

The Conscientious Objection of Physicians (Gynecologists) and the Value System

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ABSTRACT

Conscience is a complex category of the human mind and characteristic only of a rational human being. Deliberations on conscience are frequently connected to the issue of a clash between one's own conscience and laws in force that makes provisions for a certain type of behavior. The question of conscience and conscientious objection appear not only as medical but also as an ethical and legal issue. Conscience is a category that knows no exceptions, although it may be displayed in various segments differently. A legal point of view knows two legal theories dealing with the relation between law and conscience—the natural law theory and the positivist law theory supported by legalism. This article shows how dangerous it was and still is to appreciate so called collective consciousness, excluding conscientious objection. Freedom of conscience is guaranteed by different international documents, and the right to appeal to one's own conscience is regulated by European documents. The European Court of Human Rights (ECHR) has passed different judgements on conscientious objections, including the issue of medical procedures, healthcare practitioners, pharmaceuticals, life-sustaining treatment of patients etc. On European soil, there are yet different, although non-binding, resolutions (enacted by the European Parliament (EP) and Council of Europe) that some of them explicitly recognize the right to conscientious objection and some "push" the right to abortion as a human right.

When it comes to the problem of abortion and conscientious objection, according to the ECHR, the solution should be found in the so-called reasonable adjustment that could resolve the possible conflict of interest between the patient (embodied in his rights to autonomy, identity, own opinion, privacy or his wishes) and physicians (gynecologists) within the legal state obligation to provide medical service. The legal position of gynecologists means that they may claim conscientious objection without stating the reasons for any discrimination with respect to their labor rights. It should be taken into account that gynecologists are very much invited to claim conscientious objection if they feel it is their inner drive because they decide to help in creating life and maintaining pregnancy.

The right to conscientious objection is the exercise of freedom of conscience, which is a human right emanating from democratic processes that should be the aim of modern society and legal order.

Keywords: Conscience, Conscientious objection, Law, Gynecologist.

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There is something in me that haunts me;

I do not know what it is and where I got it from, but it does not let me sleep.

Meša Selimović, Death and the Dervish

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RELATION BETWEEN CONSCIENCE, LAW, AND VALUE SYSTEM

Conscience is like the truth—we know it exists, there is just one, and it is indivisible, but we cannot personify it or materialize it. Indeed, conscience stems from the truth and speaks to us in our inner self about what is good and what is bad, what should be done, and what should be refrained from.¹ Conscience is a complex category of the human mind in a permanently interactive relation to the will.² Conscience is a reflection of being; it is immanent in every human being and characteristic only of a rational human being.³ The question is only whether man recognizes it, hears it, complies with it, or ignores it and denies its existence. Conscience is part of every rational being, every being that is conscious. Interestingly enough, in Croatian as well as in English, there is a similarity between the words "savjest" (conscience) and "svijest" (consciousness). Etymologically, the word "savjest" (conscience) is defined as an act of reason performed by a conscious human being.

Deliberations on conscience are frequently, especially today, connected to the issue of a clash between one's own conscience and laws in force that makes provisions for a certain type of behavior. Therefore, this is an ethical and legal issue. In a more refined sense, this clash arises from the inability to affirm one's own dignity by being deprived of conscience as part of the personality and the right to one's autonomy, identity and privacy. If these important determinants of the personality of every human being do not go hand in hand with conscience, they result in a loss of self-confidence, integrity and authenticity.

Although the invocation of one's own conscience is closely related to religious convictions, it does not necessarily need to be so. Both religious and non-religious persons have a conscience. Morality and ethics surpass all

rules created by humans, and those who do not think in terms beyond "the tangible" still have judgements in line with their own conscience. The conscience must be integral, and behavior in accordance with it coherent and separated from public and private actions. With regard to conscience, there is a distinction between the so-called forum internum as an internal process of creation and adherence to some conviction, which belongs to the very being of a person, and forum externum as a form of external expression of one's conviction and its formation through a person's conduct and action. Conscience rests on a conviction about something that has a degree of certainty and is deeper and stronger than belief. Since conscience cannot be influenced from the outside, possible restrictions may affect only its expression. Conscience is a category that knows no exceptions, although it may be displayed in various segments differently. We may have one view on one type of behavior and issue (e.g., we oppose engagement in war operations at all times, rather than oppose it in one war and not in another), and we may have a different view based on conscience on another issue (e.g., we advocate the right to abortion). Often, our views are uniform, carved out of the same substratum of values. Consequently, our conscience, as a rule, will have the same judgement on topics that are closely related—as a rule, abortion as a right will be opposed by those who also oppose euthanasia. When it comes to the issues of freedom of conscience and conscientious objection, the crucial determinant is the invocation of ethics, morality and/or religious beliefs, not of political reasons or a general understanding of equity.⁴ Truth be told - our time is so saturated with conflicts of world views that issues of conscience and conscientious objections share the sphere of a political struggle. Discussions on conscience, its meaning and reach were led as early as ancient times⁵, followed by

¹ John Paul II once stated: "Conscience manifests itself as an inner light, which pops up in our conscience on certain occasions. In this light, we discern the moral quality of a certain act with greater or smaller clarity, i.e., we become aware that the act we are about to commit is good or evil, however not through conclusion, but through directness and intuitiveness," In *Veritatis Splendor*, 1998, 64 John Paul II wrote: "... freedom of conscience is never freedom "from" the truth but always and only freedom "in" the truth," https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor.html. (accessed on: 26. 9. 2022).

²Cf. Markeljević J., *Savjest i priziv savjesti (Conscience and Conscientious Objection)*, lecture delivered in 2015 in the Croatian Catholic Medical Society in Zagreb; <https://www.hkld.hr/11-vijesti/129-cjelovito-predavanje-prof-markeljevic-savjest-i-priziv-savjesti>. (accessed on 15. 7. 2022).

³This statement derives from Article 1 of the Universal Declaration of Human Rights, specifying: "All human beings are endowed with reason and conscience...."

⁴In this case, this would be civil resistance and civil disobedience; cf. Mujović-Zornić H., *Promene u shvatanju klauzule savesti kod pružanja zdravstvenih usluga (Changes in the Understanding of the Conscience Clause during Provision of Healthcare Services)*, quoted from Čizmić J., *Pravo zdravstvenih radnika na „priziv savjesti“ (The Right of Medical Professionals to 'Conscientious Objection')*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 37, 2016, 753-786.

⁵The concept of *synteresis* (συντήρησις) derives from the Greek word *συντήρηω* (I watch) and *συνεῖδον* (I understood together). Its other names are pre-conscience, spark and the light of conscience. Aristotle's concept of *φρόνησις* contains different interpretations of conscience, where the act of conscience differs from the act of prudence. In Aristotle's work, we will not find an explicit analysis of the judgement of conscience; nevertheless, one can say that he noticed the phenomenon of conscience

the middle ages^{6,7} often in connection with the respect for or rejection of laws in force.^{8,9} They remain of interest to philosophers and theologians¹⁰ to this day.

The origins of the issue of freedom of conscience can be found in the French Declaration of the Rights of Man and of the Citizen (1789), which reads—"No one may be

in his analysis of immoderateness and lack of self-control (*ἀκρασία*); Tićac I., Gušić A., *Uloga savjesti u etičkom prosuđivanju (The Role of Conscience in Ethical Judgement)*, Acta Iadertina, 2007, 4, 3-11. The role of conscience in ethical judgement and action, as formulated by Aristotle, refers to the natural or innate ability of the mind to understand the fundamental principles of practical or moral order; cf. <https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/synderesis>. Sophocles' play *Antigone* offers literary deliberations on the relationship between conscience and law. In Act III, Antigone points to eternal laws that are in opposition to human ones, wishing to bury her brother Polynices' dead body against Creon's command forbidding it.

"Yes, for these laws were not ordained by Zeus,
And she who sits enthroned with gods below;
Justice, enacted not these human laws.
Nor did I deem that you, a mortal man
Could by a breath annul and override
The immutable unwritten laws of Heaven.
They were not born to-day nor yesterday;
They die not; and none knows whence they
sprang."

(The F. Storr 1912 translation for the Loeb Classical Library, accessed on 7. 9. 2022 <https://sites.ualberta.ca/~egarvin/assets/sophocles-antigone.pdf>)

In Latin, the term is *conscientia* meaning co-knowledge. Conscience was understood in a double meaning: as consciousness and conscience. The term *conscientia* was used by Lucius Annaeus Seneca the Younger, who writes in one of his epistles in *Epistulae morales ad Lucilium*: "...there resides within us a divine spirit, which guards us and watches us in the evil and the good we do."

(accessed on 7. 9. 2022: https://hillelettersfromstoic.files.wordpress.com/2014/10/letters-from-a-stoic_lucius-annaeus-seneca.pdf). Cicero also refers to remorse, pangs of conscience (*morderi conscientia*).

In Hebrew works, conscience is the source of moral life, and therefore, in the Old Testament, Tob. 4:15, we find: "And what you hate, do not do to anyone." The Indian Mahabharata epic also refers to it (cf.: https://www.ivantic.info/Ostale_knjige/Mahabharata.pdf, p. 42ff., edited by M. Ježić; accessed on 15. 7. 2022).

⁶Discussion on conscience featured most prominently in the works of scholastic philosophers. They spoke of an innate ability to distinguish good from evil and the application of that knowledge to concrete actions. Medieval thinkers distinguished this general knowledge about moral values from conscience (*conscientia*) itself; cf. *ibid.* Tićac I., Gušić A., *op. cit.* in note 5, p. 4.

⁷Thomas Aquinas was the first to discuss conscience in his work *Questiones Disputatae de Veritate* (q.16 a.1) calling it pre-conscience *i.e.* innate ability of the human mind to know the fundamental moral principles; cf. <https://isidore.co/aquinas/english/QDdeVer16.htm> (accessed on 15. 7. 2022).

⁸On the relation between human law and conscience, Thomas Aquinas wrote: "Human law does not bind man in conscience..." because "human laws often bring loss of character and injury to man," *i.e.* human laws can be just or unjust; cf. Thomas Aquinas, *Summa theologica*, q. 96 Of the Power of Human Law. Whether it binds a man in conscience? (<https://knowitalltoknownothing.com/2021/03/14/st-thomas-aquinas-summa-theologica-part-2a-q-96-of-the-power-of-human-law/> accessed on 8. 9. 2022) St. Augustine of Hippo in his work *On Free Choice of the Will* analyses the relation between good and evil, and justice of law.

⁹Discussions on conscience continued through ensuing centuries; in the works of Lock and Durkheim, conscience is understood as a product of upbringing and society; M. Heidegger sees conscience as a conscious relation towards one's own existence by means of which we move away from the inauthentic, impersonal way of existence. For J. J. Rousseau, acts of conscience are not judgements, but emotions, while conscience itself is divine instinct; cf. Tićac I., Gušić A., *op. cit.* in note 4, p. 4-5.

¹⁰*Catechism of the Catholic Church* dedicates an entire chapter (Art. 6) to moral conscience and defines it as: "1778 Conscience is a judgment of reason whereby the human person recognizes the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. In all he says and does, man is obliged to follow faithfully what he knows to be just and right. It is by the judgment of his conscience that man perceives and recognizes the prescriptions of the divine law: Conscience is a law of the mind; yet [Christians] would not grant that it is nothing more; I mean that it was not a dictate, nor conveyed the notion of responsibility, of duty, of a threat and a promise.... [...] [Conscience] is a messenger of him, who, both in nature and in grace, speaks to us behind a veil, and teaches and rules us by his representatives. Conscience is the aboriginal Vicar of Christ." (https://www.vatican.va/archive/ENG0015/___P5Z.HTM, accessed on 8. 9. 2022).



disturbed on account of his opinions.”¹¹ On the basis of legal deliberations, there are two views on the relation between law and conscience—the natural law theory accepts the value of law only if it is derived from natural law, and consequently law is good only if it is aligned with morality; the positivist view of this relation gives precedence to the law-making procedure, and if it has been complied with, then the law is good.¹² We believe that the positivist view in recent times stating that the law should “satisfy justice, impartiality and the rule of law”¹³ is not acceptable since the adoption of a law and its content depend on the political will of the legislator, rather than general morality that nobody should deny. Advocates of legalism believe that the law is alpha and omega. Consequently, the law is an expression of collective consciousness, which prevails over individual conscience to the benefit of the so-called social conscience. The latter, however, regrettably resides in the foundations of all totalitarianism and the crushing of free will. Invoking one’s own conscience is part of the moral, categorical imperative¹⁴ and is not an action *contra legem*, but *exceptio legis*. For the sake of the rule of law and legal certainty, which also includes the protection (of the honest) third, their rights and freedoms, it is advisable to legalize conscientious objection and describe the conditions for its occurrence.¹⁵ On the battlefield of advocates and opponents of the right to conscientious objection, one should recall the fundamental starting point—the right to conscientious objection emanates from democratic processes, symbiotically linked to ethics; failing to notice conscientious objection, denying it or failing to recognize it clears the way for arbitrariness and tyranny.

In its legislative expression, the modern and postmodern age links the issues of conscience to the right to freedom of conscience. For some, this very contentious issue received its unambiguous and indisputable expression in the Nuremberg trials after Nazi crimes because protagonists subjected themselves to human racial laws separating morality from law instead of listening to the voice of their own conscience.¹⁶ After the Second World War, European communist regimes supported action and conduct in line not with one’s own conscience but rather with the official state policy. Some legal cases in this regard found their epilogues before the ECHR in Strasbourg.¹⁷

Conscience appears as a legal term in various international documents, most frequently as the right to freedom of conscience and part of the libertarian triad—conscience, opinion, and religion.

Freedom of conscience is guaranteed by Article 18 of the Universal Declaration of Human Rights (1948), Article 18 of the International Covenant on Civil and Political Rights (1966), Article 9 pt. 2 of the Convention of the Council of Europe for the Protection of Human Rights and Fundamental Freedoms (1950). Although relatively old documents, all of them speak of freedom of conscience, not specifying how this freedom is exercised or what conscience is and what it implies. A newer European document—the Charter of Fundamental Rights of the European Union (EU) (2010)¹⁸ goes a step further and speaks of the right to conscientious objection (Article 10); this right - the right to appeal to one’s own conscience (in failing to act in a certain, established or prescribed manner) arises from the freedom of conscience. Every freedom makes sense when it becomes effective in action. As a rule, freedom

¹¹<https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen>, accessed on 8. 9. 2022.

¹²Among many positivists, English jurist John Austen distinguishes law from morality and defines law as a type of order, stating: “The existence of law is one thing, its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law though we happen to dislike it.” Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/legal-positivism/> (accessed on 5. 7. 2022).

¹³Thus Ronald Dworkin.

¹⁴Categorical imperative is the ethical requirement to do something because it has moral justification in itself, and through it universal meaning; cf. <https://www.enciklopedija.hr/natuknica.aspx?id=30862> (accessed on 14. 7. 2022). Immanuel Kant formulated and identified categorical imperative as the highest moral principle; moral action is based on self-control because every human being already has *a priori* law commanding us how to behave.

¹⁵Also Čizmić J., *op. cit.* in note 4, p. 757. The concept “objection” (in English as well in French), “l’obiezione” (Italian), “Wehrdienstverweigerung” (German), is a legal term that implies an appeal, a referring to, an exception, a complaint - to do or not to do something because of one’s own conscience.

¹⁶Hitler forbade acts in line with one’s own conscience with the aim of “liberating man from the degrading chimera called conscience or morality”; cf. Hermann Rauschning, taken over from Puppinc G., *Conscientious Objection and Human Rights: A Systematic Analysis*, Brill Research Perspectives in Law and Religion, 1, 2017, 1, p. 9.

¹⁷For example, the judgement in the case *K.-H. W. vs. Germany* (application 37201/97 when an East German soldier shot at unarmed defectors).

¹⁸2010/C 83/02.

of conscience is an unlimited,¹⁹ absolute human right, and the crucial moment of having a conscience is when it comes out of one's inner self when it is expressed, therefore an active relation encompassing the possibility of conscientious objection and finally restriction of the right to express one's conscience. To have a conscience and the right to freedom of conscience are senseless if one cannot act in accordance with one's own conscience, including the possibility of claiming conscientious objection.

Freedom of conscience always appears as part of the trefoil of freedoms—conscience, religion, and thought, and all three share the following two elements—(1) their existence in an individual is testified only through their fulfilment, exercise and expression and (2) they are embodied as the right to freedom (of conscience, religion and thought). *Aliter dicitur*, all three make sense only if they made a transition from "existence/having" into their clear manifestation. Freedom of conscience is very often, especially if we invoke it, in close connection with the right to freedom of religion, which the theory of human rights considers to be one of the rare absolute rights (next to the right to life and right to protection from torture, inhuman and degrading treatment, and prohibition of slavery). If we invoke our religious beliefs and claim conscientious objection, then we should truly be "free."

Two alternatives overlap conscience—the first is to appeal to conscience, and the second is to deny conscience. To have freedom of conscience, religion, thought and

opinion without the possibility of appealing to them is a mere declaration and an embellishment of democracy and human rights. The issue that seems very pertinent today is the one on the conscientious objection of physicians, especially gynecologists.

Over time, there have been ever more discussions on conscientious objection in legal theory. European jurisprudence refers to the judgements of the ECHR (hereinafter—ECHR). In several of its judgements, the Court established an (admittedly not exhaustive) list of cases allowing a person to be excluded from the proceedings based on conscientious objection. Invoking one's conscience as grounds for exempting oneself from the obligation to act in a certain way becomes the object of judicial interest and intervention when individual convictions collide with the law and demands of one's superiors.

The beginnings of the right to conscientious objection were linked to the refusal of military service or the use of arms.²⁰ In recent times, the focus has shifted to the issue of medical procedures²¹ and healthcare practitioners (physicians, nurses, midwives, technicians, and service personnel), pharmaceuticals (the issue of selling contraceptives²² and the use of aborted fetuses),²³ life-sustaining treatment of patients in total dependence,²⁴ and the performance of same-sex marriages.²⁵ The ECHR decisions pertained to the clash between individual convictions and the law or demands of

¹⁹For example, the Constitution of the Republic of Croatia (1990) refers to the unlimited right to freedom of conscience in Art. 17 Para. 2: "Even in cases of clear and present danger to the existence of the state, no restrictions may be imposed upon the provisions of this Constitution stipulating the right to life, prohibition of torture, cruel or unusual treatment or punishment, and concerning the legal definitions of criminal offences and punishment, and the freedom of thought, conscience and religion." (source: The Constitution of the Republic of Croatia (consolidated text) | Croatian Parliament (sabor.hr) accessed on 8. 9. 2022). For the limitation of the right to conscientious objection in cases of protection of the woman's life and health during abortion *cf. infra*.

²⁰The *Bayatyan vs. Armenia* case and judgement (2011, application no. 23459/03). Comments and decisions of the UN Human Rights Committee appeared in relation to Art. 18 of the International Covenant on Civil and Political Rights for the first time in 1991 (*J. P. vs. Canada* case), and then in 1993 (general comment no. 22) when it is stated that the right to conscientious objection is derived from Art. 18. In 2006, the Committee formally recognized the right to conscientious objection with respect to military service.

²¹In addition to abortion and medically assisted reproduction, conscientious objection also applies to denying participation in scientific research, diagnostic and therapeutic procedures and interventions, prescription of contraceptives, family planning services, sterilization, cloning, experimenting with fetuses, euthanasia, palliative care, autopsy, organ transplantation, blood transfusion, medical experiments and stem cell research, turning off life-sustaining equipment of a patient, etc.

²²In *Pichon and Sajous vs. France* (application no. 49853/99, 2001), the ECHR enacted a decision forcing pharmacists to sell abortion pills, by invoking positivism (i.e., because the sales of the pills are legal, and therefore "a pharmacist can express his religious conviction outside his professional sphere"). The decision was harshly criticized since it gives precedence to a common right over fundamental freedoms.

²³The *Oliver Brüstle vs. Greenpeace eV C-34/10* case and judgement (dated 18th October 2011, before the Court of Justice of the European Union in Luxembourg, point 35 of the judgement forbids patenting inventions related to the use of embryos for industrial and commercial purposes since their commercial exploitation would be against *ordre public* (public policy) or morality.

²⁴The ECHR case *Lambert and Others vs. France* (application no. 46043/14).

²⁵*Eweida and Others vs. United Kingdom* (application nos. 48420/10, 59842/10, 51671/10 and 36516/10).

superiors. Their quintessence definitely reflects some new European quasi-values.²⁶

In disentangling Ariadne's thread of the right to conscientious objection, we consider it dangerous that the ECHR called itself "Europe's conscience"²⁷ in one of its judgements, endowing itself with divine virtues, forgetting that it is very much subject to influences and human weaknesses. The Court has passed varied and inconsistent judgements with respect to the right to conscientious objection and has been inclined to recognize this right in cases that are a reflection of liberal standpoints.²⁸

Conscientious objection is most frequently discussed in relation to the religious convictions of the objector, which would be a personal reason, but apart from it, the psychological impact of conscience is also mentioned in the sense of knowing oneself and the world around oneself in a spiritual way.²⁹

PHYSICIANS AND GYNECOLOGISTS IN LIGHT OF CONSCIENTIOUS OBJECTION

Theory differentiates between the so-called negative and positive claims of conscience.³⁰ In the former case, there is a deviation from the legally prescribed procedure; in the latter, conscience requires certain action (towards a patient), and although it is beyond regulations, it is *contra legem*. In the case of a positive claim of conscience - the best example of this would be killing a patient who is in great pain against rules that either do not allow or forbid euthanasia, a question should be answered as to what kind of behavior is above the right to life of another human being?

While providing healthcare, sometimes there may be a conflict of interest between patients and physicians. One should consider that both have their rights and duties; on the patient's side, there is the right to give up treatment (this

is the reason why informed medical consent exists), and on the physician's side, there is his duty to treat a patient within the framework of modern medical knowledge. The fact that a physician may decline to perform a certain procedure if he believes that it is not for the patient's well-being or that it is contrary to the rules of professional conduct shows that the physician's conscience is above the patient's desires.³¹

In order to accommodate the conscientious objection of a physician, his objection should be authentic.³² Authenticity means steadiness in the reasons for the objection, emergence of negative emotions in case of coercion to a certain type of behavior, clarity of the situation of the objector and originality with regard to possible stigmatization, pressure, etc.³³

A gynecologist's conscientious objection serves "for the self-protection of the physician from actions that would burden their conscience and jeopardize their moral integrity"³⁴ placing this right above their professional duties (in the case of the so-called abortion on request that is covered by statutory regulation), above the right of the patient to autonomy, identity, own opinion, desires, privacy and the right to a medical service.³⁵ Although they are the ones most exposed to criticism, we believe that gynecologists, whether they claim conscientious objection or not, act according to their conscience, just like the woman who decides to have an abortion uses her freedom of choice. She will judge whether her decision was the right one in accordance with her conscience.

EUROPEAN RESOLUTIONS IN RELATION TO CONSCIENTIOUS OBJECTION

As mentioned earlier, there have been major debates recently on the conscientious objection of physicians to abortion. Abortion itself is not only a medically risky procedure but also a very delicate question that seeks answers in medicine,

²⁶For the tendencies moving away from the European values that existed at the time of adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms by the ECHR, and for the creation of some kind of new social values cf. Hrabar D. *Posredni utjecaj Vijeća Europe na Europsku uniju u svjetlu obiteljskopравnih vrijednosti (The Indirect Influence of the Council of Europe on the European Union in Light of Values of Family Law)*, Godišnjak Akademije pravnih znanosti Hrvatske, 2019, X, 1, 133-162.

²⁷In the joint partly dissenting opinion of Judges Hajiyeв, Šikuta, Tsotsoria, De Gaetano and Gričco in the case *Lambert and Others vs. France*, 2015, Para. 11.

²⁸Due to the expansion of social relations, it cannot be ruled out that the issue of conscientious objection will arise in other cases as well, such as the refusal of a journalist to write an article contrary to his conscience, Sunday work, experiments on animals, etc.

²⁹Čizmić J. *op. cit.* in note 4, p. 765 refers to technical reasons as well as personal medical incapacity. We would not agree with this since it is questionable whether a person would still claim conscientious objection if such reasons ceased to apply.

³⁰Čizmić J., *op. cit.* in note 4, p. 765.

³¹For example, to perform an aesthetic operation or prescribe contraceptives to a woman who is an acute oncology patient.

³²Thus Čizmić J., *op. cit.* in note 4, p. 769.

³³*Ibid.*

³⁴*Ibid.*, p. 775.

³⁵The right to abortion on request does not constitute provision of healthcare, but rather a medical service, since it is not about a disease.

ethics, philosophy and law. It is clear from the European parliamentary perspective and the latest decision of the US Supreme Court that the situation in this area is becoming a hot issue.³⁶ Polarization of, we can say, all of humanity in the postmodern age³⁷ is visible in the area of rights such as family, marriage, protection of unborn life/right to abortion and similar. The role of the physician in general, and the gynecologist in particular, and situations related to appeals to conscience prohibiting them from performing abortions should be considered in that sense.

The EP Resolutions are a non-binding act. Nevertheless, they speak of some values and starting points in the EU as well as the Council of Europe, possibly even prospects, including in the case of conscientious objection. The resolution does not deny the right to conscientious objection, probably because the Charter of Fundamental Rights of the EU, which is a binding European document, explicitly recognizes the right to conscientious objection.³⁸ In doing so, the charter does not, however, specify to what matters a possible conscientious objection could refer, who can claim

it and possibly who must not claim it. Therefore, freedom of conscience and the right to conscientious objection imply every matter. To a large extent, conscientious objection refers to opposing behavior that gives rise to ethical and moral doubts based on values, even ideology. As such, this issue is a confirmation that a person has their own value system by which they live. The only thing that the charter requires is that national regulations (laws) govern and prescribe conscientious objection.³⁹

With reference to physicians, it should be noted that the Declaration of Geneva⁴⁰ by the World Medical Association, 1948, while streamlining the Hippocratic Oath, obliges the physician to respect human life without exception.

The right to conscientious objection in legal healthcare at the level of the Parliamentary Assembly of the Council of Europe is governed by Resolution 1763 (2010).⁴¹ Resolutions are indicators of the prevailing view and a reflection of general views of the EP and values promoted by the EU as well as the Council of Europe. It is important to note that they should not go *contra legem*, that is, against binding

³⁶<https://www.nationalreview.com/news/supreme-court-strikes-down-roe-v-wade-upholds-mississippi-abortion-law/> (accessed on 13. 7. 2022).

³⁷On the influence of the postmodern age cf. Hrabar D., *Postmoderno doba kao predvorje negacije dječjih prava (The Postmodern Age as a Prelude to Denial of Children's Rights)*, Zbornik radova Pravnog fakulteta u Splitu, 57, 2020, 3, 657-688.

³⁸Art. 10 Para. 2 states: "The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right."

³⁹In Croatia's legal system, the right to conscientious objection is governed by the following regulations: Art. 20 The Physician's Practice Act (NN 121/03 and 117/08), Art. 3 Para. 4 The Nursing Practice Act (NN 121/03, 117/08, 57/11), Art. 26 Para. 1 The Dental Medicine Act (NN 121/03, 117/08, 120/09), Art. 44 The Medically Assisted Reproduction Act (NN 86/12), Art. 2 Pt. 20 The Midwives' Code of Ethics.

⁴⁰It has been supplemented on several occasions: at the 22th World Medical Assembly in Sydney, Australia, in August 1968; at the 35th World Medical Assembly in Venice, Italy, in October 1983; at the 46th General Assembly of the World Medical Association in Stockholm, Sweden, in September 1994; editorially revised at the 170th Council session of the World Medical Association in Divonne-les-Bains, France, in May 2005; at the 173rd Council session of the World Medical Association in Divonne-les-Bains, France, in May 2006; and supplemented at the 68th General Assembly of the World Medical Association in Chicago, USA, in October 2017.

⁴¹*No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, 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 fetus or embryo, for any reason.*

The Parliamentary Assembly emphasizes the need to affirm the right of conscientious objection together with the responsibility of the state to ensure that patients are able to access lawful medical care in a timely manner. The Assembly is concerned that the unregulated use of conscientious objection may disproportionately affect women, notably those with low incomes or living in rural areas.

In the vast majority of Council of Europe member states, the practice of conscientious objection is adequately regulated. There is a comprehensive and clear legal and policy framework governing the practice of conscientious objection by healthcare providers ensuring that the interests and rights of individuals seeking legal medical services are respected, protected and fulfilled.

In view of member states' obligation to ensure access to lawful medical care and to protect the right to health, as well as the obligation to ensure respect for the right of freedom of thought, conscience and religion of healthcare providers, the Assembly invites Council of Europe member states to develop comprehensive and clear regulations that define and regulate conscientious objection with regard to health and medical services, and which:

1. Guarantee the right to conscientious objection in relation to participation in the medical procedure in question;
2. Ensure that patients are informed of any conscientious objection in a timely manner and referred to another healthcare provider;
3. Ensure that patients receive appropriate treatment, in particular in cases of emergency."

European treaties.⁴² Briefly, this Resolution recognizes the right to conscientious objection on the one hand and the responsibility of the state to ensure patients' access to healthcare regulated by law on the other. With regard to conscientious objection, the Resolution excludes negative acts (coercion, responsibility or discrimination) against a person, hospital or institution refusing to perform or assist in abortion, euthanasia or any other act that could cause the death of a human fetus or embryo. In accordance with the Resolution, the right to conscientious objection should be legally governed because otherwise, this may give rise to discrimination and anarchy and harm patients in the long run.

The EP Resolution of 24th June 2021 on the Situation of Sexual and Reproductive Health and Rights in the EU, in the Frame of Women's Health [2020/2215 (INI)], does not deny the right to conscientious objection. However, it calls it into question when it comes to the provision of healthcare services and the right of patients to full access to healthcare and services. The issue is whether abortion is the use of healthcare since it is not a disease.⁴³

The EP has recently adopted two resolutions supporting the right to abortion—Resolution of 9th June 2022 on global threats to abortion rights—the possible overturning of abortion rights in the United States of America by the Supreme Court [2022/2665(RSP)], and resolution of

7th July 2022 on the US Supreme Court decision to overturn abortion rights in the United States of America and the need to safeguard abortion rights and women's health in the EU [2022/2742(RSP)].⁴⁴ Although they do not refer to conscientious objection, unreserved and unlimited support of abortion and "pushing" it in the domain of human rights is in direct collision with the right to conscientious objection.

Rounding off these "revolutionary" views on the conscientious objection of gynecologists (and other medical practitioners),⁴⁵ because most frequently it refers to their refusal to participate in carrying out an abortion, we could conclude the following—conscientious objection is a right of limited scope since it is subjected to precisely determined limitations, one of the most important being the woman's right to life and health, and therefore it should be allowed only for abortion on request, and not when it serves to save the pregnant woman's life and health. This would be in line with the Hippocratic oath/the Declaration of Geneva; if the state legally regulates abortion, then it must ensure that it is performed, even if the whole institution would reject to participate in it. This will then mean employment (even if based on a special contract) of the physician who wants to perform it⁴⁶; neither those who claim conscientious objection nor those who do not must be discriminated against on those grounds. Equally so, the conscientious objection must be

⁴²Such as the Treaty on the European Union and the Treaty on the Functioning of the European Union; cf. *Official Journal of the European Union* C 326, 26.10.2012 Art. 1, Para. 3 of the Treaty on the European Union reads: "The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value." The Lisbon Treaty was later supplemented by the Charter of Fundamental Rights of the European Union (2010) proclaimed by the EP, the Council and the Commission, which is based on "common values (...) Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice." (From the Preamble)

⁴³The Resolution stipulates: "... 36. Recognizes that for personal reasons, individual medical practitioners may invoke a conscience clause; stresses, however, that an individual's conscience clause may not interfere with a patient's right to full access to healthcare and services; calls on the Member States and healthcare providers to take such circumstances into account in their geographical provision of healthcare services; 37. Regrets that sometimes common practice in Member States allows for medical practitioners, and on some occasions entire medical institutions, to refuse to provide health services on the basis of the so-called conscience clause, which leads to the denial of abortion care on grounds of religion or conscience, and which endangers women's lives and rights; notes that this clause is also often used in situations where any delay could endanger the patient's life or health; 38. Notes that this conscience clause also hinders access to prenatal screening, which is not only a violation of women's right to information on the condition of the fetus, but also in many cases obstructs the successful treatment during pregnancy or immediately afterwards; calls on the Member States to implement effective regulatory and enforcement measures that ensure that the 'conscience' clause does not put women's timely access to SRH care at risk."

⁴⁴<https://www.europarl.europa.eu/plenary/en/texts-adopted.html#sidesForm> (accessed on 16. 7. 2022).

⁴⁵In Croatia, there is the known case of Jaga Storjak, a midwife who lost her employment in the Knin hospital because she refused to participate in abortions. After the Ministry in charge intervened, she continued working in the hospital.

⁴⁶In this case it is important that conscientious objection is not claimed immediately before or during a certain medical procedure because this would jeopardize the patient's life and health. Moreover, conscientious objection claimed in a timely manner enables the healthcare system to provide a sufficient number of physicians who do not claim conscientious objection and ensure their legally guaranteed rights.

claimed without any impact on the patient's religious and other views.⁴⁷

It remains unclear how and why the EP adopted such resolutions when in 2013, it clearly and rightly excluded the EU from the competence on regulating abortion. The Parliament then declined to debate a report by Member EP Edit Estrel on the reproductive health of women.⁴⁸

All the EU member states except Malta allow abortion. Of these 26 member states, 21 allow conscientious objection, which is in accordance with the charter, which, in order to achieve the rule of law, leaves it to national legislation to incorporate conscientious objection into acts.⁴⁹ In all of them, conscientious objection is not allowed in emergencies that endanger the pregnant woman's health and life. Almost half of the member states that regulate conscientious objection in cases of abortion oblige the physician who has claimed a conscientious objection to refer the pregnant woman to his colleague who will perform the procedure. This is the practice that the ECHR also relied on when it tied the effective enjoyment of the right to conscientious objection to the right of access to a guaranteed service of abortion on the other side.⁵⁰ However, it seems that the ECHR does not recognize the right to conscientious objection in its balancing relation (*vis-à-vis* the duty of organizing healthcare services when it comes to abortion) always and consistently, but rather subjects it to the idea of the feasibility of abortion. Thus, in the judgments, *Grimmark and Steen*, both *vs Sweden*,⁵¹ the ECHR did not consider that the midwives who had claimed conscientious objection and could not find employment on account of it were discriminated against or that their freedom of religion and freedom of expression was

violated. Therewith, the Court *de facto* gave priority to the organization of work in institutions carrying out abortions over the right to conscientious objection. What remains unclear is the "weighting" of the effective enjoyment of the right to conscientious objection and a worrying feeling that the ECHR is the creator of new social relations in which there is no place for effective claiming of conscientious objection.

All EU members are members of the Council of Europe and, therefore, subject to ECHR; there is clarity in the EU legislative on conscience; however, jurisprudence (of the ECHR) regrettably goes its own way.

We could assert that *de lege lata* gynecologists may claim conscientious objection without stating the reasons for it, they should not be discriminated against or deprived with respect to their labor rights on account of it, they must not claim it in cases of saving the pregnant woman's health and life, and the hospital should ensure the performance of abortions by those who do not object to it. Is Resolution 2020/2215(INI) right, when in points 37 and 38,⁵² it stipulates that some physicians decline to provide help to patients or give accurate information on the status of the fetus because of conscientious objection? It is difficult to say, relying on the aforementioned physicians' oaths, and we think that this is possibly a matter of deliberate creation of an environment against conscientious objection as an ideological approach.

It is worthwhile to refer to principle no. 3 of the *ad hoc* Committee of Experts on Bioethics⁵³ of the Council of Europe - according to which no person can be coerced or required to directly participate in the performance of actions (enumerated in these principles) to which he claims conscientious objection.

⁴⁷This means that the physician should not influence a patient's conscience. Equally, the physician should not claim conscientious objection with respect to just some women (*e.g.*, differing from others in terms of age or race, economic status, etc.). Čizmić *op. cit.* in note 4, p. 770 refers to the foundation on "erroneous scientific interpretations or pre judices," however, in our view as to the beginning of human life and possible abortion, abortion advocates would exclude the right to conscientious objection claiming that life begins at birth, rather than conception, and that it is prejudice.

⁴⁸It seems that the European Parliament Committee on Women's Rights and Gender Equality erred in its Report on Sexual and Reproductive Health and Rights 2013 (probably intentionally) placing abortion in the framework of health and stating: "Reaffirms that 'health is a fundamental human right indispensable for the exercise of other human rights and that the EU cannot reach the highest attainable standard of health unless the SRHRs of all are fully acknowledged and promoted; Cf. https://www.europarl.europa.eu/doceo/document/A-7-2013-0426_EN.html (accessed on 16. 7. 2022).

⁴⁹In the Republic of Croatia, four acts and two codes of ethics regulate the right to conscientious objection, allowing it (Art. 20 of The Physician's Practice Act (NN 121/03 and 117/08 Art. 3. Para. 4 of the Nursing Practice Act (NN 121/ 03, 117/ 08, 57/11), Art. 26. Para. 1 the Dental Medicine Act (NN 121/03, 117/08, 120/09), Art. 44 of The Medically Assisted Reproduction Act (NN 86/12), Art. 2 Pt. 20 of The Midwives' Code of Ethics and Art. 12. Para. 3 of The Pharmacists' Code of Ethics and Deontology.

⁵⁰In several judgements against Poland (*R. R., P. and S. and Tysiąc*), the ECHR ruled on positive obligations of the state with regard to making legal abortion possible, obliging the state to organize the healthcare service in such a way that freedom of conscience of medical practitioners can be effectively exercised while at the same time enabling patients to get access to services guaranteed by national legislation.

⁵¹*Grimmark vs. Sweden* (application no. 43726/17) dated 11th February 2020 and *Steen vs. Sweden* (application no. 62309/17) dated 11th February 2020.

⁵²Cf. note 42.

⁵³<https://www.coe.int/t/dg3/healthbioethic/cdbi/> (accessed on 10. 7. 2022).

One can often hear comments, at least in the Croatian public, that those who do not want to perform abortions should not enroll in medical studies or specialize in gynecology. Such a position is extremely discriminatory and inappropriate, and on top of it, contradictory too. (Young) people enrolled in medical studies for humane motives that are the very foundation of the medical profession.

Moreover, gynecology is a branch of medicine dealing with diseases and the treatment of the female reproductive system. Within this framework, obstetrics deals with the medical care provided to mother and child during pregnancy and birth. It is part of the interdisciplinary scientific and professional area—of perinatology comprising obstetrics, maternal and fetal medicine and neonatology.⁵⁴ Consequently, gynecologists are medical specialists who are very much invited to claim conscientious objection if they feel it is their inner drive because they decide to help in creating life and maintaining pregnancy. Of course, this does not mean that during their specialization, they should avoid courses on performing abortions, since in some cases, a gynecologist must know how to perform an abortion in case of a miscarriage that has started or the need to save the woman's life and health by means of abortion.

Among attacks on the institute of conscientious objection of gynecologists and in relation to abortion, one can also hear comments that those who do not want to perform it should be dismissed. However, this would be discrimination under labor law, just as it would be to condition a person's employment on their refusing in advance to perform abortions.⁵⁵

The resolution of the issue of conscientious objection lies in reasonable adjustment, which means ensuring at the same time the right to conscientious objection and the right to a certain medical procedure (especially pregnancy termination). This means that the employer should conclude an employment contract with a physician/physicians who will not appeal to their conscience, provided, of course, that national legislation allows termination of pregnancy. For the sake of protection of legal abortion as a medical service, it suffices that a hospital, having employed a physician, knows whether it can count on him rather than make a list of those who do not want to perform it (recently,

there has been this kind of pressure in Croatia). In order to avoid discrimination and different treatment, it would be necessary to prescribe just that *de lege ferenda*.

Pressure in terms of declaring the right to abortion a human right and its inclusion in the Charter of Fundamental Rights of the EU has become very pertinent immediately before and after the US Supreme Court judgement, which after overturning the Roe vs Wade judgement shifted the jurisdiction for legal regulation to federal units. In early July, the EP held a debate⁵⁶ on the right to abortion, which made crystal clear a lie about the possibility of recognizing the right to abortion as a human right⁵⁷ and its inclusion in the charter. Dr Grégor Pupinck perfectly illuminated the reasons for it, which can be summed up as follows—any amendment to the charter is possible only with the unanimous support of all member states (and some, such as Malta, Hungary, Poland, and Cyprus, oppose it); the charter is not applied outside the jurisdiction of the member states, and abortion is under their jurisdiction as part of healthcare policy; the right to abortion does not exist in any international treaty, but there is the right to life that is protected, including before birth (e. g., the Convention on the Rights of the Child) as a human right, which abortion is not.⁵⁸

This same kind of pressure can be seen in the United Nations⁵⁹ in the sense of declaring the right to abortion a human right, as reported by the media,⁶⁰ emphasizing the right to choose as a fundamental human right that will make discrimination against women impossible.

CONCLUDING DELIBERATIONS

It seems that opposition to conscientious objection, especially in relation to the legal position and moral judgements of gynecologists, arises from the goal that everyone should act according to certain directives, in this case in the sense of the domination of reproductive rights over the right of an unborn child to be born. Conscientious objection as a right implies acting in line with one's conscience, which is an integral part of an individual. However, to deny the right to conscientious objection means to deny the right to freedom of conscience, for conscience makes sense only when it is brought to life.

⁵⁴Cf. Dražančić A., *Porodništvo (Obstetrics)*, Zagreb, 1994, p. 3.

⁵⁵In opposition to this, the judgements in *Grimmark* and *Steen*, cf. above ft. 51.

⁵⁶It subsequently adopted a resolution; cf. fn. 43.

⁵⁷This would be in direct opposition to the ruling *AB and C vs. Ireland* (application no. 25579/05) in which the ECHR found that the right to abortion does not exist, but the right to protection of health and physical integrity exists. The Court found that recognition of the right to abortion would be tantamount to the creation of a new right under the Convention (Para. 197), as Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not provide for the right to abortion (Para. 199), since there is no universal consensus on the recognition of this right (Para. 201), and since Art. 8 (on the right of respect for private and family life) cannot be interpreted in a way that the right to abortion is recognized (Para. 214).

⁵⁸<https://mail.google.com/mail/u/0/#inbox/FMfcgzGpGnNsgfhHtFxWnDqjVjmVkrZB> (accessed on 14. 7. 2022).

⁵⁹It refers to the UN Population Fund–Sexual and Reproduction Health Agency.

⁶⁰E.g. cf. <https://www.tportal.hr/vijesti/clanak/un-ogranicavanje-pobacaja-samo-ga-cini-smrtonosnijim-foto-20220624>

If opponents of conscientious objection recognize that conscience nonetheless exists, then there must be a possibility of invoking it in situations that are relevant to it.

If they say that conscience does not exist, then nobody has one and has ever had one; no criminal in history has had one, and consequently, everything they did was acceptable, and in the future, we shall encounter morally unacceptable acts.

If opponents of conscientious objection would allow it in some areas of activity (e. g., military service), then this means that they accept different types of conscience; by the logic of things, conscience can only be one; it cannot be hypocritical, divided, private or public, subjective or objective.

If they say that conscience exists, that conscientious objection is possible, but not with respect to physicians, especially gynecologists, then they speak of the right to freedom of choice they use for negative, subjective purposes and thus narrow the right to freedom of choice at their discretion. The right to freedom of choice either exists or does not exist. If the right to freedom of choice belongs to some, then it belongs to everyone since everyone is equal before the law.

Perhaps, it could be concluded that opponents of conscientious objection want to silence their conscience since, in this way, it turns out that people who are against abortion have a conscience, while those who are in favor of abortion and against conscientious objection—do not, and are automatically evil. In this way, and in their view, if conscience did not exist—it would not be possible to appeal to it, making all of us equal in “the good that they paint with their own colors.”

There is plenty of ignorance and false information in the public space; therefore, the basic task of the law is to use law for the sake of good—*ius est ars boni et aequi*. One should approach conscientious objection in accordance with the law (acts and other regulations), interpreting it truthfully, and regulations should take into consideration human dignity, which contains the inscribed conscience of a human being. Freedom of conscience is an unrestricted human right, and

the crucial moment of having a conscience is it's getting out of one's inner self, its expression, in other words, an active relation, which also includes the possibility of conscientious objection under certain conditions. Everything contrary to this is a distorted image of humanity, law and morality. The admissibility of conscientious objection must be regulated by law, and its restrictions of principal nature refer to the following—(1) conscientious objection does not refer to civil disobedience, (2) this is a special, not a universal right, (3) the use of this right must not mean that the rights of others are encroached upon, (4) it is an answer to some statutory or other coercion, (5) it must reflect fundamental and highest human values.⁶¹

The right to conscientious objection is the exercise of freedom of conscience, which is a human right enshrined in many international and European human rights documents. The right to conscientious objection is not a “legal monster,” as dubbed by some. As much as any debate is welcome as an expression of democracy, in this case, the focus is on the existing binding international treaties with which case law must be aligned. International documents as a legal source have enumerated all human rights; they do not exist outside of them or “at an individual's own choice,” according to their desires and preferences. In many cases, including the right to conscientious objection, the development of human rights has come to “a dead end,” resulting in a situation in which human rights become a platter for quenching our thirst for individualism and accommodating everyone. This has caused dangerous social polarization and enormous pluralism that threatens to destroy the essence of man and sever the link between law and morality. Human rights are exercised through an alleged democracy, where everyone is right but has no responsibility.

To bring all unfounded debates on conscientious objection to an end, opponents of conscientious objection of physicians should be asked the following question—would you rather be treated by a physician without conscience or one who admits that he has one? If your choice is the latter, then allow him to invoke it in certain situations.

⁶¹Similarly also Čizmić J., *op. cit.* in note 4, p. 771.