

# Legal Techniques for Balancing Conscientious Objection and Healthcare Provision

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# Levels of Legal Protection

- Constitutional
  - Human Rights Act 1998, ss. 3 and 6
- General equality provisions
  - Equality Act 2010
- Specific Legislative Conscience Clauses
  - Abortion Act 1967, s. 4
  - Human Fertilisation and Embryology Act 1990, s. 38
- Professional Codes
  - GMC, GPhC, NMC under Medical Act 1983, Pharmacy Order 2010, Nursing and Midwifery Order 2001

# Judging Conscience Claims

## Conscientious Objection

Statutory  
exemptions

Constitutional  
Rights

Human  
Rights Law

Codes and  
regulatory  
decisions

# Equality Act 2010: Religion and Belief as 'Protected Characteristics'

- i. Religion means any religion and a reference to religion includes a reference to a lack of religion**
  
- ii. Belief means any religious or philosophical belief and a reference to belief includes a reference to lack of belief.**

Equality Act 2010, s. 10

# Equality Act 2010

- Direct discrimination- less favourable treatment on grounds of a protected characteristic (religion or belief) (s.13)
- Indirect discrimination - particular disadvantage to persons of shared religion or belief from the application of a general practice or criterion that cannot be shown to be a proportional means to achieve a legitimate aim (s.19)
- General public sector equality duty applicable to public authorities and bodies exercising public functions (s. 149)

# A Human Right to Conscientious Objection

- 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.
- Article 9, European Convention on Human Rights 1950



# Balancing Rights

- 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 the freedoms of others
- Article 9.2 European Convention on Human Rights



# Two Types of Rights Balancing

**Definitional**

**Ad Hoc/ Proportional**



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## Ad Hoc/ Proportional

- Recognises that rights overlap.
- Allows for contextual adjustment.
- Increases judicial discretion (and uncertainty for litigants).

# Definitional Balancing in Domestic Law

- Abortion Act 1967, s. 4
  - ‘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’
  - The right of conscientious objection does not apply to those under a 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’: s 4(2)
- ‘The conscience clause was the *quid pro quo* for a law designed to enable the health care profession to offer a lawful, safe and accessible service to women who would previously have had to go elsewhere’. Lady Hale in *Doogan* [27]

# Definitional Balancing in Domestic Law

- Abortion Act 1967, s. 4- Limiting the interpretation of 'participate'
- *R v Salford Health Authority, Ex p Janaway* [1989] AC 537 (not secretary typing referral letter)
- *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 (not supervising midwife)

# Definitional Balancing under the ECHR

- Art 9(1)

‘As long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in 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.’

*Pichon and Sajous v France* [2001] ECHR 898.

- Art. 10

*Rommelfanger v Germany* (1989) DR 151 (dismissal of dissenting doctor employed by Catholic hospital)

# Proportional Balancing and Article 9(2) ECHR

*Eweida v United Kingdom* (2013) 57 EHRR 8

‘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.’ *RR v Poland* [2011] ECHR 828.

# European Committee on Social Rights

***International Planned Parenthood Federation – European Network (IPPF EN) v. Italy, Complaint No. 87/2012, 10 September 2013, §69:***

“[O]nce States introduce statutory provisions allowing abortion in some situations, they are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are legally entitled under the applicable legislation’

***Confederazione Generale Italiana de Lavoro (CGIL) v. Italy, Complaint No 91/2013, 12 October 2015***

## PACE Resolution 1763(2010)

### ‘The Right to Conscientious Objection in Lawful Medical Care’

‘invites member states to develop comprehensive and clear regulations that define and regulate conscientious objection with regard to health and medical services’, and which:

4.1. guarantee the right to conscientious objection in relation to participation in the medical procedure in question;

- 4.2. ensure that patients are informed of any conscientious objection in a timely manner and referred to another health-care provider;
- 4.3. ensure that patients receive appropriate treatment, in particular in cases of emergency.



# Grimmark v. Sweden

- Midwife denied employment for stance against abortion.
- Unsuccessful appeals to Swedish Equality Commission and to Swedish Labour Court of Appeal (April 2017).
- Application to ECtHR June 2017 concerning non-recognition of conscientious objection.



# Conclusion

- UK law has so far favoured definitional balancing in handling medical conscientious objection claims.
- Council of Europe is shifting from definitional approach to favouring proportional balancing.
- Proportional balancing could challenge settled understandings of statutory exemptions and professional codes.