

## CONSCIENTIOUS OBJECTION (GENERAL ASPECTS AND THE SLOVENIAN REGULATION OF CONSCIENTIOUS OBJECTION TO ABORTION)

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**Abstract** This article discusses the theoretical aspects of conscientious objection. It is primarily a moral category. In relation to law, it is the disobedience of an individual to certain legal norms (principles and rules) that conflict with the individual's moral conscience. Conscientious objection differs in several respects from other forms of disobedience to authority, such as civil disobedience. As a moral phenomenon, conscientious objection is first and foremost the inner moral obligation of an individual to resist a particular political, legal or other norm of authority or behaviour. Conscientious objection may also be permitted by law, but to a very limited extent. Conscientious objection can only be defined as a right in a rationalized reflection of morality and, above all, in the sphere of law which is based on the dualism of rights and duties (attributive-imperative character of law). In the article, some important factors for the legal assessment of the (right to) conscientious objection and some fundamental aspects of the Slovenian constitutional and legal regulation of the right to conscientious objection to abortion by a physician are presented in more detail.

### Keywords

civil disobedience,  
moral consciousness,  
morality,  
ethics and law,  
medical conscientious  
objection to abortion

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## 1 **Introductory Explanation**

This article discusses some theoretical aspects and questions of conscientious objection. The focus is primarily on the description of its authentic moral character, its relationship to the law, and the legal regulation of conscientious objection. The article then explores the Slovenian legal regulation of a physician's conscientious objection to abortion as an illustration.

## 2 **Conscientious Objection and Other Forms of Disobedience**

Conscientious objection is one of the forms of disobedience or rejection of certain legal and/or political norms and practices. According to the traditional classification, morally, politically, and otherwise motivated forms of disobedience can generally be divided into the following three categories (Raz, 1986, p. 263):

1. Revolutionary disobedience or revolution is a politically motivated radical violation of the foundations of the legal order aimed directly or indirectly at changing the government and the constitutional system;
2. Civil disobedience is a politically motivated violation of the law resulting from dissatisfaction with the law and government policy, where the demand for a change in law and policy is generally expressed in the form of a public protest;
3. Conscientious objection is a violation of the law by a person who believes that he or she is morally prohibited from acting in accordance with a particular legal norm, either because of the general nature of that norm (e.g., a person acts as an absolute pacifist and opponent of military service) or because the person believes that the norm extends to particular cases to which it should not apply (e.g., relative pacifism, euthanasia).

This classical classification results primarily from the criterion of the intensity of disobedience. In a social context, the most intense form of disobedience is revolution, while the least intense is conscientious objection. This classification can be further illuminated by one that characterizes different forms of disobedience on the basis of the same criterion and also in a general form, but somewhat more differentiated and descriptive (Hanson & Fowler, 1971, pp. 173-174):

1. At the first level, we can talk about permissible legal forms of non-conformity with the existing regulation. In this case, the legal entity opposes a particular legal norm but expresses its disagreement within the permissible legal framework;
2. At the second level, it is possible to identify disobedience that is clearly (intentionally) illegal. Still, the person expressing their disagreement does not agree to any legal punishment for their behaviour. In such cases, the person is convinced that certain legal norms, government policies or some of the state institutions are unlawful, unjust, etc;
3. At the third level, there are forms of dissent that do not relate to a particular norm or area of law or policy but are aimed at a general reform of social institutions. In these cases, it is much more difficult to justify the reasons for resorting to this form of disobedience, given the complexity of the reform demanded;
4. At the last level, there is revolutionary disobedience, which is no longer just about the desire for reform but about the desire for a radical transformation of society based on alternative principles and values.

### **3 Conscientious Objection and Civil Disobedience**

The concept of conscientious objection is best illustrated by comparing it with the concept of civil disobedience. Bay (1971, p. 226) points out that at least the following five meanings of the term "civil" are equally legitimate for the context under consideration:

1. The term "civil" can refer to the recognition of the general duties of citizens and, thus, to the legitimacy of the existing legal order as a whole. Sanctions that are used to limit the disregard of individual legal norms or state policies and to prevent violence can, therefore, (but need not) be justified as an affirmation of general civic duties.
2. The term civil can be the opposite of the term military in the broader sense. In this respect, civil disobedience is usually understood as an expression of the principle of non-violence.
3. The term civil can also be understood as the opposite of uncivil or uncivilized, resulting in the requirement that acts of civil disobedience must embody the ideals of civilized and moral behaviour of citizens.

4. The term civil can refer to the public as opposed to the private. This gives rise to the principle of the public practice of civil disobedience.
5. The term civil may also lead to the conclusion that disobedience is aimed at such changes in the political system that affect not only individual or group freedoms, but the freedoms of all citizens.

Taking into account the above and also the views of other authors, civil disobedience can be narrowly defined as individual or group-based conscious, public, reasoned and non-violent resistance to legal regulations or official decisions with the desire to enforce illegal but legitimate social values, while at the same time consenting to the legal consequences of such disobedience (cf. Rawls, 1989, p. 64; Perenič, 1990, p. 704; Bedau, 1971, p. 205; Bay, 1971, p. 225). Looking at the individual structural elements of this phenomenon in more detail (Rawls, 1989, pp. 64-66; Raz, 1986, p. 269; Bedau, 1971, pp. 197-205; Bay, 1971, pp. 225-228), civil disobedience can be defined as:

1. Illegal act (an act that violates the Constitution and/or the law). In this case, a disputed legal provision may be directly violated or a legal provision that is not the subject of a protest may be violated (e.g., a group of citizens publicly expresses their opposition to a particular criminal or administrative law provision by violating traffic regulations);
2. conscious conduct, which means that all elements of civil disobedience are the result of a conscious decision by the actors;
3. public action carried out in a public place and in a way that appeals to the public;
4. reasoned action because without a reasoned explanation of the purpose and meaning of a particular act of civil disobedience, it is not possible to adequately legitimize it;
5. usually a political action by which a socially weaker group (a minority or a majority subordinate to a stronger minority group) seeks to enforce its political demands by exerting pressure on authorities or other bodies with decisive political power;
6. a value-oriented act, because those involved in civil disobedience invoke a general social sense of justice or another general social value that they believe the existing legal order and political authorities do not sufficiently take into account;

7. usually an act of last resort, which means that all legal means and measures must have been exhausted (unsuccessfully) beforehand in order to achieve the desired changes;
8. usually a non-violent action, which means that citizens prevent the enforcement of certain legal regulations in the form of so-called passive resistance. Non-violence can also be defined more broadly, namely in such a way that an action that is in itself non-violent must not be intimidating;
9. an action whose aim is to achieve the required change in the legal order or the political activity of the state authority.

At this point, the problematic character of some of the elements mentioned should at least be briefly pointed out. Raz (1986, p. 275), for example, is of the opinion that civil disobedience is not only justified when it is an act of last resort, a public and non-violent act, and so on. According to him, in certain circumstances, it is not essential that civil disobedience be practiced only as a last resort because it may be justified earlier in support of a just end, as it is often even less socially harmful than certain legally permissible acts of dissent (e.g., a prolonged strike in an important branch of national industry or service). According to Raz, even the claim that civil disobedience must necessarily be public, non-violent, etc.,<sup>1</sup> can only mean an attempt to routinize this phenomenon and a tendency to transform civil disobedience into a regular form of political action to which everyone would be (legally) entitled. The exceptional character of civil disobedience is exactly the opposite because in a democratic state governed by the rule of law it is a political act to which individuals and social groups have no legal claim (Raz, 1986, p. 275). The latter position is particularly controversial (e.g., Dreier, 1981, pp. 200 ff.). However, one should generally be aware that civil disobedience and conscientious objection are only politically and legally tolerated to a considerable extent in a democracy. In a democratic system, the political and legal reaction of the authorities to such behaviour by civil society groups and individuals in a spirit of non-violence and partial tolerance towards the excesses of civil society and free individuals is not radical. In contrast, in authoritarian and totalitarian systems, where free individuals and civil society associations are virtually non-existent, such actions are usually

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<sup>1</sup> Bay (1971, p. 228) is of the opinion that civil disobedience can also be violent, provided, of course, that the methods and means of force used are carefully selected and limited.

suppressed with extreme violence and cruelty using police or military force, and dissidents are usually also subject to very severe criminal sanctions.

If we now turn to the central concept of this article, we see that conscientious objection is similar to civil disobedience in some elements but also differs from it in many respects and thus represents a relatively specific phenomenon. In general, conscientious objection is the individual's rejection of legal (constitutional, statutory or administrative) commands and prohibitions (Rawls, 1989, pp. 66-67), whereby the similarity of this concept to that of civil disobedience lies above all in the conscious and non-violent behaviour, which is usually also an "ultima ratio" behaviour. In contrast to civil disobedience, conscientious objection is characterized above all by (ibid.; cf. Sagi & Shapira 2002, pp. 186-182):

1. that, as a rule, it is not an appeal to the majority social sense of justice or any other general social value, because here the individual acts primarily according to his individual moral conscience, regardless of whether or not this agrees with the morality of the larger community;
2. for this reason, conscientious objection is not usually a public act, which of course does not mean that such an act is always hidden from public view, but rather that the individual does not intend to draw public attention to it;
3. conscientious objection is not necessarily or predominantly based on political principles or demands, as it is generally based on the individual's personal moral, religious and other convictions.

There is, therefore, no particularly sharp distinction between civil disobedience and conscientious objection, as some of their structural elements often overlap to a certain extent. One of the things they have in common is that in both cases, people who express their rejection of the legal order or policy agree to legal sanctions. However, despite the similarities and affinities between the two concepts, it should be emphasized that the above-mentioned differences between the two phenomena are important and, to a considerable extent, essential distinguishing features that require the two phenomena to be treated separately and, in some cases, with different criteria.

#### 4 Nature of the (Right to) Conscientious Objection

For a deeper understanding of conscientious objection, it is not enough to define its essential elements analytically, but it is necessary to delve deeper into the actual nature of this phenomenon, in which all the elements mentioned and others are interwoven into a complex unity. Within this complex unity, the personal morality of the individual is usually of decisive importance. Therefore, we will refer to this complex whole in a broader sense as morality. By its very nature, the right to conscientious objection is not a legal right but a human (natural) moral right,<sup>2</sup> whereby illegality is, by its very nature its basic element. Conscientious objection is, principally, a moral rejection or protest against a legal regulation to which the individual's morals are firmly opposed. Only in exceptional cases is a situation possible and viable in which a politically and legally organized society permits conscientious objection to certain legal norms to a very limited extent, thus enabling their unsanctioned implementation.

If, for example, we define conscientious objection as a human natural right, we mean only the legitimacy of that natural necessity of every individual to oppose his moral postulates to positive (valid) legal norms. As said before, conscientious objection can be recognized to a very limited extent by positive law as a permissible exception to general legal norms, but it is by no means possible to understand conscientious objection as a fundamental human legal right. The reason why the right to conscientious objection in the rational sense is primarily a moral right arises from the fact that conscience as such is a moral phenomenon, which makes it possible to define conscientious objection authentically only in terms of morality.<sup>3</sup>

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<sup>2</sup> As will be explained below, from the perspective of authentic morality this »right« is actually a »moral duty«, because in the dimension of morality the right is only a rational reflex of moral duty.

<sup>3</sup> The distinction between conscientious objection and conscientious objection on principle is not discussed in this article, as this question would require special treatment. A basic and framing explanation is contained in the summarized definition of the distinction between the two phenomena in Black's Law Dictionary (1990, p. 304), where it states: "A conscientious scruple against taking an oath, serving as a juror in a capital case, doing military duty, or the like, is an objection or repugnance growing out of the fact that the person believes the thing demanded of him to be morally wrong, his conscience being the sole guide to his decision; it is thus distinguished from an 'objection on principle', which is dictated by reason and judgment, rather than the moral sense, and may relate only to the propriety or expediency of the thing in question."

Moral conscience is the moral inclination and ability of a person to feel and judge the good and the bad (evil).<sup>4</sup> Since moral conscience responds to and extends to legally regulated dimensions as well as ethical, political, religious, and other normative dimensions, it seems to some extent that conscientious objection is also part of these other dimensions. On the surface, then, moral conscience extends to those normative human dimensions that are existentially more externalized than morality (e.g., law, politics, practical ethics, custom) on the one hand and to normative dimensions that are existentially even deeper than the moral dimensions (e.g., spirituality, religion) on the other. However, if the phenomena are viewed strictly analytically (discriminatively), moral conscience in its authentic essence is exclusively a moral phenomenon. Therefore, the objection of conscience is, by its origin and fundamental nature, a moral phenomenon and concept.

At this point, it should be pointed out that from the broadest and deepest philosophical-ontological perspective, moral conscience itself is not really authentic as a moral category, since as such it is only an artificially (rationally) isolated section of the all-encompassing Reality. From a holistic perspective (as far as the limited human mind can conceive it), consciousness is an inseparable part of the whole of existence. But in the sensory-rational reflection of man, who perceives the Oneness or Unity of all that exists (monistic concept) only indirectly, i.e. through many particularities and individualities (dualistic/pluralistic concept),<sup>5</sup> the part of consciousness that defines good and evil is the main carrier of the human moral dimension. In this sense, the part of a person's consciousness that triggers the

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<sup>4</sup> Various philosophical, religious and other views on the concept of conscience are presented, for example, by Sruk (1985, pp. 211-212). See also LaFollette (2017, pp. 48-53), who discusses when someone should act according to their conscience.

<sup>5</sup>To illustrate the "relationship" between monistic and pluralistic concepts, we can use the well-known example of the relationship between the ocean (the Whole) and the drops of water and groups of drops of water in it, which represent innumerable individualities and particularities. Each individual drop or group of drops forms an awareness of its separate and rounded identity (being), while temporarily losing the awareness of its actual fusion with the Whole. With the help of this simile, we can perhaps more easily understand that in a subjective and relative sense there are innumerable individual and collective dimensions of consciousness, which on the one hand exist only apparently, being an inseparable part of the Whole, and on the other hand are real at the level of the consciousness that is not aware of the Whole. In this sense, the parts of our relative and subjective social reality are also many different kinds of individual and collective human consciousness expressed through various social norms, such as religious, moral, ethical, customary, political and legal norms. Since all these normative aspects of consciousness are in fact part of the same and indivisible Reality (the Whole), all these social norms are inherently interrelated and interdependent. But due to the different needs of society at the present stage of civilizational development, where individual and collective social consciousness is still deeply rooted in individuality and particularity (drops and groups of drops), it is theoretically and practically necessary to distinguish between moral, legal, religious, political and other types of particular normative consciousness and to maintain an appropriate dynamic balance and coherence between them.



recognition of good and evil in an individual and his reactions to it is authentic as such only as moral formation.

In such a perspective and context, conscientious objection is torn between the moral and legal spheres, which are separate in the rational view, but in the holistic sense are inseparable parts of the same Whole. When a person enters the world of law within the framework of a dualistic or pluralistic view of the human world, they leave the world of morality and, thus, the original dimension of the abode of moral conscience. If we start from our everyday rational, i.e. differentiating perspective, in which morality and law are predominantly or completely separate normative areas (dimensions), we find that the moral dimension creates conscientious objection, while the legal dimension generally prohibits it systematically. Only in exceptional cases can conscientious objection be legally permissible to a limited extent in some areas.

For a true understanding of conscientious objection, it is not only important to know its authentic moral nature, but above all to know that conscientious objection in its authentic manifestation is not a moral "right" as it appears in rationalized (reflected) morality or ethics, but in its authenticity is the moral duty of the individual. In fact, the individual must express his rejection of the law when he is prompted to do so by a moral necessity arising from his moral conscience. As a rule, people are of course, aware that we must obey legal norms even if our morals contradict them. However, if the moral imperative and the resulting inner sense of duty of the individual are so strong in a particular case that the individual assesses and decides that he or she must follow their personal moral imperative and not the law, this leads to an objection of moral conscience, which manifests itself in the disregard or violation of one or more legal norms. In such a case, the tension between the unacceptable legal norm and his personal moral attitude is so strong and unbearable for the individual that he decides to resolve this inner conflict in favour of his own morality, even though he knows that he will receive a legal sanction as a result. In this context, the concept of morality is to be understood in a broader sense, which also includes various philosophical, religious and other values or world views that are essentially linked to and conditioned by the moral core of the human being, i.e. his moral conscience.<sup>6</sup>

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<sup>6</sup> By way of illustration, it should be noted that, for example, conscientious objection to military service in the United States and also in other Western democracies was initially only recognized on the basis of individual religious grounds (Bay, 1971, p. 238).

As soon as we get to the moral core of a person, we can no longer identify individual rights and duties in this core separately and correlatively<sup>7</sup> because both merge here into a unity for which it is impossible to find a completely adequate term in the established terminology. In the following, I call this unity of right-duty "moral duty", which is the inner tendency of an individual to act in accordance with his moral conscience in such a way that he must and may act in a certain way at the same time. From a moral point of view, the individual feels and understands his moral duty to conscientious objection as his moral right, which from his subjective point of view justifies his disagreement with the law and thus, his individual rebellion against the legal norm even more strongly. Thus, if in the sphere of law, right and duty are seen as two separate and correlative phenomena,<sup>8</sup> in the deeper cognitive spheres of the human world (e.g., morality, intuition, belief in God) the relationship between right and duty is increasingly one of interpenetration, fusion and ultimately even identity.

## 5 Consequences of Conscientious Objection

Regarding the question of the consequences of an individual's behaviour according to his moral conscience, the question arises whether actions based on moral conscience are to be evaluated subjectively or objectively. From the monistic-holistic sense, the answer is superfluous, because the differences between phenomena and perspectives are transcended in the unified Whole. However, since our discussion must naturally be considered within the context of an interpersonal, emotional-rational and social framework, it makes sense to find an answer within this framework that best corresponds to the nature of morality and law in their confrontation brought about by the objection of moral conscience.

In such a context, three criteria must be considered in order to understand and judge the permissibility of acting according to conscience. First, a subjective criterion is crucial for understanding conscientious action, for only if we know the subjective impulses and motives of a person's moral conscience can we understand his reaction to them. However, regarding the question of the permissibility of a person's

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<sup>7</sup> The correlativity of rights and duties is particularly characteristic of law (various forms of this correlativity are described, for example, by Hohfeld, 1923, pp. 23 ff., 65 ff.), which, as a predominantly rational formation, is also based on many other dualisms or correlations, such as creditor - debtor, plaintiff - defendant, conviction - acquittal.

<sup>8</sup> Leonid Petražicki, one of the pioneers of the psychological conception of law, states that the imperative-attributive (duty-right) dualism is one of the essential elements of law as such, while in the dimension of morality only imperative emotions appear in people (quoted by Podgorac, 1981, pp. 64, 79).

behaviour based on their moral conscience, we encounter two situations in which we must apply two additional criteria:

- a. At the level of legal judgment, the decisive objective criterion is the one that informs us whether such conduct of an individual is in accordance with the law, or, if we are in an area where the law allows greater leeway for the free conduct of legal subjects, whether such conduct of an individual is at least not contrary to the law. In this case, the subjective aspects of the individual's moral thinking and feeling may be relevant as accompanying circumstances that may affect the aggravation, mitigation or even waiver of a legal sanction. As a rule, however, they cannot change the objective fact that the individual has violated one or more legal norms by refusing to act for reasons of moral conscience.
- b. At the level of objectified moral judgment, which is formed within the framework of an externalized collective morality (e.g., village morality, worker morality, student morality or a morality formed on the basis of a particular professional code of ethics), the objective criterion is also decisive. In a community or a professional group or an organization, the moral judgment of the majority is decisive. However, this objective criterion is naturally much more strongly interwoven with the subjective evaluations and prejudices of the social group that accepts moral judgment than in law. Unlike in law, where, for example, a judge judges the illegality of conscientious objection on the basis of officially published and content-specific legal and other rules, in the field of collective morality, there are generally far fewer clear criteria (even ethical codes are generally shorter and less explicit and unambiguous than legal and other legal norms) on that a social group or its representatives can rely to decide whether or not conscientious objection is genuinely moral.

In the following, the consideration of conscientious objection as such will be limited mainly to the relationship between the moral and the legal dimension. In this relationship, law and a person's moral conscience can either coincide in content (e.g., legal and moral condemnation of murder) or be indifferent to each other (e.g., legal regulation of units of measurement or a critical moral reaction to a friend's unfulfilled promise of a family visit), or they can be in conflict with each other (e.g., a person's moral conscience opposes a legal prohibition, commandment or sanction). Freedom of conscience, which is highly legally recognized in democratic

political systems where human rights and the rule of law are respected, includes the moral conscience of the individual, but in any legal system, freedom of conscience is also limited by the rights and freedoms of other subjects, as well as by the public interest and similar legally protected values.

If an individual violates legal norms by acting out of conscience, this must be punished with a prescribed legal sanction, unless the law expressly provides for other possibilities. Even if an individual claiming conscientious objection still sincerely believes that he is acting (morally) right and that the legal norms are unjust, unacceptable, etc., that individual implicitly agrees to respect the legal norms of that (state-organized) society by his conscious participation in organized society. If we agree to a different logic, i.e. the logic of the legal arbitrariness of individuals, we thereby deny the possibility of a legally organized society. The latter is imperfect in many ways (like everything in this world) and causes many frictions between the personal moral views of individuals and the positive legal regulation, but for a sustainable and civilized life in society such a solution is necessary. Of course, a particularly authoritarian or totalitarian, and therefore downright inhumane and violent, law can at some critical point lead to wider and more serious collective forms of discontent and even rebellion by members of society.

The conflict between personal morality and the legal system can be vividly illustrated by the example of infanticide. If, for example, a mother voluntarily takes the life of her mentally and physically severely handicapped newborn child, she does so because she (subjectively) believes that this is the best solution for her and, above all, for the newborn child. The mother's moral assessment is that this action has more good than bad (evil) consequences. Her conscience, which has dutifully led her to such an act, is a central moral criterion for her, so the mother has a predominantly "clear conscience", at least from a subjective point of view,<sup>9</sup> even if she has committed murder (infanticide) according to legal and ethical standards. According to the legal criteria under which infanticide is a criminal offence, it is

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<sup>9</sup> Of course, the mother's moral conscience, in conjunction with her rational consciousness, is usually internally torn in such a serious case, as she is aware of the pronounced value bipolarity of such an act, which represents "rescue" on the one hand" and the arbitrary killing of another human being, even her child, on the other. In such and similarly difficult cases, "clear conscience" therefore only means that the mother's subjective balance of emotion and rational judgment was predominantly oriented towards infanticide, even if she was aware that such a decision would be judged as unacceptable and reprehensible, at least predominantly, from the perspective of collective (communal, social) morality.

indisputable that the mother has to bear the criminal responsibility for this act and must be punished accordingly. Her legal status as a natural person gives her the right and the duty to be treated in accordance with the law of the state to which she formally belongs. If, for example, a medical doctor were also to assist the mother in killing the child, he would not only be acting unlawfully but also against medical ethics, whereas on his intimate personal moral level, his own moral conscience would also be decisive as a criterion for him.

Remaining at the level of comparing morality and law, we can say that authentic morality (as opposed to ethics and law) is essentially individualistic. Of course, morality is strongly socially conditioned, since the individual inevitably forms his moral attitudes through the process of socialization. However, every moral decision that an individual makes is always the result of their personal (intimate, subjective) judgment. In contrast to morality understood in this way, law is by its nature and essence a social, collective phenomenon. For this very reason, law also assumes, to a certain extent, the function of an enforced collective moral or ethical evaluation of the individuals' actions. If the individual cannot be instructed or convinced that, for example, murder, theft and lying are immoral actions because his moral conscience is not sufficiently developed in this respect or is deformed due to various social and other factors, at least the majority of such actions must also be prohibited by law (e.g., as criminal acts such as murder, theft or slander), whereby it is logically and institutionally assumed that every psychophysically sufficiently developed (adult) individual must be subject to such legal norms.

Kant and Hegel were among the first to systematically reflect in legal philosophy on such a necessity of the subordination of a member of society to the law of that society and in their specific way provided a legal philosophical basis for the legal principle of generality and consequently the principle of legal equality in modern law. Hegel (1989, p. 100) believed that the legal sanction imposed on a criminal is not only just in itself, but is simultaneously the right of the criminal himself, grounded in his existing will, in his behaviour. It follows from the criminal's mental act that the legal punishment is something general, that with it a certain law is established which he has recognized for himself and under which he can therefore be subsumed under his right (Hegel, 1989, p. 100).

Hegel's conclusion, which refers to the objection of conscience, also fits in with this. Hegel describes those groups of people (above all certain religious communities) who do not agree with the fulfilment of a state-imposed legal duty to defend against the enemy as active members of civil society. Concurrently, however, Hegel believes that they cannot be members of the state because of their failure to recognize state obligations (Hegel, 1989, p. 389). To a certain extent, the state is tolerant towards these people and allows them to fulfil their civic duties in other ways (Hegel, 1989, p. 389). This is in line with the above statement that such disputants do not enter the dimension of (national) law in this respect, but remain only within the framework of morality according to their own view. In such a case, legal punishment is not their right because, from their authentic moral point of view, external punishment is not relevant to them. This does not mean that the community or society cannot punish them, but it does mean that they cannot punish them in an authentic moral way, because the only truly authentic moral sanction (punishment) is only the suffering of their (own) guilty conscience.

Thus, in such a Hegelian spirit, when we consciously enter the dimension of law, the legal sanction for our illegal action becomes not only our right, but also a corresponding duty for the one who is obliged to determine and guarantee it. This is vividly illustrated by Kant's (1967, p. 139) hypothetical case of society's self-dissolution. Even if a society decided to dissolve itself (e.g., all its members would leave the island on which they lived and scatter all over the world), according to Kant, every murderer awaiting execution in prison should be punished beforehand (with the death penalty), for only then would everyone get what he deserved by their deeds, and the blame would not fall on the collective people. In this respect, we must agree with the findings of Zupančič (1985, p. 62), who says that the criminal has violated the norm *in concreto* and the society that would refrain from punishing this criminal would violate the norm *in abstracto*, and the latter violation deserves a much stronger condemnation. An abstract violation of a norm has a generalizing effect *pro futuro*, while a concrete violation is an individual act irretrievably lost in the past (Zupančič, 1985, p. 62). The individual act of a criminal should not be condemned until the abstract norm is generally respected by society (*ibid.*).

As indicated above, the essential difference between a legal and a moral sanction is that the former can only be imposed on a person "from the outside" (which does not mean that the punished person cannot internalize it, i.e. accept it autonomously),

whereas an authentic moral sanction can only act "from the inside" - i.e. as an auto-sanction in the form of suffering under a guilty conscience. The only authentic moral sanction is therefore one that man imposes on himself<sup>10</sup> after he has realized that his thinking or behaviour violates his own moral conscience and duties. A moral, ethical or legal sanction imposed on him "from the outside", i.e. by other individuals and the wider community or social institutions, is not actually a moral sanction for him in the proper sense, but only a more or less expected external reaction of others to his thinking or behaviour. If an individual acts morally according to his own judgment, his own moral conscience and his own duty, then everything that contradicts this is extra-moral (a-moral) for him. In other words, it is not anti-moral (which is usually referred to as immoral), because, from an individual subjective point of view, a person can only be anti-moral if they themselves act in contradiction or disagreement with their own moral conscience. A morally acting person therefore judges the morality of another person not only from the perspective of his own morality but also, as far as possible, from the perspective of the morality of this specific other person. This does not mean that a morally acting person will not act, e.g. admonish, criticize or otherwise take verbal or physical action against someone whom they themselves judge to be acting immorally, but in doing so they will only be fulfilling their moral, ethical or legal duty and not denying from the outset the fact that the perpetrator of the immoral behaviour may also be acting entirely in accordance with their own moral conscience. Although it may sound paradoxical, a person who acts sincerely in accordance with his moral conscience should be respected in this regard, even if simultaneously we do not respect him or even strongly condemn him from the point of view of our different personal morality, the morality of the community and ethics or law.

From the point of view of the dualistic and pluralistic ontological conception mentioned above, morality is also only one of many normative dimensions of an infinitely plural world and is also infinitely dual (plural) in itself. The fundamental dualism of morality manifests itself in the distinction between good and evil and then in the positive and negative definitions of the innumerable manifestations of good and evil. Since the balance of good and evil never rests in man as an imperfect

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<sup>10</sup> The suffering of a guilty conscience as an inner moral punishment of a person manifests itself in the human psyche in various ways, but can also manifest itself externally in various forms, e.g. when a person inflicts physical pain on himself due to feelings of guilt, verbally condemns himself in front of others, renounces certain advantages, isolates himself from society, etc.

and, at the same time dual and plural being, it happens repeatedly with every individual that he doubts his moral convictions and attitudes and the moral actions he performs and experiences them, especially in rational reflection, at one time as moral and at another time as immoral. This can be illustrated by the opposing principles of yin and yang as they are understood in Chinese Taoist thought (Kjels, 1990, pp. 43-71), which is characterized by the fact that each of them, even in its greatest intensification, always contains a part of the opposite principle. On the one hand, this reminds us that each individual's authentic moral values and attitudes can change over time depending on social, personal and other circumstances, and on the other hand, it tells us that each person's authentic moral choice carries at least a hint of uncertainty or doubt that it is definitely right.

There are also many collective (communal, etc.) moral codes that represent established (objectified) average moral values and norms in a given time and space. But any territorial, class- or group-based or otherwise socially bounded collective morality is in fact inauthentic, so it can somehow be categorized between authentic morality and law. It is inauthentic because not all its members share common moral values and attitudes. Even if, for example, in a village, a religious community, a student organization or in the field of public administration, there are shared moral values and norms among the members of such a social community or organization, this does not generally mean that all these members inwardly (subjectively) fully identify with these values and norms. In fact, some or many of them may have completely different personal moral views, but for fear of being criticized or excluded from the community or organization, they submit to the prevailing moral values and views, which are either an expression of the moral views of the majority or the imposed views of the leading members of the community or organization. Such collective morality is on the one hand consensual, a compromise, but it can also be imposed by dominant individuals or leading groups, so that it cannot be defined as authentic morality. On the other hand, such a collective morality differs in many respects from law, which is characterized by many formal and substantive peculiarities.

There is a genuine collective morality only to the extent that the individual moral concepts are clearly similar in their value and rational content. Although they have the same deepest origin, which is intuitively perceptible, they are only markedly similar at the level of the cognitively limited and, therefore subjective superficial



feeling and thinking of individuals. Therefore, (every) authentic moral community comprises people who value, feel and think in a markedly similar (related) way. Such a community can be called an authentic moral community. This does not mean that the morality of such a community is objectively or absolutely correct, for each such community defends its own morality. Nor are such true moral communities territorially or functionally rounded, for moral kinship knows no spatial, social-organizational or temporal boundaries. The common denominator of true moral communities is therefore a similar (related) moral evaluation, thinking and behaviour, so that these communities are not connected to each other, e.g. territorially (village community, etc.), class-wise (farmers, workers, townspeople, etc.), profession-wise (physicians, judges, civil servants, journalists, etc.) or within another territorial, functional or institutional framework.

It is also important to understand that no code of professional ethics can correspond to an authentic morality since it is the product of an agreement within such communities, in which there can be no real (complete) moral consensus due to the diversity of its members.<sup>11</sup> A code of ethics is merely an expression of a certain objectified morality, which usually comprises average existing and agreed (compromise) moral norms, which are also supplemented by certain formal elements, such as the adoption and publication of the code in written form, the formal definition of certain bodies (e.g., ethics committees) and procedures and sanctions for cases of breaches of ethical norms. Significantly, the content of ethical codes naturally influences the development of authentic moral views of individuals, especially those who are (professionally) bound by the respective code, just as, on the other hand, the authentic moral views of individuals influence the content of the codes and also the law.

Finally, in this context, we do well to remember that authentic morality is the most internalized compared to collective (communal) morality and law, since its values and views are most closely linked to the deeper psychological and spiritual layers of a person (intuition, emotions, sense of distinction between good and evil and other psychological feelings), while collective morality and, to an even greater extent, law

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<sup>11</sup> Thus, for example, we can in principle agree with the argument that a conscientious objection is unethical when healthcare practitioners treat patients only as means to their own spiritual ends (Dickens, 2009, p. 337), but this objective approach is not persuasive for objector who according to his or her spiritual view sincerely morally feels and believes that his or her concrete treatment of patients, which others condemn as unethical, is morally justified.

are based on rational and other more external human and social factors. This means that authentic, personal morality is a much stronger inner motivating factor for a person than collective morality, ethics and law. This can often be seen in conscientious objection. For example, conscientious objectors who justify their disobedience on personal moral, moral-religious and similar grounds (e.g., regarding issues of euthanasia, abortion or pacifism) are much more persistent in their behaviour and willing to make greater personal sacrifices than those objectors who justify their behaviour in the more external spheres of worldview.

## 6 Some Basic Guidelines for the Legal Judgment of the (Right to) Conscientious Objection

Here, the focus is on six basic guidelines that are important for the legal evaluation or assessment of conscientious objection. All these guidelines must be considered in the interrelated and wider context of all the factors and circumstances of each specific case.

First, conscientious objection is only legally permissible to a limited extent. The state can indeed eliminate the need for conscientious objection if it regulates social conditions through legal acts in such a way that the goods for which potential conscientious objectors stand up are generally protected. For example, there is no need for conscientious objection to military service if the state does not prescribe or abolish general service. However, if a legal act directly guarantees the right to conscientious objection, then such a right can only have the character of an exception to the rule. The general legal authorization of conscientious objection would be inherently contradictory from a legal standpoint, since conscientious objection is by its very nature directed against the law. The law must therefore limit the right to conscientious objection, if it is expressly defined as such, at least by a relatively restrictive definition of the scope of its enforcement and by prohibiting the objector from interfering with the rights of other legal subjects.

In the Constitution of the Republic of Slovenia, such a restrictive approach is found directly in the second paragraph of Article 123, which restricts conscientious objection only to the performance of military duties,<sup>12</sup> and indirectly and in principle

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<sup>12</sup> Article 123 (Duty to participate in national defence) of the Constitution reads: "(1) Participation in the national defence is compulsory for citizens within the limits and in the manner provided by law. (2) Citizens who due to their religious, philosophical, or

in Article 46,<sup>13</sup> whose provision restricts the right to conscientious objection by prohibiting interference with the rights and freedoms of other persons, but generally leaves it to the legislator to define the concrete cases in which conscientious objection may be invoked. The legislator is, therefore, responsible for correctly assessing the nature of conscientious objection and defining its scope.

Second, in the concrete assessment of the sincerity, factual basis and legal admissibility of a conscientious objection, in cases where such an objection is generally legally admissible under certain conditions, it is appropriate for the representative of the authority to decide in favour of the individual's expressed (subjective) point of view in cases of doubt and to recognize his right to conscientious objection. The sincerity and subjective validity of the conscientious objector's expressed point of view cannot, of course, be entirely reliably and truthfully verified. Thus, the person deciding on the refusal must, on the one hand, endeavour to understand and take into account the individual's (subjective) reasons for the refusal and, on the other hand, prevent a possible deliberate deception and dissimulation of the individual.<sup>14</sup>

The point of the individual on which he bases his conscientious objection must of course also be assessed in the light of all legal criteria, in particular the relevant provisions of legal acts and established legal practice, and only a conscientious objection which meets these criteria should be upheld. In case of doubt, if the competent person is not sure whether the conscientious objection is authentic and meets the legal criteria, he or she must, as stated, give precedence to the statements or interpretation of the objector.<sup>15</sup> Such a position sensibly follows the general democratic norm of the recognition of freedom, according to which the individual in a democratic system and in a state governed by the rule of law is in principle

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*humanitarian convictions are not willing to perform military duties, must be given the opportunity to participate in the national defence in some other manner."*

<sup>13</sup> Article 46 (Right to conscientious objection) of the Constitution reads: "*Conscientious objection shall be permissible in cases provided by law where this does not limit the rights and freedoms of others.*"

<sup>14</sup> To find out whether a conscientious objection is authentic (true) in a particular case, we should not be satisfied only with the superficial assertions of the person concerned, but we must find out why and to what extent an individual's belief in the rightness of his behaviour is central to his personal dignity or self-respect, according to Raz (1986, pp. 280-281).

<sup>15</sup> Murray (1971, p. 334), for example, thinks along the same lines when he says, with regard to selective conscientious objection, that the right to (selective) conscientious objection must also be guaranteed for the possible mistaken belief of the individual, because otherwise it cannot be said that this right is guaranteed at all (this statement can also be applied to conscientious objection in general).

permitted any conduct that is not expressly prohibited by law and that does not interfere with the rights and freedoms of other subjects.

The objective (more precisely: objectified) criteria for assessing the validity of conscientious objection, which result from legal acts and established interpretations and norms of the competent state authorities, appear at first glance to be even more important than the subjective criterion, i.e. the will of the objector. This appears particularly convincing if one subscribes to the view that the individual's claim to the rightness of an act is always also the demand for permission or even authorization of this act by others (Prosch, 1971, p. 218). In this case, the universalistic tendency of an individual's expression or behaviour may pose a threat to a certain part of the legal order (e.g., if it leads a large number of like-minded individuals to behave illegally). However, the fallacy of such a position is revealed by the fact that in such a case - according to the definition presented in the introduction - it is no longer conscientious objection, but one or another form of civil disobedience by which an individual calls for general criticism or rebellion against the existing system. As explained in the introduction, conscientious objection does not in itself have such a universalist and activist tendency, so it does not in itself threaten the existence of a valid legal regime. Considering these and other characteristics of conscientious objection, it is therefore more appropriate, in general and especially in cases of doubt, to emphasize a subjective criterion in its assessment, i.e. the identification and evaluation of the authentic will of the objector. However, the subjective criterion should not prevail if the person making the conscientious objection is insincere and manipulative, or if his or her justification for the conscientious objection is clearly exaggerated or unreasonable.

Third, when deciding on the permissibility of conscientious objection, certain limits of principle must always be taken into account in addition to the limits expressly laid down by law. It necessarily follows from the previous discussion that the right to conscientious objection cannot encompass those phenomena which, although related to this form of protest, are nevertheless substantially different, such as various forms of civil disobedience. It has also already been explained that the right to conscientious objection cannot be a general human right in the sense that it would legally allow the individual to assert conscientious objection in all legal relationships and that it must not interfere with the rights of other people as legal subjects. In

addition, the following two general restrictions on the right to conscientious objection must be considered:

- a) A behaviour or position that compels a person to conscientious objection must be imposed on him in whole or at least in part (a typical example is the obligation to serve in the army), otherwise, the objection cannot be invoked. For example, if someone voluntarily and knowingly chooses the profession of judge and the role of criminal judge, they cannot claim conscientious objection to imposing more severe criminal sanctions without an explicit legal basis, even if their objection may be morally understandable and acceptable in individual cases. Of course, exceptional or complex situations are also possible in such cases, for example if only a narrower and outstanding area of a judge's powers is morally unacceptable to him or if, for example, a severe penalty (e.g., life imprisonment or the death penalty) was only imposed by law after he took office. It is therefore necessary to resolve such cases by considering all specific characteristics and circumstances, of course, taking into account the applicable legal regulation.
- b) The individual's conscientious objection must be based on his conviction that he is protecting the highest values, such as life, health, safety, freedom or privacy. In this case, the subjective criterion (the value judged by the individual) is the main criterion in the evaluation, but the reasons of the conscientious objector for the refusal must not be false or, manifestly exaggerated or unreasonable.

Fourth, conscientious objection can be expressed both actively and passively.<sup>16</sup> For example, the objector may actively oppose the regulation through certain outwardly recognizable conduct (e.g., protesting in writing or orally against his conscription into the army) or passively express his objection (e.g., a physician who, without justification but clearly consciously and knowingly, refrains from providing medical care to a terminally ill patient). The indication that conscientious objection can be expressed actively or passively is of practical importance, especially if the objector is

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<sup>16</sup> This distinction must not be confused with the difference between negative and positive conscientious objection (see Saporiti, 2015, pp. 420-423), where negative conscientious objection consists in the faculty of neglecting a prescribed legal duty for reasons of moral conscience (for example, the physician's conscientious objection to an abortion), whereas positive conscientious objection can consist in the capacity to perform an act prohibited by law, or in the power to enact a valid legal act for reasons of conscience, even though the law would not normally uphold the effect of the act - such a power could be attributed, for example, to the Constitutional Court in the context of constitutional review (Saporiti, 2015, p. 422-423).

passive in that he does not wish to explain his objection. In such cases, it is important to check whether the objector is concealing their true reasons for refusal due to shame, prejudice, fear or similar reasons.

The principle of recognizing the possibility of passive conscientious objection obliges us, in the case of a violation of the legal norm, to treat an accused at least potentially as a possible objector on the basis of his moral conscience. We must do so despite his passive behaviour if there are indications that his moral conscience may be a reason for such behaviour. The competent official who decides in such a case must therefore use all permissible and appropriate means and methods to determine, on the basis of the circumstances of the case and an appropriate discussion with the person concerned, whether his conduct is to be regarded as a conscientious objection. Of course, no one may force a person to define an act as conscientious objection, even if there are convincing external indications of this.

From a legal point of view, in cases where an explanation (justification, reasoning) for the objection on the part of the opponent is completely lacking (such cases are of course rare in practise), it is decisive whether the legal acts expressly prescribe admissible grounds for the objection and their justification. If the regulations are silent in this respect, it makes sense, in the spirit of acting in favour of the individual's freedom of conscience as already explained, to legally take into account an objection of conscience for which the objector has not given any explanation, if there are convincing external indications that it arises from his moral conscience.

Fifth, in interpreting the right to conscientious objection, a distinction must be made between the moral and the legal understanding of conscientious objection. In addition to what has already been said, it should be emphasized here that the law always presents its own concept of conscientious objection. This can be seen in the already mentioned example of the second paragraph of Article 123 of the Constitution of the Republic of Slovenia, according to which citizens who are not willing to perform military duties due to their religious, philosophical or humanitarian convictions<sup>17</sup> must be given the opportunity to participate in the national defense in other ways. This provision has not been relevant in Slovenia for

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<sup>17</sup> As I said, in a broader sense, the (value) intersection of these views relevant to conscientious objection can be characterized by a common denominator: morality. Only when the various forms of these views are differentiated as the moral conscience of a concrete individual can such views be asserted as conscientious objection.

a long time, as compulsory military service was abolished more than 20 years ago. But this example of a legal regulation clearly shows how the legal norm (in this case a constitutional provision) refers to extra-legal sources to justify a legally permissible conscientious objection, while the concrete relevance of these sources is ultimately defined by the law, more precisely by legal decisions accepted by competent state or other authorities or authorized individuals.<sup>18</sup>

In the event that the declaration or conduct of a person asserting a conscientious objection is not decided by an authorized person, commission or state body that would expressly legally permit or deny that objection, it must be assumed that the declaration or conduct of the holder expressing the conscientious objection is the individual legal act on the basis of which he exercises that specific right. For example, in order for a healthcare worker's conscientious objection to be taken into account in Slovenia, it is sufficient under the law for the healthcare worker to inform the institution in which he or she works (more on this below). In the event of a legal dispute over a particular conscientious objection, the final decision on the admissibility of such an objection will of course always lie with the person or institution responsible, with the court deciding in the last instance.

Despite the fact that the authentic moral understanding of conscientious objection is subjective, this understanding is objectified in law, since it is based on legal criteria which naturally take moral criteria into account to a large extent. This does not contradict the point that the subjective view of the individual takes precedence in law when it comes to assessing the validity of conscientious objection, because this subjective view is already a priori placed in an objectified (legal) context within the framework of the law.

Sixth, if conscientious objection is legally impermissible, the objector must be found guilty by operation of law, unless it is a case of minor social importance in which the state waives its legal consideration. After the conviction, it is then possible and

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<sup>18</sup> At the time when general (compulsory) conscription was still in force in Slovenia, against which conscientious objection was permissible, according to Article 43 of the then valid Conscription Act (Official Gazette of the Republic of Slovenia, No. 108/02 - official consolidated text), the validity of each specific conscientious objection was decided by a special commission in which a social worker, a psychologist, a doctor and representatives of administrative bodies responsible for internal affairs, defence matters or protection and rescue made decisions. Their concrete decision on conscientious objection meant the legal recognition of conscientious objection and thus the reduction of concrete moral conscientious objection to a common denominator which represented an intersection of the various professional, legal and personal criteria of the members of the commission.

appropriate, if the particularities of the individual case permit or require it, to apply mitigating mechanisms to the legal sanction. If the judge were to acquit the conscientious objector in the case of conscientious objection, he would thereby deny him his existence within the framework of the law. With Hegel, one can philosophically say that, on the one hand, the judge would deprive him of condemnation and punishment as his legal rights; on the other hand, he himself would violate the law (the latter violation could also mean a legally inadmissible conscientious objection by the judge under the conditions mentioned).

In the liberal and humanistic spirit of modern law, this categorical position of Hegel must admittedly be softened, for in the case of an inadmissible objection, a legal conviction suffices for "fulfilment in the world of law", while the penalty may or may not be imposed (the judge may also acquit the convicted person of the penalty). This view, which sees at least part of the sanction (punishment) already in the conviction itself, is controversial. Still, it makes sense in cases in which the exercise of conscientious objection does not lead to harmful consequences or these are minor. It, therefore makes sense for the judge or another state authority to condemn the unlawful conscientious objection legally but only impose a mild penalty for it or not impose the penalty at all if the legal system permits this. Of course, remission or mitigation of punishment for conscientious objection should not be a fundamental legal guideline or principle but only an option in specially justified cases.

## **7 The Refusal of Artificial Abortion on Grounds of Conscience in the Slovenian Constitutional and Legal System**

The last part of this paper will consider the case of conscientious objection to artificial abortion in the Slovenian legal system. Article 55(1) of the Slovenian Constitution stipulates that the decision to give birth to a child is free, and this provision also includes the right of women to an artificial abortion.<sup>19</sup> A doctor's refusal to perform an abortion on grounds of conscience is therefore a refusal against a constitutional legal norm (and not only against a legal norm) in the Slovenian legal

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<sup>19</sup> Although the constitutional text itself does not explicitly mention the right to abortion, this right is included in this provision. The official explanation of the draft constitution of the Republic of Slovenia of December 19, 1991, states that the freedom in Article 55 "also includes ... the right of women to an artificial termination of pregnancy." It also states that the State must ensure the availability of medical and other services for the exercise of this and other rights covered by this freedom. This interpretation of Article 55 of the Constitution has been consistently followed in practice by the relevant government bodies, health institutions and individuals.



system. Concurrently, the legal basis for such conscientious objection in Slovenia is already enshrined in the Constitution, as Article 46 of the Constitution states that conscientious objection is permitted in cases defined by law if it does not restrict the rights and freedoms of other persons.<sup>20</sup> Despite the fact that physicians' right to conscientious objection is more precisely defined at the legislative level (according to the law, conscientious objection is also allowed for other healthcare workers, but for the purposes of this article, the focus will be only on physicians' conscientious objection), the legal and general legitimacy of this institute<sup>21</sup> is much stronger due to its explicit general constitutional basis.<sup>22</sup>

Article 56 of the Health Care Act stipulates<sup>23</sup> that a physician or other health care professional may refuse to perform a medical procedure if he/she considers that it is "not in accordance with his/her conscience and the international rules of medical ethics." This is a general right (entitlement) of the physician to invoke conscientious objection in relation to his/her medical activity, which means that the physician is thus given a legal basis for refusing an artificial termination of pregnancy on grounds of conscience. Article 56 also stipulates that the doctor must inform the medical institution of his or her conscientious objection. The latter must take the doctor's decision into account, while at the same time giving patients the opportunity to exercise their healthcare rights, which means that a woman who wishes to have an artificial abortion must be provided with the services of another doctor in the exercise of her constitutional right. Article 56 also stipulates that a physician (medical worker) may not refuse to provide emergency medical assistance.

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<sup>20</sup> Some general observations on the conditions and limits of medical conscientious objection as an expression of the physician's freedom of conscience are presented by Ciuca (2017, pp. 23-24).

<sup>21</sup> As the right to an induced (artificial) abortion is always controversial in a society, the legal right of the physician to refuse such or any other medical intervention may also be controversial (see, e. g., Campbell, 2011). Munthe & Nielsen (2017) present arguments for and against a legal right to conscientious refusal for healthcare professionals and take the position that the idea of a legal right to conscientious refusal in medicine or any other profession is either fundamentally incompatible with elementary legal-ethical requirements or implausible because it undermines the functioning of a related professional sector (healthcare) or even a society as a whole. On the consequentialist and deontological arguments for and against conscientious objection by physicians see e.g. Cummins (2021, pp. 249-250).

<sup>22</sup> The explicit legal basis for the legal regulation of conscientious objection in Slovenia, as a member of the European Union, is also given at international level, in the second paragraph of Article 10 of the Charter of Fundamental Rights of the European Union (18 December 2000 – 2000/C 364/01), which states: "The right to conscientious objection is recognised in accordance with the national laws governing the exercise of this right."

<sup>23</sup> Healthcare Act (Official Gazette of the Republic of Slovenia, No. 23/05 - official consolidated version, 23/08, 58/08 - ZZdrS-E, 15/08 - ZPačP, 77/08 - (ZDZdr), 40/12 - ZUJF, 14/13, 88/16 - ZdZPZD, 64/17, 1/19 - odl. US, 73/19, 82/20, 152/20 - ZZUOOP, 203/20 - ZIUPOPdVE, 112/21 - ZNUPZ /21 - ZDUPŠOP, 100/22 - ZNUZSZS, 141/22 - ZNUNBZ, 76/23 - ZNUZSZ-A, 196/21 - ZDOsk - ZDOsk-A, 84/23 - ZDOsk-1, 136/23 - ZIUZDS, 35/24).

This regulation is supplemented by the provisions of the Medical Service Act,<sup>24</sup> which only apply to physicians (medical doctors) and not to other health workers. According to Article 49 of this law, a physician may refuse a medical intervention if he considers that it is both not compatible with his conscience and that it is not an emergency medical aid. This law therefore does not mention the international rules of medical ethics as a possible legal basis for the refusal of a medical intervention (i.e. for the refusal on grounds of conscience), which is incompatible with Article 56 of the Healthcare Act. Thus, the question remains open whether in this case, according to the principle of *lex specialis*, only the provisions of the Medical Service Act for physicians are to be observed, or whether the provisions of the Healthcare Act, which apply to all health care workers, also apply to physicians, which would of course be logical and reasonable from the nature of the matter, because it is difficult to imagine that physicians in particular, unlike all other health care workers, should not refuse a medical intervention that they consider to be a violation of the international rules of medical ethics.

The statutory regulation does not expressly provide for a special review of the validity of the physician's conscientious objection, e.g., by the doctor's superior or another superior organ of the institution or a special commission. Of course, this does not preclude the possibility that, if the physician is employed by a healthcare institution, his or her superior could not or should not assess the validity of the physician's conscientious objection because it would be manifestly insincere, false or otherwise objectionable in principle (e.g., if a physician refuses to perform a medical procedure on a patient by invoking his or her own conscience when he or she has previously performed the same medical procedure on other patients on a regular basis).

The legal regulation takes into account a subjective criterion, namely the doctor's own assessment of what is consistent with his conscience or medical ethics. It is only a genuine (authentic) conscientious objection if the doctor refuses the medical intervention in accordance with his moral conscience.<sup>25</sup> However, if he does so in

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<sup>24</sup> Medical Service Act (Official Gazette of the Republic of Slovenia, No. 72/06 - official consolidated text, 68/06 - ZSPJS-F, 58/08, 15/08 - ZPacP, 107/10 - ZPPKZ, 40/12 - ZUJF, 88/16 - ZdZPZD, 40/17, 64/17, 49/18, 66/19, 203/20 - ZIUPOPĐVE, 206/21 - ZDUPŠOP, 199/21, 141/22 - ZNUNBZ, 136/23 - ZIUZDS, 35 /24).

<sup>25</sup> Theoretically, this concept overlaps with the concept of identity, according to which one retains one's moral integrity if and only if one's actions are consistent with one's core moral convictions. Wicclair (2017) notes that the concept of identity is subject to a number of criticisms and objections, such as that it lacks a social component and

accordance with the provisions of Article 56 of the Law on Health Care out of the conviction that a certain medical intervention is incompatible with the international rules of medical ethics, objective criteria already appear in the assessment, since the norms of international medical ethics are objectified as common ethical denominators and as such are already a matter of rational interpretation. This interpretation must take into account the established professional norms and standards that are considered compatible or incompatible with international medical ethics in medical doctrine and practice. In doing so, the individual does not act exclusively according to his (intimate, authentic) moral conscience, but also according to rational professional considerations in relation to the objectified criteria mentioned above.

At the same time, the question arises as to whether the provision of the Healthcare Act sets moral conscience and international ethical rules as a cumulative or alternative condition for conscientious objection. The conjunction "and" suggests the cumulative conditionality of conscientious objection with both conditions, but the logical and purposive (teleological) interpretation of this provision argues rather for an alternative standard, because if conscientious objection were always to be directed simultaneously against both the physician's (moral) conscience and the international medical ethical rules, this would in many cases make the physician's authentic objection, i.e. objection solely on the basis of his or her own conscience, impossible. At the same time, it could trigger procedures to determine whether a conscientious objection is really justified in the case of conduct that is incompatible with international medical ethics. In the event of a medical intervention that does not comply with the international principles and rules of medical ethics, an even more serious problem arises, because in such a case all physicians would naturally have to refuse the medical intervention, as they are all bound by international professional ethics. In such a case, it would be practically impossible to exercise the statutory obligation to ensure the desired medical intervention by another physician.

Since this article focuses primarily on the fundamental theoretical aspects of conscientious objection, a more detailed discussion of the legal issues mentioned above would go beyond the purpose and scope of this article. Therefore, in

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is a concept of subjective rather than objective integrity, etc., but argues that none of the objections establish the unsuitability of the concept of identity in the specific context of responding to health professionals' conscientious objections and their requests for accommodation.

conclusion, I wish to briefly draw your attention to the provisions of Articles 31 and 81 of the Medical Service Act. Article 31 provides that a physician's declaration of conscientious objection must be included in the medical register, while Article 81 provides that a physician who does not make a declaration of conscientious objection under Article 31, but later claims such objection, must be punished with a fine of EUR 650 - 1,200. Such a legal regulation is clearly unconstitutional (cf. Šturm, 2019), as it contradicts the essence of the right to conscientious objection, which is a constitutional category and has a permanent and dynamic character, which means that it cannot be waived in advance. Conscientious objection cannot be accurately predicted in advance, since both medical activity and the moral conscience of the individual are by their very nature dynamic, changing phenomena. A physician cannot reliably predict which medical interventions his or her conscience will reject in the future. There are exceptions, including a physician's conscientious objection in the case of an abortion, where such a prediction is usually possible. The latter only applies if the physician is absolutely opposed to an abortion, i.e. in any case, but not only under certain conditions, which may also depend on unforeseeable life situations (e.g., if a physician is prepared to perform an artificial abortion on a woman who has been raped, the decisive factor for him will be whether it really was a rape, whereby the criterion of his conscience will not necessarily be legal criteria, and the physician will also not be able to wait for the final judgment of the court in such a case).

## 8 Conclusion

Conscientious objection is primarily a moral (and not an ethical or legal) category. In relation to law, it is the rebellion of an individual against certain legal norms that conflict with his moral conscience. Conscientious objection to military service differs in several respects from other forms of disobedience to authority, such as civil disobedience. As a moral phenomenon, conscientious objection is principally the moral duty of an individual to resist a particular political, legal or other norm of authority or behaviour. Conscientious objection can only be defined as a right in a rationalized reflection of morality (e.g., from the standpoint of community or other collective morality or from the standpoint of ethics), and above all in the sphere of law, which is based on the dualism of rights and duties (attributive-imperative character of law).

When assessing the (right to) conscientious objection, the following guidelines must be taken into account. First, conscientious objection may be legally permissible, but only to a very limited extent. Second, in the specific assessment of the sincerity, factual justification and legal admissibility of a conscientious objection, the subjective view of the objector should generally be given preference in cases of doubt. Third, in addition to the limitations expressly laid down in the legislation, certain guiding principles must be considered when deciding on the admissibility of conscientious objection, including (i) the finding that the situation compelling a person to conscientious objection is at least partly imposed on that person, and (ii) the finding that conscientious objection is based on the individual's conviction that he or she is thereby protecting important life values (such as life, health, safety or liberty). Fourth, conscientious objection may be expressed in an active or passive form. Fifth, when interpreting the right to conscientious objection, a distinction must be made between the (subjective) moral and the (objectified) legal understanding of conscientious objection. Sixth, if conscientious objection is legally impermissible, the objector must at least as a rule be sentenced to a legal penalty, and then it is possible and sensible, if the particularities of the individual case permit and require it, to apply mitigating mechanisms to the legal sanction.

In Slovenia, according to the Constitution and laws, a physician can (also) oppose performing an abortion on grounds of conscience. In this case, the subjective criterion for evaluating his decision is given priority. As a rule, his declaration is sufficient for the legal recognition of this decision, even if this does not mean that the sincerity and validity of this a person's decision need not be examined at all if there are obvious doubts about the credibility of this declaration. In the event of a physician's conscientious objection, the medical institution must provide the patient with access to another doctor who will perform the desired and permissible medical intervention. Concerning the legal regulation of a doctor's conscientious objection, a number of legal issues arise, among which the unconstitutional provision of the Medical Service Act should be highlighted, according to which a doctor is punished with a fine if he invokes a conscientious objection to a medical intervention that he has not already invoked in advance by making a general declaration in the medical register that he would exercise conscientious objection in such cases.

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### **Povzetek v slovenskem jeziku**

Zadevni članek govori o teoretičnih vidikih ugovora vesti. Primarno gre za moralno kategorijo. Z vidika prava, gre za posameznikovo neupoštevanje določenih pravnih norm (načel in pravil), ki so v konfliktu s posameznikovo moralno vestjo. Ugovor vesti se od drugih oblik neupoštevanja oblasti, kot je denimo civilna neposlušnost, razlikuje v več vidikih. Kot moralni pojav je ugovor vesti, najprej in predvsem, notranja moralna obveznost posameznika, da se upre določeni politični, pravni ali drugi normi oblasti ali vedenja. Ugovor vesti je lahko dovoljen tudi z zakonom, vendar v zelo omejenem obsegu. Ugovor vesti je lahko definiran kot pravica samo v racionaliziranem zrcaljenju morale in predvsem v sferi prava, ki temelji na dualizmu pravic in obveznosti (atributivno-imperativni značaj prava). V članku so podrobneje obravnavani nekateri pomembni dejavniki za pravno presojo (pravice do) ugovora vesti in temeljni vidiki slovenske ustavne in pravne ureditve pravice do ugovora vesti pri splavu na strani zdravnika.

