a selective conscientious objection claim is the chronology of the particular objection. In other words, it might be argued that a claim for selective conscientious objection is strongest when it arises in respect of a previously unforeseen operation or mode of warfare. However, in this regard the guidance from the various sources studied is particularly ambiguous, given that an individual's objection might well be expected to develop as he or she becomes increasingly aware of particular details and facts about the operation objected to. As such, while in some contexts the chronology of a selective conscientious objection being raised has been appealed to in denying protection,[228] other guidance is indicative of the opposite stance. Evidently the law is not clearly established in this respect, but we can tentatively nevertheless identify the chronology/foreseeability of a selective conscientious objection arising as a factor which may serve to add particular strength to a claim, if not necessarily to weaken it in different circumstances.

A final factor of possible significance in addressing selective conscientious objection under the freedom of thought, conscience and religion (with support also from international refugee law) is the objector's status as a member of a minority. Specifically, there is some support for such a stance from the ECtHR's Grand Chamber judgment in *Bayatyan*. Moreover, the significance of an objector's status as a member of a minority is also intuitively and pragmatically compelling. First, with reference to human rights law in general, there is strong emphasis on the protection of the rights of minorities. Furthermore, in the context of conscientious objection to military service, individuals claiming such a right have historically been members of clearly identifiable religious minorities. Finally, from a pragmatic perspective, exempting or accommodating a member of a minority group claiming a selective conscientious objection to some operation or duty in the professional military would be more feasible from the perspective of possible other interests (such as military discipline or efficacy), given the relatively small number of individuals who would claim such an objection. On the other hand, such arguments might be countered with reference to the norm of non-discrimination, whereby 'preferential treatment' of some minority group might be extended to others, and thus potentially making it less feasible for such preferential treatment (e.g. exemption or accommodation) being afforded to any one in the first place.

[228] For example in *Shepherd, supra* note 99.

All in all, it can be concluded that despite a certain level of support for protecting a right to selective conscientious objection within the professional military in a number of international human rights sources, an honest assessment would conclude that the precise extent of the protection offered under the freedom of thought, conscience and religion is uncertain. An important question in this regard pertains to the significance placed on the particular constraints of the professional military context such as might modify the substantive protection of selective conscientious objection under the freedom of thought, conscience and religion. Given the scarce international level jurisprudence on selective conscientious objection as it stands, it would be imprudent to be overly optimistic regarding the level of protection offered. Nevertheless, it is suggested that the norms and factors outlined above warrant consideration, given their basis in the existing jurisprudence under the freedom of thought, conscience and religion. For present purposes, it therefore suffices to identify such tentative norms or factors which, together with the findings of the previous two chapters, will be analysed in the final chapter of this thesis where the norms under the freedom of thought, conscience and religion as applicable to conscientious objection in the workplace will be distinguished on the basis of the type of norm at stake.

CHAPTER 6: The core of conscience: a framework for approaching claims of conscientious objection under the freedom of thought, conscience and religion

1. Introduction

In this thesis I set out to investigate the European legal approach to conscientious objection in workplace contexts under the freedom of thought, conscience and religion, addressing the question by way of three case studies. First, I considered the legal protection of conscience-based objections in the workplace under the freedom of thought, conscience and religion under Article 9 of the European Convention on Human Rights, focusing mainly on the relevant jurisprudence of the European Court of Human Rights in this respect (Chapter 3). Second, I addressed the research question from the vantage point of the healthcare profession, with a view to ascertaining how conflicts between conscience and professional duties are addressed at the level of human rights standards and professional ethics, with some examples from domestic law (Chapter 4). Third, the issue of selective conscientious objection in the professional military was considered in the light of human rights law standards (including international refugee law) as well as some examples from different domestic legal approaches (Chapter 5). While the afore-mentioned three case studies are not exhaustive, I nevertheless suggest that they provide at least a preliminarily sufficient basis to begin to identify the norms and factors which weigh in the legal approach to conscientious objection in the workplace under the freedom of thought, conscience and religion. The purpose of this final chapter then is to identify such norms, with a particular view to ascertaining the nature of such norms as either rules of principles, according to Alexy's theory as presented in Chapter 2. Furthermore, the implications of the norms identified for the resolving conflicts of norms will be explained by applying this framework of norms to some example cases, even though a detailed assessment of such norm conflicts is beyond the scope of the chapter. Having identified the norms applicable to conscientious objection in the workplace under the freedom of thought, conscience and religion, this chapter will conclude by arguing that a theoretical

conceptualization of the freedom of thought, conscience and religion based on the types of norms contained therein (as opposed to the traditional belief/action dichotomy) is advantageous for a number of reasons. First, such a theoretical framework is conceptually more coherent than the *forum internum/externum* construct, particularly as illustrated by the example of conscientious objection. Second, such a theoretical framework is advantageous in terms of the increased analytical clarity which it would provide if applied by courts, particularly in cases of conflicting rights, given the different types of conflict resolution involved for each type of norm. Such is conducive moreover to identifying particular points of sensitivity in such conflicts, enabling clearer identification of conformity as well as divergence in the case law. Third, such a theoretical framework accords more with the nature of belief and practice from the perspective of the individual concerned and therefore addresses at least some of the critiques voiced regarding the traditional *forum internum/externum* construct from the perspective of (some) religious individuals. Finally, this chapter concludes by suggesting some implications of the presented argument regarding a number of wider legal-theoretical questions, particularly as regards the broader discourse on the 'essence' of fundamental and human rights, whether human rights are appropriately considered as rules or principle, as well as the discourse on so-called 'absolute rights'.

2. Theoretical considerations: a recap

In Chapter 2, three theoretical considerations or components central to the argument proposed in the present thesis were introduced. These considerations were the traditional theoretical construct of the freedom of thought, conscience and religion based on the *forum internum/externum* dichotomy, the distinction between rules and principles as proposed by Alexy, and the notion of an essential or inalienable core to human rights. Regarding these theoretical considerations, it was suggested that the present thesis would strive to identify specific norms under the freedom of thought, conscience and religion as applicable to instances of conscientious objection, and, subsequently, determine whether the norms identified are rules or principles.[1] Moreover, it was hypothesised that conceptualising the freedom of thought, conscience and religion primarily on the basis of the types of norms it encapsulates rather than on the traditional *forum internum/externum* or belief/practice

[1] This methodology draws inspiration from that employed by M. Scheinin in 'The Right to Say "No": A Study under the Right to Freedom of Conscience', 75 *Archiv für Rechts- und Sozialphilosophie* (1989) 345, where a draft list of criteria for approaching conflicts of conscience is proposed based on a number of legal sources, and where it is argued that some of the criteria proposed have the character of a rule.

dichotomy is preferable for a number of reasons, to be explained further below. However, in brief, it can be said that distinguishing between the types of norms is particularly useful in terms of achieving a theoretically (more) robust conceptualisation of the 'inalienable core' of a particular human right, in this case the freedom of thought, conscience and religion. As such, and on this basis of the material presented in Chapters 3-5, the following will identify norms applicable to conscientious objection in the workplace – both rules and principles – under the freedom of thought, conscience and religion applicable, with a view to (better) articulating its inalienable core, understood thus.

3. Identifying norms on conscientious objection in employment under the freedom of thought conscience and religion

3.1. Rules

3.1.1.Freedom from coercion regarding one's religion or belief/ right to resign

It has been articulated in the earlier parts of this thesis that one of the traditionally termed 'absolute' aspects of the freedom of thought, conscience and religion even under the traditional *forum internum/externum* dichotomy is the prohibition of coercion to change one's religion or belief. The prohibition of coercion to change one's religion or belief has traditionally been understood as prohibiting, *inter alia,* indoctrination in education, as well as a right not to participate in the practice of a religion which is not one's own. However, it has been hypothesised that the prohibition of coercion in this regard[2] may also be of significance to the question of conscientious objection claims arising in the workplace. While admittedly the relevant law is not developed or established enough to draw any overarching and comprehensive conclusions, it is nevertheless suggested here that the prohibition of coercion regarding freedom of religion or belief may, in some instances provide some limited protection also to individuals with a conscience-based objection to some aspect of their work duties.

[2] In the following, I will refer generally to the prohibition of coercion in respect of religion or belief, rather than articulating the prohibition as pertaining to changing one's religion or belief. P. Taylor (writing) in 2005, also argued that, on the basis of the relevant jurisprudence (both ECHR and Human Rights Committee) at the time, 'a basis exists under the core freedom of religion provisions for the protection of the forum internum in claims based on coercion to act contrary to the individual's conscience, pressure to change belief, and punishment for holding particular beliefs' even if the reasoning in the jurisprudence was not fully developed, in P. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice,* Cambridge: Cambridge University Press, 2005, at 147, and 342-343.

It may, at first, be questioned whether the prohibition of coercion is in the first place applicable to the sphere of employment, given the 'voluntary' nature of the workplace context. While it has been rightly pointed out that the 'voluntary' nature of work is not an uncontroversial descriptor – one has to make a living somehow – it is nevertheless true that the general degree of choice individuals can exercise in respect of training and vocation differs from that of some other obligations such as compulsory education, taxation, or, where it is maintained, military service for those subject to conscription.[3] However, even conceding the voluntary nature of the sphere of employment, it is suggested here that the prohibition of coercion may also come into consideration with respect to conscientious objection claims in the workplace. Support for such an argument can be garnered from international human rights law, where, in addition to recognising the right not to be forced to participate in a religion which is not one's own, it can be argued that there is some support also for protection from coercion to act against one's deeply help moral convictions.[4] Furthermore, as articulated in the Human Rights Committee's General Comment No. 22, the freedom of thought, conscience and religion prohibits 'coercion that would impair the right to have or adopt a religion or belief', emphasising particularly the threat or use of physical force or penal sanctions on believers or non-believers to force adherence to religious beliefs, or to compel renouncement of their religion or belief, or to compel conversion.[5] While it is not suggested here that physical force is applied or threatened in typical instances of conscientious objection, at least in the case of selective conscientious objection in the professional military penal sanctions (such as insubordination, desertion etc.) are not unusual. Although the Human Rights Committee's submissions in the General Comment No. 22 as cited above refer to penal sanctions to compel individuals to adhere to a religion or belief (or recant, or convert), rather than such sanctions applied or threatened to compel non-adherence (as would be the case with 'compelling' an individual with a conscientious objection to perform the offending duty), it can be argued that the 'coercive' element in such a situation is not the negative or positive nature of the activity which the threat or punishment is intended to compel, but rather the nature of the methods employed or threatened. As such, it can at least be argued that

[3] However, even here one must highlight the appropriateness of 'voluntary' as a descriptor of employment and training. If an individual as applied for numerous study/training programmes and/or jobs and is not accepted into any, or only one, is such a position really 'voluntary' or an exercise of choice?

[4] See Human Rights Committee in *Yeo-Bum Yoon and Myung-Jin Choi v. Republic if Korea*, Communication Nos. 1321/2004 and 1322/2004 Para 8.3, 'It observes that while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious beliefs'.

[5] General Comment No. 22: Article 18 (Freedom of thought, conscience and religion), CCPR/C/21/Rev.1/Add.4, adopted 30 July 1993, at para 5.

particularly severe repercussions maintained in response to genuine instances of conscientious objection can be considered coercive for the purposes of the freedom of thought, conscience and religion. In this regard, the consequences suffered or endured by the objector following his or her conscientious objection merit consideration. At present, it can be asserted that the loss of one's job as a result of conscientious objection does not appear to amount to such coercion (see the ECtHR in *Eweida et al.*[6]*)*. On the other hand, the Human Rights Committee has submitted in General Comment No. 22, in connection with the prohibition of coercion that would impair the right to have or adopt a religion or belief, that practices or policies 'such as those restricting access to education, medical care or employment' are incompatible with Article 18.2. ICCPR.[7] As such, there is, at least, a strong argument in favour of considering the prohibition of coercion as generally applicable to the sphere of employment when it comes to conscientious objection, even if an exception to such a rule may in fact determine the outcome of a particular case.

Indeed, it is suggested here that the predominant early jurisprudence of the European Court of Human Rights which relied heavily on the 'freedom to resign' reasoning as the ultimate guarantee of the freedom of religion in cases where an individual's religion or conscience was in conflict with some aspect of one's work duties can be understood in light of the prohibition of coercion impairing the right to hold a religion or belief. In other words, as long as an individual was free to resign from a job which presented him or her with an irreconcilable conflict of conscience, the prohibition of coercion in respect of religion or belief had not been infringed.[8] Of course, the 'freedom to resign' approach was heavily criticised and ostensibly overturned by the *Ladele et al* judgment in 2011, where the Court considered the possibility of changing jobs as just one aspect 'to be weighed in the overall assessment'. Under the present approach, the Court's submission could be read in terms of the nature of the norm under Article 9 under which the case was to be assessed. In other words, it could be said that in *Eweida et al*. the Court was in effect moving its analysis from the realm of possibly applicable rules to the applicable principles. To put it differently, the Court could be said to have implicitly recognized that no '*rules'* under Article 9 had been violated, therefore moving

[6] ECtHR *Eweida and Others v. United Kingdom*, Appl. nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013.

[7] General Comment No. 22 *supra* note 5, at para 5.

[8] Of course, here it should be noted that the Court didn't approach the case on the basis of the theoretical approach argued for here, i.e. of rules and principles under the freedom of thought, conscience and religion, let alone in terms of specific identifiable rules.

its analysis to that of competing principles (weighing and balancing), as will be discussed further below.

Finally, while the prohibition of coercion to have or adopt a religion or belief has been considered above particularly in light of the previous 'right to resign' doctrine of the Court, it can be argued that while the freedom to resign is one criteria in the assessment of whether or not a workplace scenario giving rise to a conflict of conscience amounts to coercion, it is not the only one. Other consequences of a refusal to conduct a work duty which conflicts with one's conscience may be sufficiently punitive in nature to warrant assessment under the prohibition of coercion. While it has been submitted above that the current jurisprudence of the ECtHR does not suggest that mere loss of one's job amounts to such coercion, the Court has considered the availability of other employment opportunities in its assessment in some cases.[9] Worth mentioning in this regard is also the availability of possible unemployment benefits to an individual who has resigned due to an irreconcilable conflict of conscience in the course of his or her work. If, say, an individual was denied unemployment benefits pursuant to a refusal to take up a position in which such a conflict of conscience would resurface, would this amount to coercion? In other words, it is arguable that if a refusal to take up a position which would present an individual with an irreconcilable conflict of conscience would also deny the person access to unemployment benefits, the issue of coercion may arise. This would particularly be the case in circumstances in which no other jobs were actually available. An analogous situation was addressed by the European Court of Human Rights in *Dautaj v Switzerland*[10] which concerned an individual who was denied unemployment benefits following his refusal after one day to return to a job as a receptionist at a conference centre of a local protestant church. The applicant claimed that the fanatic religious atmosphere at the centre was intolerable to him. The Court however found that given that the job at hand had merely involved the work of a receptionist assisting customers and was by definition of a non-religious nature, the denial of unemployment benefits did not amount to an infringement of the applicant's right not to adhere to a religion, finding the application inadmissible. As such, the Court appears to have objectively assessed the nature of the job in question, rather than merely relying on the applicant's submissions.[11] On the other hand, the Court also maintained that the applicant had not articulated in detail how the job in question had been

[9] See for example in ECtHR *Schüth v. Germany*, Appl. no.1620/03, Judgment of 27 September 2010.
[10] ECtHR *Dautaj v. Switzerland*, Appl.no. 32166/05, Decision of 10 May 2011.
[11] *Ibid.,* at 6.

such as to infringe his freedom not to adhere to a religion,[12] noting that he had at no point been required to identify with the values of the centre or to represent such values to the centre's clients.

A possible framework offering at least some structure to the assessment of possible coercion with respect to a particular instance of conscientious objection in the workplace would draw on some of the 'weight factors' discussed below under the discussion on 'principles' under the freedom of thought, conscience and religion, drawn inter alia from cases decided by the ECtHR, such as *Osmanoğlu and Kocabaş v. Switzerland*[13], and *Mocukté v Lithuania*,[14] as well as the overall jurisprudence on Article 9 in the workplace. These factors are introduced briefly below:

(i) Right to resign (including exemption from conflicting duty until resignation takes effect)

Although the 'right to resign' was already addressed above, it is suggested here that the right to resign from a position which presents an individual facing an irreconcilable conflict of conscience also ought to entail at least a prima facie exemption from the offending duty until resignation takes effect. Otherwise the 'voluntariness' argument which can be raised in respect of the workplace is redundant, if in fact an individual cannot avoid the irreconcilable conflict of conscience. Such is the case all the more when the conflict of conscience was not foreseeable or accessible to the individual in question prior to taking up the position, as is presented next.

(ii) Foreseeability and accessibility of conflict of conscience

The foreseeability and accessibility of a conflict of conscience arising in a particular workplace context is arguably also relevant to assessing whether the prohibition of coercion regarding religion or belief is engaged. While it has been submitted that the fact that a particular work duty as might give rise to a conflict of conscience was unforeseen at the time of entering employment is not, on the basis of the jurisprudence of the ECtHR by itself determinative of an infringement of the freedom of thought, conscience and religion, it is

[12] Noting moreover that had the atmosphere at the centre been so intolerable to the applicant, it should not have been difficult for him to articulate at least some concrete examples of why such was the case.
[13] ECtHR *Osmanoğlu and Kocabaş v. Switzerland*, Appl. no. 29086/12, Judgment of 10 January 2017.
[14] ECtHR *Mockuté v. Lithuania*, Appl. no. 66490/09, Judgment of 27 February 2018.

submitted that it does increase the 'coerciveness' of a conflict of conscience in that, again, the 'voluntariness' aspect of the workplace is reduced.[15]

(iii) Seriousness of penalty[16]

Although the loss of one's job does not, on its own, amount to 'coercion' for the purposes of the freedom of thought, conscience and religion, it is suggested that insofar as other penalties might be imposed on an individual facing conflict of conscience, the issue of 'coercion' regarding religion or belief might arise. A potential problem in regarding the seriousness of the penalty might relate to possible legal costs entailed in challenging, for example, a dismissal following a claim of conscientious objection, and whether such costs might be indirectly 'punitive' and have a deterrent effect on the adjudication of claims of conscientious objection before the law – including international human rights law – is worth reflection.[17]

(iv) Reviewability of decision to refuse exemption or to impose a penalty[18]

A further factor of possible relevance to the assessment of whether coercion regarding religion or belief is engaged pertains to the reviewability of any decisions regarding claims of conscientious objection.[19] In other words, the lack of reviewability of decisions regarding claims of conscientious objection in the workplace increases the 'coerciveness' of the approach.

(v) Subjective genuineness of conscientious objection claim

While to some extent the subjective genuineness of a claim of conscientious objection has been presumed throughout this thesis,[20] it is suggested that where a claim of conscientious objection is indeed accepted as genuine, the issue of possible coercion is potentially relevant. In other words, while also 'less profound' or indeed non-genuine claims of conscientious objection might in certain circumstances be accommodated, it is suggested that such claims do not engage the prohibition of coercion under the freedom of thought, conscience and religion. Rather, for the prohibition of coercion regarding religion or belief to apply, a claim

[15] The foreseeability aspect was recognised as relevant in the context of a Article 9 conflict in education in *Osmanoğlu and Kocabaş v. Switzerland*, *supra* note 13, at para 54.
[16] *Ibid.*, also in para 103.
[17] Although not writing with regard to the particular context of the workplace, Bielefeldt, Ghanea and Wiener consider a number of different forms that coercion regarding the freedom of religion or belief can take, H. Bielefeldt, N. Ghanea & M. Wiener, *Freedom of Religion or Belief: An International Law Commentary*, (Oxford University Press, 2016) at 210-213.
[18] *Osmanoğlu and Kocabaş v. Switzerland*, *supra* note 13, at para 104.
[19] *Ibid.*
[20] Although clearly, it is not precluded that conscientious objection may also be *claimed* for reasons other than genuine moral conviction.

of conscientious objection has to be subjectively genuine and sincere, and as such, might entail appropriate assessment thereof.[21]

(vi) Objective acceptability of conscientious objection claims (is the objection within the realm of acceptable ethical disagreement, would the duty objected to entail direct participation in an offending act according to the underlying moral belief?)

One final factor which might be relevant for the threshold of 'coercion' under the freedom of thought, conscience and religion to be attained in the context of conscientious objection in the workplace concerns the objective acceptability of the moral conviction in question. One aspect thereof pertains to the directness of involvement which would be required of the individual objector in the morally offending duty. While clearly directness of involvement entails a continuum of possibilities, it is suggested that the more direct the involvement required, the more likely that the threshold of 'coercion' is attained. The second aspect of the objective acceptability of the claim concerns the substantive moral question at stake. In other words, does the objection concern a matter which is recognised as of particular moral gravity?[22] For present purposes, it suffices to say that the protection of human life is recognised as particularly sensitive in this regard, as evidenced both in the justification of conscientious objection to military service in international human rights law as well as in codes of ethics in the healthcare profession.[23] This aspect of conscientious objection is also addressed below under 'Principles'.[24]

A potential criticism with regard to the prohibition of coercion in respect of religion or belief as a rule applicable to conscientious objection claims in the workplace, (or elsewhere for that matter), is the extent to which such a rule should take into account subjective considerations of the individual claiming the conscientious objection. In other words, to what extent should 'coercion' in the context of the freedom of conscience and religion be determined with respect to the subjective characteristics of the individual concerned? To put it another way, what consideration should be given to the particular strain experienced by an individual facing an irreconcilable conflict of conscience in respect of a work duty – either if performing said duty,

[21] However, how such assessments of sincerity/credibility are conducted is not a matter at the state's discretion. Important as it is to determine appropriate methods for assessing sincerity of an individual's conscientious objection claim, a detailed consideration thereof is beyond the scope of this thesis.
[22] See Bielefeldt, 'Conscientious Objection in the Medical Sector: Towards a Holistic Human Rights Approach' in S. Klotz, H. Bielefeldt, M. Schmidhuber and A. Frewer (eds.), *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation* (transcript, 2017) 201, at 214-215.
[23] Bielefeldt *ibid.*,, at 215, as well as the discussion on professional codes of ethics in Chapter 4.
[24] See below at 3.2.2.

or facing the consequences of not performing the duty? This possible aspect of the prohibition of coercion under the freedom of thought, conscience and religion is introduced here as a question for further study.

3.1.2. Non-discrimination

A second 'rule' under the European Convention of Human Rights applicable to claims of conscientious objection in the workplace is that of the prohibition of discrimination. While it may be more accurate, in this context, to articulate such a rule as one under Article 14 together with Article 9, it is suggested that the precise construct of such a legal argument (whether argued solely on the basis of Article 9 or Article 9 taken together with Article 14) is not of practical significance given that applicants can in any case include an Article 14 argument in their applications before the Court. Moreover, arguably the prohibition of discrimination is also an aspect permeating Article 9 as such, as evidenced, for one, by the emphasis placed by the Court on the State's duty of 'neutrality and impartiality' vis-à-vis the assessment of the legitimacy of religious (or other) beliefs and the ways in which they are assessed. Looking beyond the ECHR to the Human Rights Committee's jurisprudence under Article 18 as evidenced, for example, in its General Comment No. 22, non-discrimination as a pervasive aspect of the freedom of thought, conscience and religion is apparent.[25]

How then would a norm with the quality of a rule prohibiting discrimination under the freedom of thought, conscience and religion apply in respect of claims of conscientious objection in the workplace? For one, it is suggested that exempting, say, some claims of conscientious objection to some identified duty based on a particular religious affiliation, while not exempting others (with equal, genuine conscientious objections) would infringe the rule of non-discrimination under the freedom of thought, conscience and religion. Perhaps a more difficult case would involve the possible differential treatment of an individual with a conscientious objection which arises as a result of a change in the individual's convictions subsequent to entering the job in question. An initial consideration would suggest that discrimination based on the chronology of conversion or change in one's convictions (in exercise moreover of the absolute right to change religion or belief) would be unacceptable. A

[25] General Comment No. 22, *supra* note 5, paras 6, 8, 9, 10, 11. See also B. G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Protection*, (Kluwer Law International, 1996), at 26, who (writing in 1996) suggests 'discrimination on the basis of having, or not having a certain religion or belief' as a fact of the *forum internum* under the freedom of thought, conscience and religion.

possible exception to such a conclusion would arise in a situation where, say, an individual was recruited with the particular objective of performing the given duty/service regarding which he or she subsequently claims a conscientious objection. Arguably in such a case the prohibition of discrimination would not be infringed. However, in such a case it would also be necessary to establish that the prohibition of coercion had not been infringed. Moreover, the prohibition of discrimination in this context would also preclude differentiating between those with a religious basis to their conscientious objection and those with a non-religious ground. On the other hand, both religious and non-religious grounds of objection would need to be 'conscientious', rather than, say, based on preference or convenience.

A potential criticism with regard to the prohibition of discrimination regarding the treatment of conscientious objections in the workplace would concern the possible limitation of the protection offered. Given that the range of grounds upon which a conscientious objection might be claimed is potentially infinite,[26] employers and states could face the unenviable position of assessing the extent to which such numerous grounds of conscientious objection would be sufficiently 'alike' for the purposes of the norm of non-discrimination under the freedom of thought, conscience and religion. One way out of such a bind would be to be equal handed in offering no protection provided that the prohibition of coercion outlined above would not be infringed. However, even such instances might give rise to claims of indirect discrimination.[27] While a resolution to such a problem is not offered here, the question is nevertheless identified for the purposes of further debate.

Finally, in addition to non-discrimination applying to possible exemptions or accommodations afforded on the basis of conscientious objection to work duties, it is furthermore suggested that non-discrimination would also apply to the consequences of dismissal or resignation. In other words, unjustified differentiation in the consequences of conscientious objection on the basis of the source of the objection (for example, a particular religious affiliation, or indeed a non-religious affiliation) as compared with substantively similar objections arising from a different source would infringe the rule of non-discrimination under the freedom of thought, conscience and religion. Interestingly, the

[26] That is, extending not only to numerous established and organised religions, but also to new and 'hybrid' religions, not to mention wholly individual worldviews (such as would satisfy the criteria of 'cogency, seriousness, cohesion and importance' under Article 9).

[27] In such a case, a claim based on indirect discrimination would claim that not affording exemption treats certain individuals (those with an objection) differently, without the adequate justification. Such an argument was employed in the application of Ladele in *Eweida et al., supra* note 6.

jurisprudence of the European Court of Human Rights presents some instances in which the prohibition of discrimination under the freedom of thought, conscience and religion could have been at issue. For one, in the landmark judgment in *Eweida et al*.[28], particularly the application of Eweida could arguably have been decided on the basis of the prohibition of discrimination under Article 9. Recalling the facts of the case, the applicant Eweida faced disciplinary measures and was eventually dismissed from her position as an airline employee for a refusal to remove or hide the Coptic cross which she wore around her neck as a manifestation of her religion, which, while not mandated by her religion was of significant import for her. Furthermore, it will be recalled that her employer airline did allow adherents of certain other religions (Islam and Sikhism), to wear such religious attire as could not be concealed under the employee's uniform. Later, the employer airline amended its uniform rules so as to allow also the visible display of religious symbols such as that worn by the applicant. However, a violation of Article 9 was nevertheless found on the basis of the time during which the applicant had been suspended from her job. Although importantly the Court's reasoning was articulated in terms of the proportionality of the interference with the applicant's right to manifest her religion[29] and whether a 'fair balance' had been struck between the applicant's rights and the rights of others, it could equally be argued that the real source of infringement of Article 9 in the case pertained to the discriminatory nature of the interference as compared with the treatment of adherents of other religions. Indeed, while the application lodged with the Court claimed both a violation of Article 9 as well as of Article 9 together with Article 14, the Court did not separately assess the complaint under Article 14.[30] Nevertheless, it can be argued that the prohibition of discrimination does play a role in the assessment of the permissibility of limitations in any case, given that it is difficult to argue that a measure limiting the expression of one religion (say, by way of attire or symbol) is necessary in a democratic society if an analogous expression of another religion is not. By way of contrast, on the other hand, in the application of Chaplin in *Eweida et al.,* the rule prohibiting discrimination would not have been violated, even though the applicant was not permitted to wear a small crucifix while some other religious attire had been allowed. This is because a close reading of the facts of the case and the reasoning of the Court reveal that it was not the cross as such which was not permitted: the applicant had been offered the option of wearing a cross on a brooch attached to her uniform. Rather, the prohibition of wearing a

[28] *Ibid.*
[29] *Ibid.,* at para 93.
[30] *Ibid.,* at para 95.

cross on a chain around her neck related to health and safety issues, for example the possibility of the cross coming into contact with an open wound, or a disturbed patient grabbing hold of the chain. For similar reasons, other nursing staff had been prohibited from wearing religious attire which would pose the same risk, (bangles, kirpans, flowing hijabs). On this basis, it could be argued that the prohibition of discrimination had not been breached in the application of Chaplin.[31]

3.2. Principles

3.2.1. Introduction: an overarching principle of freedom to manifest one's religion or belief

In addition to the two rules identified above, it is suggested that under the categorisation proposed by Alexy, there is also a principle (or principles) under the freedom of thought, conscience and religion which apply to claims of conscientious objection in the workplace. It is suggested that the main principle of concern here is the general principle of freedom to manifest one's religion or belief. As will be recalled from Chapter 2, principles are generally applicable norms which can be characterized as optimization requirements, and conflicts between which are resolved by weighing and balancing rather than applying one principle instead of another competing principle to a given case. For present purposes, it is not therefore controversial to state that no other considerations applying, the optimization of the freedom to manifest one's religion or belief would call for accommodation and exemptions in accordance with the objecting individual's conscientious objection. On the other hand, it will similarly be uncontroversial to assert that particularly in the workplace environment, scenarios in which *in fact* no other considerations ever apply will be extremely rare, indeed non-existent. Certainly in the case of claims which make their way to the courts, there are, by definition, countervailing arguments against accommodation or exemption. The crucial question therefore is the weight to be attached to the principle of the freedom to manifest one's religion or belief when weighed against a competing interest or principle. While a precise mathematical formula for calculating the weight of the principle in a particular case is not attempted here, it is suggested that a number of 'factors' can arguably be identified as adding to the relative weight to be attached to the principle of the freedom to manifest religion

[31] Here it should be noted that an argument based on discrimination on grounds of religion was also made by the applicants in *Osmanoğlu and Kocabaş v. Switzerland*, (*supra* note 13), however the Court did not consider the claim to have been substantiated, at para 96.

or belief. These factors (indeed, there may be more), are identified and explained in more detail below.

3.2.2. 'Weight factors'

(i) Foreseeability of the conflict[32]

One suggested factor affecting the weight to be accorded to the principle of freedom to manifest religion or belief applicable to claims of conscientious objection in the workplace is the foreseeability of the objection to the objector upon entering the employment in question. The issue of foreseeability pertaining to a claim of conscientious objection might manifest itself in a number of ways, including changes in the objector's job description, the terms of the employment contract and informal workplace arrangements or task delegation, or indeed changes in legislation or professional codes of ethics. On the other hand, a conflict of conscience might also be unforeseen at the time of entering a particular position as a result of a change in the religion or beliefs of the individual objector. While changing one's religion or beliefs is indisputably an inviolable aspect of the freedom of thought, conscience and religion, it is suggested here that for the purposes of weighing and balancing competing principles in cases of conflict of conscience, particular (though not definitive) significance has been accorded to the fact that a conflict of conscience was unforeseen for reasons unconnected to the individual objector. Although, yet again, the precise weight of the 'foreseeability' factor for the principle of the freedom of manifestation of religion or belief is difficult to ascertain, the jurisprudence of the ECtHR has consistently indicated that it is one factor to be considered in the overall assessment. Such was the case, for example, in the judgments in *Eweida et al*, particularly regarding the applications of Ladele (where the conflict was not foreseen) and Macfarlane (where the conflict was foreseen).[33] Foreseeability can also be argued to have weighed in a number of selective conscientious objection cases (*Shepherd*)[34]. Specifically, it can be articulated that relatively more weight attaches to the freedom to manifest one's religion or belief in cases where a conflict of conscientious was not or could not have been foreseen at a time of entering employment, than where such a conflict could be foreseen, even if the latter case does not preclude the application of the overall principle to the case at hand.

[32] See Scheinin *'The Right to Say "No"' supra* note 1, at 349.
[33] *Eweida et al. supra* note 6.
[34] C-472/13 *Andre Lawrence Shepherd v Bundesrepublik Deutschland* (EU:C:2015:117).

(ii) 'Acceptability' of the objection

Perhaps a particularly controversial factor affecting the relative weight accorded to the principle of the freedom to manifest one's religion or belief, but nevertheless one with some support in the jurisprudence of the European Court of Human Rights pertains to the substantive 'acceptability' of the specific objection at stake. While the jurisprudence of the Court formally affirms the stance that a state's duty of neutrality and impartiality is incompatible with it assessing the legitimacy of religious beliefs or the way such beliefs are expressed, a closer reading of the jurisprudence reveals that some aspects of the substance of beliefs such as those giving rise to a conscientious objection do seem to (or at least can be interpreted as) carry some weight in the balancing of competing interests. It is suggested here that the 'acceptability' of the objection for the purposes of affecting the relative weight accorded to the principle of freedom to manifest religion or belief can have at least three dimensions of relevance. As before, these dimensions are drawn from the jurisprudence of the European Court of Human Rights, as well as the two profession-specific case studies addressed in the present thesis.

(a) directness of involvement[35]

One relevant dimension of the 'acceptability' of the objection for present purposes pertains to the directness of the duty objected to vis-à-vis the nature of the claimed objection. While it may be the case that the individual claiming the conscientious objection is genuine in considering whatever the task from which exemption if claimed to offend his or her conscience, it is suggested here that an objective assessment of the nexus between the sought exemption and the claimed objection is necessary. Indeed, regarding the manifestation of religion or belief, the Court has long since maintained that 'every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief'[36], and that 'the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case'[37]. However, the point here is not to argue that a particular instance of conscientious objection would not, as a result of the 'directness of involvement' count as a manifestation of religion or belief. Rather, the purpose is to point out the basis for considering the directness of involvement vis-à-vis a particular objection for the

[35] See also Scheinin, *'The Right to Say "No"' supra* note 1, at 350. See also Bielefeldt, Ghanea and Wiener *supra* note 17, at 523.
[36] *Eweida et al. supra* note 6, at para 82.
[37] *Ibid.*

purposes of according weight to the principle of freedom to manifest religion or belief. In *Dautaj v. Switzerland,*[38] we can see the Court, in effect, considering the weight of the claim under Article 9 with reference to an objective assessment of the nature of the task objected to by the applicant. In particular, the Court drew attention to the fact that the applicant's job as a receptionist had entailed merely welcoming/receiving guests at a religious conference centre, and that the applicant had failed to specify how his tasks had violated his freedom not to adhere to a particular religion. The Court furthermore pointed out that at no point had the applicant been required to identify with the religion with which the centre was associated with, nor to represent the centre's religious values to customers. While not specifically articulated as such, it can be argued that, the Court conducted (on the basis of the facts before it) and objective assessment of whether the job indeed infringed the freedom not to adhere to a particular religion. The applicant clearly claimed that it did, and his claim was not considered insincere as such. Rather, the Court conducted an objective assessment of whether the facts involved a sufficiently direct link between the job and the objection.

In other contexts the significance of the link between directness of involvement in the offending task and the objection can also be seen. Although not discussed in detail in the present thesis, the significance of the nexus of the task/activity from which exemption is sought and the substance of the objection is apparent in cases in which exemption is sought from taxation on grounds of religion or conscience. Thus in the Commission's inadmissibility decision in *C v. UK,*[39] the applicant (a member of the Religious Society of Friends (Quakers)) made his payment of a portion of his taxes conditional upon a guarantee that it would not be spent on purposes contrary to his conscience, namely armaments, weapons research and allied industries. The applicant claimed that the lack of a procedure whereby a portion of his taxes could be directed towards peaceful purposes (and away from such purposes as were contrary to his conscience) infringed his rights under Article 9. The Commission however considered that the general obligation to pay taxes did not have any 'specific conscientious implications' inter alia as individual taxpayers could not 'influence or determine the purpose for which his or her contributions are applied, once they are collected'[40]. Moreover, the Commission drew attention to the fact that the Convention itself provides that the power of taxation is expressly recognized in the Convention, and that the applicant had been free to influence the distribution of public funds through the democratic process. Similar conclusions were reached

[38] *Dautaj v. Switzerland, supra* note 10.
[39] *C. v. United Kingdom*, Appl. no. 10358/83, Decision of 15 December 1983.
[40] *Ibid.* p. 147.

in the analogous case of *H. and B. v UK*[41], and *Bouessel du Bourg v France*.[42] Arguably, such an interpretation can also be made in respect of the Court's reasoning in *Lautsi* whereby mere presence in a classroom in which a crucifix was displayed was not such as to infringe the applicant's rights under Article 9 (together with Article 2 Protocol 1)[43]. In this regard it is worth noting that the Court specified that the applicant's subjective perception was not sufficient to establish a breach of the relevant Convention rights, but in its own assessment considered that the display of a crucifix on a classroom wall was 'an essentially passive symbol'[44] in contrast to the nature of didactive speech or participation in religious ceremonies.

In addition to the jurisprudence referred to above, the relevance of the directness of the involvement in light of the objection can also be seen in the approach to conscientious objection in the healthcare profession as discussed in Chapter 4. In the codes of ethics considered (albeit not a comprehensive sample), a regular feature was the limitation of exemption from a particular procedure for reasons of conscience to tasks of particular directness regarding the substance of the objection. Thus referral to another practitioner is generally not covered.[45] On the other hand, it will be recalled that in the jurisprudence of the Human Rights Committee regarding conscientious objection to military service, protection in the form of exemption from service extends to service involving a relatively low level of complicity with what is recognised as the substantive objection (use of lethal force) – namely by extending to unarmed service in the military as well as civilian service with a sufficient level of military oversight. However, such an observation does not nullify the argument advanced in the present section, but rather merely demonstrates that the directness of involvement/level of complicity is but one factor affecting the overall weight to be afforded to the general principle at hand, and may, indeed, be affected by the following two aspects of the acceptability of the objection. These aspects are the ethical and the legal sensitivity of the subject matter of the objection.

[41] ECmHR *H.; B. v. United Kingdom,* Appl. no. 11991/86, Decision of 18 July 1986.
[42] ECmHR *Bouessel du Bourg v France*, Appl. no. 20747/92, Decision of 18 February 1993.
[43] ECtHR *Lautsi and Others v. Italy*, Appl. no. 30814/06, Judgment of 18 March 2011.
[44] *Ibid.,* para 73.
[45] See Chapter 4, at section 4.

(b) ethical disputability of the substantive content of the objection[46]

It is suggested here that one of the dimensions of the objective assessment of the acceptability of a particular conscientious objection for the purposes of assigning weight to the general principle of freedom to manifest religion or belief concerns whether the objection pertains to a belief on a particular matter within the spectrum of accepted ethical disputability.[47] It is important to note here that such a dimension is to be distinguished from the general incompatibility of the state to assess the legitimacy of religious beliefs or the ways in which such beliefs are expressed. Rather, what the Court would be doing by assessing the various dimensions of 'acceptability' presented here would be to determine the relative weight to be accorded to the principle of freedom to manifest one's religion or belief as compared with a competing principle or interest. How then should the Court determine whether a particular objection falls on the spectrum of 'acceptable ethical disagreement'? Given the non-static nature of ethical debates, it should be clear that such 'acceptable spectrums' are necessarily fluid. One important source in this respect could be professional codes of ethics. This is perhaps particularly relevant in the healthcare profession discussed in Chapter 4 in which a number of ethical codes were referenced. If, therefore, a particular instance of conscientious objection pertains to a matter recognised as such in the relevant professional guidelines, then such an objection should carry relatively more weight as compared with an objection pertaining to a matter not recognised or even rejected in professional ethics. A similar conclusion could be made regarding selective conscientious objection in the professional military, although in the military profession it is perhaps more likely that an ethically disputable issue is also legally disputable, as discussed next.

[46] See also Scheinin, *'The Right to Say "No"'*, *supra* note 1, at 350.

[47] In the academic literature in bioethics, the importance accorded to the substantive content of a conscientious objection has been addressed by way of some 'outlandish' examples. For example, Giubilini uses the example of a doctor who refuses prescribe antibiotics due to his conviction regarding the moral status of microbes. The point of the example is decidedly not to argue for extending protection to such objection, but rather to argue against allowing conscientious objection in the healthcare context at all (Giubilini, 'Objection to Conscience: An Argument Against Conscience Exemptions in Healthcare', 31 *Bioethics* (2017) 400, at 400-401). However, under the present approach it can be said that an objection based on the moral status of microbes in the context of medical care would not add any weight to the principle of freedom to manifest one's religion or belief, given that such an objection would 'beyond the pale' of accepted ethical discourse in the profession in question. On the other hand, not prescribing antibiotics due to a conscientious belief/conviction on the harmful effects of excessive use of antibiotics, leading, for one, to increased antimicrobial resistance, would be accorded weight (if indeed such a view was in conflict with a healthcare professional's work duties!).

(c) legal disputability of the subject matter of the conscientious objection

A third dimension in the assessment of the 'acceptability' of a particular conscientious objection for the purposes of according relative weight to the principle of the freedom to manifest one's religion or belief is the extent to which the subject matter of the objection relates to a *legally* disputable matter. As mentioned above, many of the examples of selective conscientious objections in the professional military relate to the question of legal disputability, for example, of a particular conflict, particular weapons, or indeed particular orders. In the professional military context, ultimate legality of a particular operation may depend on facts and circumstances which are not evident at the outset, particularly to a rank and file service member. Moreover, there may be incongruence between the legality of a particular duty depending on whether such legality is assessed according to national or international law. However, it is suggested here that where such disputability exists, an objection falling on the spectrum of accepted dispute is to be accorded more weight, relative to one which pertains to undisputed legality on all fronts. Similar legally disputed objections may also occur in the medical and healthcare professions, and should be likewise accorded more weight than objections which are, on all counts, undisputedly legal. Again, it should be emphasised that the dimension of disputed legality is but one dimension of one factor in the overall weight to be accorded to the freedom of thought, conscience and religion, and does not, by itself, determine the outcome of the resolution of the competing principles at stake.

(iii) Centrality of the objectionable duty to the objector's job[48]

A third factor to be considered under the principle of freedom to manifest one's religion or belief is the centrality of the duty subject to the conscientious objection to the objector's job description. In this regard, objections pertaining to peripheral aspects of a particular job would carry relatively more weight in the resolution of competing principles as compared with objections to duties which are more central. Clearly such an assessment is not always simple and straightforward. As mentioned in Chapter 4 regarding the healthcare profession, some duties or procedures might be quite infrequent, but nevertheless extremely important when their performance is required. As such, an abstract metric based on frequency alone would not suffice for such a determination. Rather, it is suggested that the determination of whether a particular aspect is relatively speaking peripheral or central to a particular job is to be conducted on a case by case basis. On the other hand, certain lines of interpretation may

[48] See also Scheinin, 'The Right to Say "No"' *supra* note 1, at 349.

appear over time, regarding aspects such as work attire/uniforms, and indeed working hours. In respect of the latter it can at least be said that regular exemption from working hours will be more difficult to accommodate (and therefore carry less weight) than more infrequent or one-off absences for reasons of conscientious objection.

(iv) Objector's status as a member of a minority[49]

A fourth factor to be considered in according weight to the principle of freedom to manifest religion or belief is the objector's status as a member of a minority. It can be argued that the objector's status as a member of a minority has been considered of significance in the Court's jurisprudence on conscientious objection to military service, particularly as articulated in *Bayatyan v. Armenia*[50]. Along the same reasoning, more weight might be accorded to the principle of freedom to manifest one's religion or belief where the objector is a member of a minority and, moreover, when the substance of the objection is closely connected to that status.

(v) consequences of non-accommodation

A final factor affecting the relative weight to be accorded to the principle of the freedom to manifest one's religion or belief with a view to accommodating a conscientious objection concerns the consequences endured by the objector in case of non-accommodation of the objection. As mentioned above, the severity of consequences endured may be relevant for the assessment of whether the prohibition of coercion related to religion or belief has been infringed. As it stands however, it was also noted that the loss of one's job is not, under the jurisprudence of the Court such as to supersede the threshold of 'coercion'. On the other hand, it can be argued that 'lesser' (i.e. 'non-coercive') consequences such as the loss of employment do carry some weight in the assessment of possible accommodation. Support for such an interpretation can be found in *Eweida et al.* (especially the application of Ladele)[51], as well as cases such as *Schüth*[52] and *Obst*,[53] but similarly from some analogous cases such as *Osmanoglu*.[54] Specifically, the more severe the consequences endured by the objector in case

[49] Scheinin *ibid.,* at 352.
[50] ECtHR *Bayatyan v. Armenia*, Appl. no. 23459/03, Judgment of 7 July 2011.
[51] *Eweida et al., supra* note 6.
[52] ECtHR *Schüth v. Germany*, Appl. no.1620/03, Judgment of 27 September 2010.
[53] ECtHR *Obst v. Germany*, Appl. no. 425/03, Judgment of 23 September 2010.
[54] *Osmanoğlu and Kocabaş supra* note 13.

of non-accommodation, the more relative weight to be added to the principle of freedom to manifest one's religion or belief.

3.2.3. Conclusion: principles and 'factors'

The sub-section above sought to identify and explain a number of factors as, on the basis of the material studied in the present thesis, are or might be considered relevant in determining the relative weight to be accorded to the general principle of freedom to manifest one's religion or belief in assessing whether a particular instance of conscientious objection in the workplace should be accommodated. It is not suggested here that this catalogue of factors is comprehensive, not least due to the relative lack of jurisprudence directly raising issues of conscientious objection in the workplace, particularly since the landmark case of *Eweida et al*. Nevertheless, it is suggested that there is sufficient support for considering these factors as relevant, even if their precise 'weights' and functions in the overall assessment is not, at present, clear. At this stage however of greater significance is the identification of these factors as procedural steps in the Court's assessment. Moreover, it may be the case that over time as sufficiently analogous cases are adjudicated, certain patterns in the relative weights of the various factors as compared with specific countervailing principles or interests will emerge, as will be considered in the section below, together with some worked examples of how this assessment of competing principles might be conducted.

4. Resolution of conflicting or competing norms

As mentioned above, conscientious objection – whether in general or in the specific context of the workplace – is controversial and subject to such continuous debate due to the conflict or tension between competing norms and normative frameworks which inevitably surfaces. On the one hand, it goes without saying, rights of conscience including ostensibly a right to conscientious objection (what ever its precise parameters) is grounded in the human right to freedom of thought, conscience and religion. On the other hand, whenever an instance of conscientious objection makes its way to the courts, there are conflicting or countervailing norms or interests calling for the conscientious objection not to be accommodated. Such norms might stem from legislation, terms of contract, even social conventions, some other

interests,[55] or even other human rights norms[56]. Given this, it is of paramount importance to determine not only what the applicable norms under human rights law to claims of conscientious objection are, but also how possible conflicts and tensions between competing norms are resolved. The argument advanced here presupposes identifying and distinguishing between applicable norms which are rules and those which are principles. It will be recalled from Chapter 2 when this distinction was introduced, that one (perhaps *the)* key difference between rules and principles pertains to the resolution of conflicting norms. Where two rules appear to conflict, the resolution of 'conflict' takes place at the level of validity, that is, correctly identifying the applicable rule (e.g. *lex specialis*) to the particular case at hand. Where it appears that two conflicting rules do ostensibly apply to the same case, then the conflict is resolved by reading an exception into one of the rules (or indeed declaring one of the rules invalid). Or, to put it another way, the proper scope of application of the rule into which the exception is read is modified such as to take into account the exception.

When it comes to principles on the other hand, it will be recalled that principles are generally applicable optimization requirements which do not, as in the case of rules, have specific scopes of application. As such, it is, as noted by Alexy, perhaps misleading to speak of *conflicting* principles. Rather, it is more appropriate to speak of *competing* principles of which one alone, if optimized to the full in a given case, would call for a diverging outcome as compared with that called for by the other competing principle. In contrast to conflicting rules, a case involving competing principles is resolved through a process of weighing and balancing,[57] where by, in a give case, one of the competing principles outweighs the other, but neither is invalid vis-à-vis the case at hand as such. The section above identified a number of 'weight' factors affecting the relative weight to be accorded to principle of the freedom to manifest one's religion or belief. However, in order to resolve competing principles in a case of conscientious objection in the workplace, it is necessary to also correctly identify the competing principle, and any factors affecting the relative weight to be accorded thereto. The

[55] Whether more specific, such as interest related to corporate image, or broader concepts such as 'public interest'.

[56] Such as the right to health in the context of conscientious objection in the healthcare profession, or the prohibition of discrimination, as was at issue in the applications of Ladele and Macfarlane in *Eweida et al. supra* note 6.

[57] Indeed, the assessment of competing principles is necessarily linked to the principle of proportionality, as explained in R. Alexy, *A Theory of Constitutional Rights*, Oxford University Press, 2002), transl. J. Rivers, at 66-69, submitting at 66 that 'The nature of principles implies the principle of proportionality, and vice versa.' Indeed, proportionality analysis of competing principles is, in itself, a broad subject of study and analysis, a detailed consideration of which is beyond the scope of this thesis. Rather, the present section seeks only to cursorily illustrate how, on the basis of the argument advanced in this thesis, the various 'factors' identified would be applied in situation of competing principles in the context of conscientious objection in the workplace.

following subsections will consider how, in the context of conscientious objection in the workplace, conflicts between rules and competing principles might, on the basis of the approach presented in this chapter, be resolved.

4.1. Rules

First, how on the basis of the approach presented in the present chapter, are conflicts between rules applicable to instances of conscientious objection in the workplace to be resolved? Of the two rules presented in section 3.1. above, it is suggested that the situations in which the prohibition of coercion is at stake are likely to be fewer, given its stringent criteria, even though its scope of application is not as such narrow. Nevertheless, we can, for the purposes of illustrating the point, consider the case of *Buscarini v. San Marino,*[58] even though the case was evidently not decided on the basis of the approach articulated here, but rather on the basis of an assessment of the 'permissibility of limitations' under Article 9(2). It will be recalled that the facts *Buscarini et al. v San Marino* concerned a compulsory oath to be sworn 'on the gospels' by elected parliamentarians. The applicants claimed that such an oath infringed their freedom of religion by making the exercise of certain political rights in effect conditional upon publicly professing a particular faith. It is suggested here that the facts of the case could, under the present approach, have been argued in terms of a violation of the prohibition of coercion regarding religion or belief. Thus, on the basis of the ECHR, there is an apparently valid rule which conflicts with a national rule requiring the swearing of a particular oath by elected officials. Although it could be argued that the elected officials were not required to stand for election, and thus could have avoided the conflict (i.e. the national rule would be read as an exception to ECHR rule), the case was in fact (correctly) decided by effectively declaring invalid the national rule, with the ECHR rule instead found to be valid and determining the outcome of the case. However, such is not to assert that the prohibition of coercion regarding religion or belief by way of requiring the public profession of a particular religion as presented here has no exceptions at all. An evident example would concern religious organizations or Churches requiring the profession of a particular faith by their members and at least certain employees, without thereby infringing the rule prohibiting coercion in matters of religion or belief. In other words, the relevant rule of autonomy of religious organizations (whatever its precise formulation), is an exception to the rule

[58] ECtHR *Buscarini and Others v. San Marino*, Appl. no. 24645/94, Judgment of 18 February 1999.

prohibiting coercion regarding religion or belief[59], insofar as that rule generally prohibits the requirement of a particular religious affiliation or profession thereof.[60]

An important aspect to consider regarding apparent conflicts between rules in instances of conscientious objection concerns the correct identification of the nature of the conflict in question. This thesis has focused on discerning – if not completely at least to an increased degree of accuracy – particular norms under the freedom of thought, conscience and religion, and identifying the correct category of such norms, as well as their content. However, the implications of the approach adopted here also extend to other human rights. In other words, also other human rights provisions consist of a number of identifiable norms, including rules and principles. Some such norms – for example the rule prohibiting discrimination – apply in the context of all human rights (i.e. Article 14 ECHR), while others are highly specific to the particular provision in question – such as the privilege against self-incrimination in criminal proceedings under Article 6. Sometimes however it may at first be unclear whether the conflict at stake is one between two rules, two principles, or a rule and a principle. Such might, for example be the case where a particular rule, to put it metaphorically, is embedded in a principle, and it is not evident whether the issue at hand falls within the scope of the rule (or its very perimeters), or the surrounding principle. Moreover, the same can be said of the countervailing norm. It is suggested that such a case is particularly likely when the apparent conflict concerns, say the freedom of thought conscience and religion under Article 9, and another of the so-called relative rights under Articles 8-11. In such a case it is necessary to identify the precise norms under each of the rights which are engaged. If the 'conflict' does in fact arise between a valid rule under one of the rights and a principle under another, then the 'rule' under the first right will prevail, and vice versa. If, on the other hand, the conflict concerns conflicting rules under the two rights, then the conflict is resolved by the process

[59] Great care should be taken here: the rule prohibiting coercion in matters of religion or belief has a very particular content, and for religious/belief-based organisations to enjoy a *particular* exception to that rule is not to say that the rule, in all its dimensions is categorically set aside in the context of religious/belief-based organisations. For example, one aspect of the prohibition of coercion regarding religion or belief is the freedom to renounce one's religion. The internal rules/doctrine of some religions may not recognise such a right. However, clearly, making an exception to the freedom to renounce one's religion on the basis of the autonomy of religious organisations would in fact completely nullify the right to renounce one's religion for the individual concerned. In such a case, the freedom from coercion regarding a religion or belief is an exception to (or a rather, modifies the scope of application of) the rule (whatever its precise content) protecting the autonomy of religious or belief-based organisations.

[60] In this regard, the autonomy of religious organizations is also an exception to the prohibition of discrimination under the freedom of thought, conscience and religion. In fact, *Buscarini v. San Marino* could also have been argued on the basis of the prohibition of discrimination under the freedom of thought, conscience and religion, as the rule requiring public profession of a particular religion by parliamentarians was discriminatory for those not adhering to the religion in question.

outline above, that is, by reading an exception into one of the rules which in effect slightly modifies that rule's scope of application. If, on the other hand the conflict involves principles under the two rights, then such a conflict or tension is resolved as outlined below.

4.2. Principles

If an instance of conscientious objection in the workplace does not infringe the two rules identified above (i.e. prohibition of coercion and the prohibition of discrimination), then the applicable norm under the freedom of thought, conscience and religion which will be engaged is the principle of freedom to manifest one's religion or belief. The relative weight to be accorded to the principle will depend on an assessment of the presence of the various 'weight factors' identified above. On the other hand, it will be necessary to identify the countervailing principle, which, in the particular workplace context would call for non-accommodation of the conscientious objection. Such a principle or interest might relate to workplace efficiency, economic interests (including customer preference) or corporate image. Indeed, it is difficult in the abstract to conjure up a sufficiently specific yet comprehensive countervailing principle that would apply to all possible instances of conscientious objection in the workplace. As such, it will be more useful to take some specific examples of conscientious objection to work through.

Taking the example of the application of Eweida in *Eweida et al,* we can maintain the following. The applicant's claim, employing the principle of the freedom to manifest one's religion or belief, was strengthened by the 'directness of involvement' factor insofar as her claim related to an aspect of personal appearance. Moreover, while the conflict was apparently foreseeable in that the airline's uniform code only allowed certain forms of religious attire which did not include the symbol which the applicant wished to display, the form of objection claimed – a minor modification of the uniform – arguably did not pertain to a central aspect of the applicant's job as an airline's check-in staff member. In addition, while this aspect was not specifically drawn on by the Court, the applicant's status as a member of a minority religion (Egyptian Coptic Christianity) would arguably add weight to the principle, as would the consequence of non-accommodation (i.e. several months of unpaid suspension) which, while not 'coercive', was nevertheless a significant burden to endure. On the other hand, in favour of non-accommodation was primarily the corporate image of the employer airline, which, moreover, had not been deemed to have been affected by permitting other forms of religious attire. Although it was suggested earlier in this chapter that the application

of *Eweida* would more appropriately have been decided under the rule of non-discrimination, the process outlined above - based indeed on the actual reasoning of the Court – shows how the competing principles in the case were resolved under the analytical framework proposed in this thesis. To put it differently, a somewhat dubious and incoherent principle/interest of corporate image would not outweigh the general principle to manifest one's religion or belief, particularly where a number of identifiable factors added to its relative weight.

By contrast, the resolution of competing principles leading to a different outcome can be seen in the application of Chaplin in *Eweida et al*. In that case, as mentioned earlier, a nurse wished to wear a small cross around her neck, but was not permitted to do so for reasons of health and safety. On the side of the freedom to manifest one's religion or belief, we can, more or less, assign the same 'weight factors' as those cited above regarding Eweida, barring perhaps the applicant's status as a member of a minority religion insofar as the level of analysis differentiates among branches of Christianity[61]. On the side of the competing principle or interest we have, in contrast to the application of Eweida, a relatively strong case of health and safety, insofar as analogous limitations on other forms of religious expression were equally prohibited. As such, in the case of Chaplin, the freedom to manifest one's religion or belief in the specific way claimed by the applicant was outweighed by the interests of health and safety.

An important point to consider in the assessment of competing principles presented here, as based mainly on the jurisprudence of the European Court of Human Rights, is the oft invoked doctrine of the margin of appreciation. Indeed, it is suggested that the margin or appreciation is only (or at least almost always only) relevant in the sphere of competing principles, and particularly regarding the relative weights to be applied to the various factors presented above. Such is not to assert, however, that the margin of appreciation doctrine always or necessarily applies to instances of competing principles, as over time, certain patterns may emerge regarding the relative weight of certain factors in comparison to competing principles or interests. Indeed, an argument can be made regarding the emerging relative weight of 'corporate image' when juxtaposed against certain forms of religious expression in the workplace (at least in the context of a particular set of facts). In the event of such an emerging pattern we could indeed start speaking of nascent 'rule' of precedence between competing

[61] In other words, it is not always self-evident whether a particular religious identity is appropriately considered a religious *minority*. Coptic Christianity is a minority religion in Egypt, but Christianity (as a broad category) is not a minority religion in the UK context.

principles under specified conditions.[62] On the other hand, it is suggested that the application of the identified rules under the freedom of thought, conscience and religion generally or as applicable to conscientious objection in employment is not a matter for national discretion, although certain aspects of specific national contexts may factor into whether a particular case in fact falls within such a rule's scope of validity/application. For example, provisions of national legislation may impact the 'foreseeability' factor which was considered as one aspect of relevance for assessing whether the threshold of 'coercion' for the purposes of engaging the prohibition of coercion regarding religion or belief is attained.[63]

4.3. The limitation clause in Article 9(2) and the margin of appreciation

It will have been apparent to the reader that neither of the foregoing subsections have addressed the conflict of norms arising in instances of conscientious objection on the basis of the permissibility of limitations under Article 9(2). The purpose of the present section is to explain how the assessment of the permissibility of limitations accords with the approach presented here. First, it should be said that while the permissibility of limitations – and the process of balancing inherent in the proportionality assessment under the 'necessary in a democratic society' step – is evidence of the rights under Articles 8-11 being identified as principles, it suggested that such a conclusion is not altogether accurate. For example, if the scope of application of one rule is slightly modified by way of another apparently conflicting rule (protecting some aspect of another's right), then such a 'limitation' would be 'provided by law', 'for the protection of the rights of others', and be 'necessary in a democratic society', without resort to a process of balancing. However, such, it is suggested, is a process in which the doctrine of margin of appreciation does not operate so as to allow divergence between domestic approaches, if at least one of the rules in question is a rule under a provision of the ECHR. On the other hand, it is not inconceivable, that an aspect of the ECHR protected under a particular principle is, at the domestic level, protected as a rule. Insofar as such a rule conflicts with another principle under a provision of the ECHR, then the 'limitation' of the latter will have to satisfy the limitation proviso under the relevant ECHR right (i.e. provided

[62] See R. Alexy, *A Theory of Constitutional Rights,* (Oxford University Press, 2002), translated by Julian Rivers, at 53.

[63] On this, see also the jurisprudence on abortion where one of the relevant factors is the precise extent to which national legislation protects conscience-based exemptions, and, in addition, possible incongruence between professional ethical standards which may recognise the right of a healthcare professional to conscientious objection, while no such right is recognised either explicitly or as a matter of interpretation in national legislation.

in law, necessary in a democratic society for the protection of one of the identified interests or rights of others), being both necessary (appropriate) and proportionate in view of the legitimate aim pursued. In so doing, the Court would consider whether the respondent State had based its decision 'on an acceptable assessment of the relevant facts'[64]. It is suggested here that such facts as are relevant in instances of conscientious objection are identified above in 3.2.2. above. However, relative facts regarding the countervailing principle will clearly depend on what other principle is at stake in a given case. It is suggested that the margin of appreciation enjoyed by states under Article 9 regarding conscientious objection operates at this level, that is, at the level of according relative weight to the various factors, although, as mentioned, over time normative guidance from the Court may also emerge.[65]

In this context, it is worth noting that there are a number of different ways in which an applicant's claim might succeed against a respondent state. Indeed, the differences between different forms of violations are significant. One form of violation would involve a state infringing a 'rule' under the ECHR, where no exception to the rule exists (at least such as to apply to the facts of the case). Such an infringement is substantive in nature. On the other hand, a state may be found to have failed to note a particular relevant fact in its proportionality analysis, and therefore, have infringed a right protected under the ECHR at a 'procedural level'. Thirdly, a state may be found to have infringed a particular right under the ECHR by failing to accord appropriate weight to one or more of the relevant factors under the applicable principle in its proportionality assessment of the acceptability of limitations. Such, depending on the facts of the case may be categorised as either a procedural or a substantive violation.

4.4. Conclusion: rules and principles under the freedom of thought, conscience and religion and the resolution of norm conflicts

Sections 3 and 4 above have sought to clarify both the nature and substantive content of norms under the freedom of thought, conscience applicable to instances of conscientious objection in the workplace, while also, on that basis, providing at least the sketchings of an analytical framework for how arising norm conflicts would be resolved. There are several advantages to such an approach. First, distinguishing between the applicable types of norms

[64] see ECtHR *Gorzelik et al. v. Poland* (Appl. no. 44158/98 Judgment of 17 April 2004.), at para 96.
[65] For example, regarding the relative weight to be accorded to 'corporate image' as compared with the freedom to manifest one's religion or belief by wearing a religious symbol.

itself provides an analytical tool for approaching the most contentious aspects of such cases, namely the resolution of conflicting norms. Moreover, the framework also provides a tool for more accurately identifying the particular distinguishing features of different cases on the basis of which diverging conclusions might be reached in apparently analogous cases, and, moreover, the different types of violation of a right (Article 9) which might be found. On the other hand, the presented approach also provides a tool of accountability vis-à-vis the Court, such that the precise locus of any incoherence in its jurisprudence can be identified, hopefully too with implications for improved quality in its reasoning. Furthermore, the approach presented here might also be expected to somewhat constrain resort to the margin of appreciation in cases involving Article 9 in the workplace, or at least clarify its scope of application somewhat.

However, despite a number of advantages mentioned above, it has to be said in the interests of honesty and transparency, that the approach also suffers from a number of weaknesses. First, while the approach presented in this chapter is grounded in the jurisprudence of the European Court of Human Rights, it is also one not explicitly or undisputedly employed by the Court to cases of conscientious objection in the workplace under Article 9, or indeed more generally. Indeed, as discussed in the foregoing sections, a number of ECtHR judgments have effectively been 're-reasoned' in light of the theoretical approach constructed herein. A further criticism pertains to the difficulty of discerning the precise content of particular rules, most notably in the present context of the prohibition of coercion regarding religion or belief. In other words, given the nature of rules as norms which either categorically apply (within their specific scopes of application), it is problematic if their precise content – or perhaps more appropriately if their precise scope of application – is subject to uncertainty. This is particularly problematic in a system such as that of the European Court of Human Rights, where the applicable law is primarily developed through case law, rather than say authoritative statements of interpretation[66] or perhaps also a preliminary reference procedure such as that of the Court of Justice of the European Union. Rather, the European Court of Human Right's ability or opportunity to interpret and apply the ECHR is dependent on the particular cases brought before it, which might not always be representative of all the possible cases which might arise in relation to the rights protected in the ECHR. For present purposes,

[66] Such as are general comments issued by the Human Rights Committee on the interpretation of the ICCPR.

we can mention the relatively late arrival of cases alleging violations of Article 9[67], indeed a pattern which seems to have repeated itself somewhat in the context of the CJEU.[68] Although, at the time of writing the Court's jurisprudence on Article 9 both in general and in the workplace context in particular has steadily increased, there remain many unanswered questions about the precise approach that the Court would take in specific cases. This lack of uncertainty is no doubt compounded by the fact that certain landmark cases have been decided over the years in which marked developments in the Court's approach have taken place. Such landmark cases, while positive in many aspects, also cast significant doubt as to the status of earlier case law, which continues to be cited, for example, in academic literature. This criticism aside, it is maintained here that the distinction between rules and principles under Article 9 still stands and is of value, even if a level of uncertainty remains regarding the precise scope of the protection accorded therein. There is value in knowing that certain norms under Article 9 apply categorically (i.e. rules) at least in defined circumstances, while other aspects (i.e. principles) apply generally and are subject to optimization. Moreover, while rules, as presented here, are categorical in nature, it does not follow that no developments in the Court's jurisprudence are possible. As is well known, the Court maintains that the ECHR is a 'living instrument' to be interpreted in the light of present day conditions. As such it is possible, indeed imperative, that the scopes of application of rules, or indeed the balancing of competing interests, is adjusted as required when significant circumstances and facts change. For example, in professions in which technological developments are of particular significance – such as those considered in chapters 4 and 5 – it would be appropriate that such changing circumstances can also affect the interpretation of Article 9, including the precise content of 'rules' therein.

In conclusion, it is suggested here that there is a strong argument at least in favour of considering the analytical framework presented above to claims of conscientious objection in the workplace. While this framework based on the distinction between rules and principles may not be flawless, it is not only grounded in existing jurisprudence but also, from a normative standpoint, is more coherent and precise as to provide an improved tool for

[67] *Kokkinakis v. Greece,* Appl. no. 14307/02, Judgment of 25 May 1993, being the first case in which a violation of Article 9 was found.
[68] For example, under the Employment Equality Directive Council Directive (2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16), it took some years before any preliminary ruling procedures concerning discrimination on grounds of religion or belief were lodged, with *Bougnaoui* and *Achbita* being the first such cases.

approaching new instances of conscientious objection in the workplace, all the while allowing for flexibility to adjust to future developments as required by changing circumstances.

5. Reconceptualizing the freedom of thought, conscience and religion on the basis of norms

In this final section I will reflect on the implications of the analytical approach to conscientious objection in the workplace based on rules and principles for the theoretical construct of the freedom of thought, conscience and religion, as well as some other associated legal-theoretical discourses.

It will be recalled that one of the theoretical considerations introduced in Chapter 2 concerned the traditional construct of the freedom of thought, conscience and religion based on the 'inviolable' forum internum and the 'relative' forum externum which may be subject to limitations. It was also pointed out that while the *forum internum/externum* dichotomy has been an extremely persistent feature of the freedom of thought, conscience and religion both as it has been addressed in courts as well in academic literature, it has also been subject to significant criticism. In particular, criticism has been voiced regarding the lack of clarity as to the precise locus of the divide between the two *fori*, the lack of a strong jurisprudence on the content of the *forum internum*, as well as arguably too great a willingness to accept limitations on the manifestation of religion, often with reference to the margin of appreciation. Conceptualizing the freedom of thought, conscience and religion rather on the basis of the types of norms therein, rather than on an enigmatic dichotomy of two *fori* has several advantages. First, the dichotomy based on types of norms is more complex and nuanced than a simple division between a *forum internum* and a *forum externum*. While to some extent still reflecting the reality of private, internal religion and belief on the one hand and 'lived out' expressions of religion or belief on the other, it is not the case that one type of norm (e.g. rules) only apply to the inner sphere, while the outer sphere is the realm of principles. As has been suggested with the example of conscientious objection in the workplace and the norms identified as applicable thereto, rules can apply to aspects of religion or belief which under the traditional construct would have fallen within the *forum externum*. As such, on the basis of the framework presented need, there is not such a pressing need to identify whether a particular aspect – whether an action or omission etc. – falls within the internal or alternatively the external realm. The crucial task is rather to correctly identify

the applicable norm/s. Indeed, the types of norms identified come with some particular strings attached, especially regarding how conflicts between norms are resolved. Moreover, as has been demonstrated, identifying the types of norms involved in a (or an apparent) norm conflict can bring greater analytical clarity to the specific locus of the dispute, and thus also clarify particular distinguishing features between seemingly analogous cases, which might lead to different outcomes.

On the other hand, conceptualizing the freedom of thought, conscience and religion in terms of the types of norms therein might also be considered as lessening somewhat the 'inviolability' of the traditional *forum internum*. If, for the sake of argument, we now consider that what was previously the '*forum internum'* now rather refers to aspects of religion or belief protected under the freedom of thought, conscience and religion by *rules*, then the nature of rules does not necessitate that they are absolute in the sense of being applicable in each and every circumstances. As will be recalled, 'rules admit of exceptions', and rules, categorical though they are, only determine the outcome of a case within their proper spheres of application/validity. In other words that it is a *rule or rules* which apply to what would previously have been considered the *forum internum* does not yet mean that such protection is necessarily *absolute*. In this regard it is worth noting that it is indeed possible that a particular rule has a very (even indefinably) wide sphere of application, such as to be, in effect, 'inviolable'. On the other hand, it is suggested here that at least some aspects of the *forum internum* as traditionally understood are not protected in such an 'inviolable' manner. Even, for example, the right to hold a particular thought or belief is not regarded as so inviolable as to not allow for involuntary treatment of psychiatric disorders. Another example worth noting is the seemingly 'absolute' nature of the freedom to change one's religion or belief. While it is clear that individuals can believe or not believe as they wish, and indeed to change those beliefs, the freedom to change one's religion is not so absolute in all cases. Notably, insofar as organized religion is concerned, an individual's freedom to change his or her religion to a *particular* form of organized religion might be limited by the internal rules of the religion in question. As such, there are at least some exceptions to the freedom to change one's religion to a particular religion, insofar as the internal rules of that religion (under the autonomy of religious organizations) so require.

On these grounds it is suggested that conceptualizing the freedom of thought, conscience and religion on the basis of the types of norms contained there in is a useful theoretical shift to

make. Importantly such a distinction is a qualitative one as to the characteristics of the two types of norms, and is not, as such, a value-judgment on the moral worth of the aspects protected under each. On the other hand, the construct presented here also accords with the interconnectedness and interdependence of all human rights, which may, at times stand in tension. Given this qualitative difference, it can be argued that the 'essence' of the freedom of thought, conscience and religion can be conceptualized as the rules protected therein, as compared to the overarching principle of freedom in matters of religion or belief which may at times stand in tension with other principles, in which case the competing principles must be appropriately balanced. In this sense, the 'essence' of the freedom of thought, conscience and religion can be identified as the *rules* it contains, and can be described as the aspects of the rights which cannot be subject to balancing. Importantly, this does not yet imply that this core of rules cannot be subject to 'limitations', given that exceptions to rules are possible. On the other hand, once a valid exception is identified, what is left of the 'core of rules' is not a *lesser* core, but rather a more accurate understanding of that core, or more specifically, a more accurate delineation of the sphere/s of validity of those rules. It should be noted that given the focus of the present thesis was on the particular question of conscientious objection in the workplace, it is not suggested that the norms identified here amount to a comprehensive account of the normative content of the freedom of thought, conscience and religion. More work, in particular a (more) comprehensive analysis of the entire corpus of Article 9 jurisprudence, would be necessary for such an endeavour. Nevertheless, *that* both rules and principles were identified in the foregoing research is sufficient to make the arguments presented here.

Finally, some wider implications of the arguments presented above can be identified. First, and briefly, the arguments presented in this thesis and particularly in this concluding chapter have implications for the debate on whether fundamental and human rights are appropriately considered rules or principles. Many, including Alexy himself, have been of the view that the latter is the correct conclusion.[69] However, such a finding is often also criticised, given the inherent possibility of balancing principles, which often leads to the disappointing conclusion that human and fundamental rights are 'entirely relative'. However, the argument presented in this thesis suggests that to ask whether fundamental and human rights are rules *or* principles is to ask the wrong question. As has been demonstrated in this chapter, particular human

[69] It will be recalled that Alexy's theory was based on constitutional rights in Germany, and he did not focus on human rights as protected at the international/regional level.

rights provisions can encompass a number of norms, including both rules and principles. While other human rights have not been considered in detail here, it is suggested certainly that insofar as an 'essence' of a right is recognised as that part of a right which is not subject to balancing with other interests, then there is good reason to look for identifiable rules therein. Moreover, even a cursory overview of jurisprudence on other ECHR rights suggests that both rules and principles can be identified under other provisions as well. Now, given this, were one to insist on categorising human rights as *either* rules or principles, then the latter would not be inaccurate, given the generally applicable nature of principles, with specific rules often embedded therein. On the other hand, while denoting human rights as principles would not, in this sense, be inaccurate, neither would it be sufficient. Given the categorical nature in which rules operate within their specific spheres of application, it is often of particular importance to identify the rules which might be applicable to a particular case, even if they are 'embedded' in a surrounding principle.

A slightly different discourse concerns whether there are particular meta-rules or meta-principles applicable to the entire corpus of human rights law. The arguments presented in this thesis are not sufficient to make such claims, but neither is the possibility of certain overriding principles and indeed rules permeating all human rights dismissed herein. However, for present purposes and in the interests of solving particular cases, it is perhaps easier to identify norms – particularly rules – as specifically as possible. Nevertheless the possibility of accurately identifying certain meta-norms is by no means precluded, even if such an endeavour is evidently beyond the scope of the present thesis.

A further implication of the framework of rules and principles, and indeed the discourse on the core/essence of human rights concerns the conceptualization of so-called absolute rights. As alluded to in the discussion above on the inviolability of the 'core' of the freedom of thought, conscience and religion, mere categorization of a norm as a rule does not yet entail that it is 'absolute' in the sense of applying in each and every situation and never allowing for limitations or exceptions. Rather, the applicability of a rule in each and every situation is a function of its unlimited scope of application. However, one of the problems with rules precisely concerns the problem of defining their appropriate spheres of application with the utmost precision, which is not always possible *ex ante*. As such, it is arguable that neither is it possible to determine beforehand that the sphere of application of a particular rule is in fact unlimited. It may be the case that as circumstances and facts develop, a rule which previously

was considered to have an unlimited scope of application, may in fact be questioned. Such a situation may arise, for example, if one such 'absolute' right apparently conflicts with another absolute right. The purpose here is not so much to definitively conceptualize 'absolute' human rights or 'absolute' aspects of particular human rights, but rather to point out that under the present approach, the identification of 'absolute' rights understood as categorically applicable in every conceivable circumstance requires not only a certain type of norm (rule) but also an unlimited scope of application thereof. Thus, while the approach presented in this chapter really only requires that the correct rule be identified as applicable to a particular case of conscientious objection, the identification of 'absolute' rights – either under the freedom of thought, conscience and religion or some other right – requires that in the abstract, a particular rule is determined to be always applicable.

Finally, some remarks can be made with regard to the observation in Chapter 2 concerning the disconnect between the traditional *forum internum/externum* construct and the experience of religious individuals for whom distinguishing between belief and practice can be meaningless. The advantage of the analytical approach under the freedom of thought, conscience and religion as presented in this chapter is that it distances somewhat the legal-normative analysis of the freedom of thought, conscience and religion from any value judgment on particular aspects of a religion. Furthermore, neither is the approach presented here inherently biased towards some forms of religion, such as those with regard to which external manifestations are not central. The focus is rather on identifying the correct applicable norms to a particular set of facts, and proceeding from there. As an additional benefit, the present approach is not based on a theoretical construct with a historical grounding in a particular religion, and is moreover, symbolically provides a more 'neutral' approach and terminology for the court to adopt, much more in accordance with the Court's role as an impartial and neutral arbiter.

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