

ALL OR NOTHING!

THE LEGAL, ETHICAL AND JURISPRUDENTIAL BASIS OF LEGAL RIGHTS TO CONSCIENTIOUS OBJECTION OF VOLUNTARILY EMPLOYED PROFESSIONALS

Based on but going beyond:

Munthe, C & Nielsen, MJE (2016). The Legal Ethical Backbone of Conscientious Refusal.
Cambridge Quarterly of Health Care Ethics, accepted and in press.



Background

- Recent tendencies in jurisdictions with no legal rights to CO
 - Sweden: "pro life" midwives suing county governments for right to CO to (legal) abortion practices at public hospitals (moving towards the ECHR)
 - Sweden: Sw. Medical Association general council accepts motion re legal right of doctors to refuse referrals to "alternative" clinics (June 2016!)
 - General perception of health care professional community that legalised assisted dying (PAS, euthanasia) will require strong CO right
- Recent pushes to abolish or weaken CO in jurisdictions with such rights
 - Italy: Minerva F. Conscientious Objection in Italy. *Journal of Medical Ethics* 2015 41,2 170-173
 - UK: Savulescu J. Conscientious Objection in Medicine. *British Medical Journal*, 2006 332 (7536): 294–297
 - UK/Commonwealth/US: Montgomery, J. Conscientious Objection: Personal and Professional Ethics in the Public Square. *Medical Law Review* 2015 3 (2): 200-220



Definitions and distinctions 1

- Legal right to CO =
 - **Employees protected by law** to have employers accommodate to their requests regarding the content and organisation of work based on moral opinions of the employee without facing any sort of penalty or dismissal.
 - **Employers legally obligated** to accommodate to employee requests regarding the content and organization of work based on a moral opinion of the employee.
- Voluntary employment (standard labour law):
 - Employees may enter and resign employment as they prefer
 - Employers may optionally accommodate to employee requests within legal boundaries
 - Employers may otherwise decide the content and organisation of work within legal boundaries
 - **No ground for legal right to CO, as employee freedoms and employer accommodations are optional and legally valid independently of the presence/non-presence of employee moral opinions**
- Legal and civic duty to abide by the law
 - Provides room for employees to object to illegal employer instructions
 - No legal right, as rights are optionally exercised
 - **The CO issue thus regards legal employer instructions that the employee holds moral opinions in relation to**



Definitions and distinctions 2

- Legal right = right defined in actual legal statute
- The claim for legal rights to CO = claim to have exemptions from standard labour law to be inserted into/kept in actual legal statute
- Moral rights/reasons vs. legal rights
 - MR re action X
 - MR re regulation under which X-type actions
 - MR for the act of CO relative to action X (employee)
 - MR for the act of granting CO relative to action X (employer)
 - **All of these may exist without any (justified) legal right to CO relative to action X**
- Moral *rights/reasons* vs. Moral *convictions/beliefs* re. MR
 - CO rights regard the latter
- CO vs. (justified) Civil disobedience → **formally incompatible!**

What reasons may support a legal right to CO?

- Substantial reasons regarding the function of CO (necessary reasons)

Weinstock D. Conscientious Refusal and Health Professionals: Does Religion Make a Difference? *Bioethics* 2014 28 (1): 8-15

- Common good (societal cohesion, legitimacy, etc.)
 - Promote quality of the workplace, and service
 - Protection of individual liberty (n.a. to voluntary employment)
 - Protection of social/cultural identities
 - **All within the constraint of not undermining the function of the workplace, quality of service, or the common good / general societal function**
- Formal ethical constraints re. the quality of all legal statutes (necessary reasons)
 - Rule of law: Right uniformly and equally applicable to all legal subjects
 - Impartiality/equal treatment: Right defined as widely as the substantial reason supporting it allow
 - Non-discrimination: Qualifications and clauses within the right do not undermine impartiality/equal treatment, or otherwise imply unjustified exclusion of some legal subjects
 - Legal security: Practically possible to reliably apply the statute defining the right
- **Together these two types may produce a sufficient reason for a legal right to CO, but not alone**



Worry no. 1: Legal security

- One part of LS is uniform predictability in the application of a statute
- Implies sufficiently reliable methods to corroborate when and when not the conditions of the statute are met/not met by an action
- The right to CO includes the condition of the presence of *an objection based on a moral opinion*, rather than other grounds
- Clear definitions of "based on a moral opinion" (or equivalent notions) usually absent
- Even imagining such a definition, no reliable method to distinguish which objections are truly conscientious and which are not
- **Application of statute can be expected to be arbitrary, depending mostly on employees ability of finding phrasings that happen to meet with approval of a judge as expressing a *conscience* rather than something else (such as a mere preference)**



Worry no. 2: Selective CO rights

- Applies to statutes giving legal right to CO restricted only to certain
 - Professions
 - Professional tasks
 - Types of moral systems / teachings
 - Types of opinions
- Such statutes probably either
 - Do not apply equally to all citizens (violate rule of law), or
 - Apply the right less widely than what reasons supporting it allow (violate impartiality/equality), or
 - Contain clauses undermining impartiality/equality or otherwise unjustifiably excluding some legal subjects (violate non-discrimination)
- Attempts at providing independent reasons to justify selections are usually arbitrary, much more widely applicable, or based on the assumption that certain groups or types of convictions should be legally privileged over others. This regards, e.g.,
 - Claims regarding special impact on quality and/or length of life of patients/clients/customers
 - Claims regarding importance for common good or quality of workplace or service
 - Claims regarding importance for cultural or social identity



Result of worries 1+2

- Default assumption is that legal rights to CO can be justified only if they apply to all ...
 - Professions
 - Professional tasks
 - Types of moral systems / teachings
 - Types of opinions
 - Any more restricted version must be justified by special reasons capable of justifying exclusion from legal privilege regarding (highly unlikely to be forthcoming).
 - Special impact on quality and/or length of life of patients/clients/customers
 - Special importance for common good or quality of workplace or service
 - Special importance for cultural or social identity
- Abolishment of standard labour law assumptions, the new default rule being that employees are to receive employment and perform work tasks as they please according to personal discretion.**



Conclusion: all or nothing!

- Ethically acceptable legal rights to CO must conform to standards of rule of law, impartiality/equality, non-discrimination and legal security
 - Highly unlikely that this can be accomplished by any other legal right than one of employees to receive employment and perform work tasks as they please
 - More restricted rights to CO are thus highly likely to undermine rule of law and equality before the law, be legally insecure, and be unjustifiably discriminatory
 - But such a legal right is at the same time very likely to seriously threaten the function of the workplace, quality of service, and/or the common good / general function of society as a whole
- So ...

... probably nothing!