

Conscientious Objection in Public Service Ethics: A Proposed Procedure for Europe

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*Bureaucracy is not an obstacle to democracy,
but an inevitable complement to it.*

Joseph Schumpeter

A. Introduction

In this article, I would like to present a concise case for including the concept of conscientious objection in European civil service regulations for two principal sets of reasons. The first set of reasons relates to the freedom of personal conscience that ought to be upheld in democratic societies, and will be indicated henceforth as ‘moral autonomy’.¹ The second set of reasons is particular to the professional comportment and ethics of public sector employees within efficient institutions, and will be indicated henceforth as ‘procedural virtues’. These two considerations are best understood as separate but related insofar as public sector employees are both citizens of democratic societies and members of government bodies requiring effectively functioning adjudication mechanisms in the implementation of their internal regulations.

A great deal of scholarly attention has been paid to private service ethics since the 1970s, along with somewhat less reflection on the equally real and important problems faced by employees in public sector bodies, such as the European Union (EU) administration. Although certain ethical problems can be described as common between the private and public sectors, such as challenges to transparency, and whistle-blowing, others are particular to one of the two sectors. In particular, civil service ethics raises issues of civic responsibility and the balancing of the political and personal roles required by government employees in

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¹ On the centrality of moral autonomy as a democratic value, see R.A. Dahl, *On Democracy* (1998), especially Chapter Five.

their professional responsibilities. An important and especially daunting problem of this sort is the question of conscientious objection.

Most of the literature and discussion of conscientious objection is focussed on what is generally taken to be its primary framework, the refusal of military service for reasons of moral autonomy. In a sense, this is not surprising. For many generations, there was a high degree of public consensus on a broad degree of morally significant aspects of public administration. One notable exception, involving matters of life and death, was the question of the obligation to bear arms. The members of pacifistic religious groups such as the Quakers and Mennonites cannot, for reasons of moral autonomy, take human life. Although there has been some degree of latitude within certain groups on the inviolability of this principle, they, along with secular pacifists, have maintained that citizens ought not be required by the state to bear arms.

With the liberalisation of Western society that has occurred since the 1960s, a whole host of new moral controversies has emerged. In effect, the Western democracies are far more heterogeneous than at anytime before, and it would serve them well to consider that conscientious objection is not limited to the question of military service. Many other questions, mostly related to sexual and reproductive ethics, have become matters of widespread public debate and controversy. Although legislative bodies such as the EU have done well in emphasising that they represent a broad range of well-considered opinion, this does not obviate the value of recognising in law and legislation the right to dissent, on the part of individuals and minorities. As long as the procedure for securing recognition as conscientious objectors is not excessively lax or broad in scope, it is not likely that professionals in the course of their duties will abuse it.

Finding a just solution to this problem requires knowledge of the general treatment of conscientious objection and conflicts of interest, as well the importance of social roles in human life. The values in question must to be understood in their embodiment within the institutional framework in which civil servants operate. A case in point is that of the EU.

B. The Case of Rocco Buttiglione and the EU: Moral Conscience and Legal Procedure

Article 10

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in the community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the *exercise of this right*.

The European Union Charter of Fundamental Rights (2000)

In the autumn of 2004, a public case involving an Italian nominee for the position of European Commissioner for Justice, Freedom and Security, Rocco Buttiglione, ignited a major debate over the role of religion in European politics, and the relation between personal and professional commitments and values. Buttiglione, Italy's Minister for Europe, and a member of the Pontifical Academy, withdrew his candidacy under considerable pressure from a broad range of European political parties due to his explicit condemnation of homosexuality as a 'sin'. He had also made clear his highly conservative views on moral issues such as the moral evaluation of single mothers and the processing of immigration claims.

Central to this case was Buttiglione's insistence that his views on homosexuality are a matter of deep personal conscience, and would in no way affect his professional competence or sense of justice, in dealing with cases involving individuals from the categories in question. Prior to his standing down from the nomination, he maintained that his conservative Catholic views on marriage and sexuality are entirely legitimate, that they represent the beliefs of a considerable portion of European society, and that he had been cast into the role of a Christian dissident by secular and leftist critics.

There is considerable justification for this self-assessment. A substantial minority of many European countries consists of conservative Christians, whose code of sexual and family ethics prohibits them from assenting to a completely egalitarian perspective on these matters, in which sexual orientation and the choice of family structure are seen as 'lifestyle issues' or purely matters of autonomous personal choice, rather than as matters of divine command and natural law. Given that the EU's dominant consensus and general culture are secular and repudiate such views both procedurally and substantively, it is little wonder that Buttiglione and his supporters have come to view themselves as the recalcitrant defenders of a traditional faith. The question of how to balance such a perspective with the core values and institutional workings of a body such as the EU is likely to increase in importance, as increasingly diverse nations with varying cultural and moral traditions accede to full membership.

The question of the relation between religious conviction and existing institutional law raises issues of both the scope and justification of morality, and the limits of natural law approaches to jurisprudence. Although a full treatment of this issue would be beyond the parameters of this article,² a few points are in order.

Firstly, defenders of natural law, including conservative Catholics like Buttiglione, see themselves as upholding a moral system that ultimately transcends the laws of secular institutions like the European Union. It is important, however, to grasp that in some accounts, such perspectives on personal morality are combined with an acknowledgement of liberal frameworks and procedures for

² For detailed and by now classical treatments of natural law in twentieth century moral philosophy, see A.P. d'Entreves, *Natural Law: An Introduction to Legal Philosophy* (1951) and J. Finnis, *Natural Law and Natural Right* (1981). I am here using the term to mean systems of law and morality that are held to have transcendental justification, either in human nature and/or divine command. As such, they are thought of by their adherents as being beyond the parameters of secular law, at least as an ideal.

social life. In other words, for reasons that are grounded in respect for democracy, pluralism, and natural justice, it is entirely open to the proponents of natural law and/or divine command theories to respect consensual rights that are founded in different jurisprudential systems. In so doing, they need not resort to purely positivistic justifications according to which legal justification is entirely internal to any given system. Rather, like Buttiglione, it is possible for them to distinguish between the institutionalised consensual rights of a society and the communal morality of a section of its population.

Buttiglione's own defence of his right to freedom of conscience is worth quoting at length, in this context. In an address before the Sixth Congress on Catholics and Public Life, in Madrid, on November 20, 2004, he stated his position as follows:

[...] they wanted me to say that I see nothing objectionable about homosexuality. This I cannot do because it is not what I think. In the Catechism of the Catholic Church it is written that, from a moral point of view, homosexuality is not a sin but rather an objectively disordered condition. Homosexuality can become a sin if one adds the subjective element, which is to say, full knowledge that this is wrong and also freedom of the will which accepts this wrong position. I was not allowed to say that and for this reason I was deemed not worthy to be a European commissioner [...].

Catholics have the right to hold positions in the European Union. Is it conceivable that Catholics can be prohibited from exercising public office because of their Catholicism? Because they take the Church's position? Some say that the Catholic position on sexuality is aberrant, and that this should be grounds for discrimination at the EU, or in regard to holding public office. I do not want this to become accepted practice. They have established that a Catholic who says that perhaps it is possible that homosexuality would be a sin can be discriminated against. I found myself in a position in which I clearly had to decide with respect to whether I would keep my position, between my faith (or if not my faith at least the doctrine of my faith) or to accept being discriminated against. For my faith I was able to sacrifice a seat at the EU [...].

And on his respect for liberal pluralism in the defence of his Christian values:

[...] if we have the courage to mobilize ourselves and to become active in public life, which means not to impose our values on others, but to defend the liberty of all and to participate our vision of man. [...] Sometimes we will have a majority and at other times we won't, and Europe will follow its path.³

Buttiglione's justification of his position on homosexuality and its alleged acceptability within European jurisprudence and social ethics combines elements of both legal positivism and the natural law perspective. This is a difficult synthesis to effect, one which arguably involves a major qualification of the scope of natural theory to personal and communal conscience. The philosophical implication of Buttiglione's qualification is the acknowledgement that whether for reasons of prudence or natural justice, there must be limits against the imposition of moral belief within contemporary democratic society. He is thus repudiating clearly any ultramontanist interpretation of Catholic doctrine, in favour of an approach to

³ R. Buttiglione, speech, *see* <http://www.secondspring.co.uk/articles/buttiglione.htm>.

political ethics and jurisprudence that accepts a strong degree of value neutrality on the part of the state, with the right of the citizen to conscientious objection on religious grounds. It is noteworthy that this is not in keeping with the traditional approach to natural law, as articulated by St. Thomas Aquinas, and promulgated by the Vatican.⁴

Natural law, which is an essential foundation of the Catholic Catechism,⁵ here remains binding on the personal conscience of the believer. However, Buttiglione recognises that it cannot trump the consensual rights and laws of the general community. It is in this sense that his position represents a compromise between a positivistic repudiation of absolutist moral coercion through law and the primacy of natural law to his Catholic faith. Conscientious objection is here justified through a distinction between and equal acceptance of two juridical frameworks. The personal affirmation of natural law and religious faith, and respect for moral autonomy and consensual politics are thus held to be reconcilable.

The Buttiglione case is particular, because of the seniority and comprehensiveness of the EU position for which he was nominated. In that sense, it is distinct from the case of civil servants, such as legislative drafters. Nonetheless, it raised, in an especially public and thought-provoking manner, the question of the potential gap between personal and professional roles within European society. The case might well be seen as a warning bell for future cases of moral dissent that will have to be faced by the EU. In keeping with this recommendation, the interpretation of European law and EU internal regulations should ideally extend Article Ten of the Charter to include its own body of civil servants, in the performance of their duties.

C. Some Thoughts on Ethically Significant Roles

Understanding the question of conscientious objection and professional life requires some appreciation of the importance of roles in society.⁶ All of us present ourselves in various ways in order to function as members of communities and institutions. This process is so natural that it is often not even noticed. Consider, for example, what is involved in being a parent. The style of presentation, focus of attention, and precise beliefs involved in raising a child form a complex constellation of values and behaviour that are manifested in a parent's daily interaction with their child over time. The complexity of such a role is apparent to both the parent and socially knowledgeable observers of their interactions with their children. It involves attention to the particular needs of children, combined with an implicit sense of how to raise them, general beliefs about society, and a sense of responsibility in assuming this important task. These matters are

⁴ On Aquinas and natural law, see his *Summa Theologica*, Question 91, in R. McNerny (Ed.), *The Essay on Law* (1996).

⁵ *Catechism of the Catholic Church*, Chapter Three, Article Three. Available online at: <http://www.usccb.org/catechism/text/pt3sect1chpt3.htm>.

⁶ For a good general discussion of the notion of *roles*, see J. Glover, *The Philosophy and Psychology of Personal Identity* (1988), especially Chapter Seventeen.

sometimes discussed openly, as in the case of a chat with a friend on questions that relate to the children, but usually they are left unstated; they are what might be termed implicit values.

It is clear that the diverse professions and occupations that make up the division of labour of any society all possess their own sets of roles and implicit values, allowing for variation of both salience and substance. Police officers, physicians, lawyers, and civil servants are all expected to conform to certain standards of public behaviour, to possess certain *virtues* specific to their functions, to interact with their clients in a manner deemed 'professional', and to maintain the respect of their peers. There is much in this, and a virtue-based approach in ethics offers us the opportunity to explain its diverse implications.⁷ By paying due attention to the roles and practices required for specific occupations, their attendant virtues, conceived as excellences of character and function, become evident to the attuned and capable practitioner. The greater the knowledge and sensitivity to the activities in question, the more perspicacious the understanding of those virtues which will be needed in order to fulfil them well.⁸ Therefore, on a virtue-based account, the acquiring of necessary and appropriate skills by professionals involves a combination of consistent understanding and competence in the actual performance of one's duties.⁹ Moreover, the precise action(s) called for in order to fulfil said duties will vary between differing situations. Determining what is to be done will require the virtue termed 'practical wisdom' (*phronesis*) by Aristotle.¹⁰ This is akin, in its applications to the question at hand, to what is often termed 'professional judgement'.

There is a common, and sometimes tragic dilemma to be faced when the personal values and roles of professionals of all sorts conflict with those of their occupations. Given the importance of both work and personal integrity in life, it is important that there exist an institutionalised procedure for dealing with such clashes. This is why the notion of conscientious objection has been internalised in a variety of organisational contexts.

Let us take the apposite example of professional legislative drafters, working within a public sector institution. Firstly, we must consider the extent to which such individuals can be said to be autonomous within the roles they inhabit. Bracketing ultimate questions about the reality of freewill, let us remind ourselves that they are not automata, but rather individual human beings who entered the civil service with prior conceptions of value and the good life. That is to say, there is an important sense in which they ought to be viewed fundamentally as human beings and secondarily as members of a given profession. Furthermore, in the context of a democratic society informed by value heterogeneity and

⁷ On this question, see J. Oakley & D. Cocking, *Virtue Ethics and Professional Roles* (2001).

⁸ On virtues and sensitivity, see A. MacIntyre, *After Virtue* (1984).

⁹ For a good short account of contemporary virtue theory and its application to professional roles, see R.C. Solomon, *Corporate Roles, Personal Virtues*, in D. Statman (Ed.), *Virtue Ethics: A Critical Reader* 205 (1997).

¹⁰ See Aristotle, *The Nicomachean Ethics* (J.E.C. Welldon (trans.)) (1987).

freedom of choice,¹¹ it is reasonable to suppose that it is unlikely that a) their moral convictions, including those which are most deeply held, will always be perfectly harmonious with a given public policy, and b) that there will be a natural conformity to said policy on the part of all of the institution's employees. This being the case, there is a troubling choice to be made between a pluralistic model which attempts, within reasonable parameters, to respect the public servant's moral autonomy, and what might be termed a dogmatic model involving required absolute institutional conformity.

Possible justifications for the dogmatic model in these matters will likely invoke the priority of procedural virtues over moral autonomy. Core procedural virtues invoked here include the civic responsibility of the civil servant as a remunerated employee of the state, as well the need for institutional conformity in order to ensure the harmonious functioning and overall efficiency of government offices. It might be held that the sole alternative to this is institutional breakdown, if too much moral leeway is allowed.

D. Conscientious Objection as a Human Right

At times in the ethical analysis of institutions, it is illuminating to draw parallels to practices in both similar and significantly different sorts of institutions. In the case of conscientious objection, there is room for fruitful comparative analysis with its historically primary framework, the military, as well as the health professions.

The right to conscientious objection to military service has been recognised in European law for centuries. In the UK, for example, it was given legal status for most of the twentieth century by the 'Military Service Act' of 1916, and the 'National Service Act' of 1939.¹² These acts were in response to the applications of thousands of conscientious objectors in the UK during the First and Second World Wars, respectively.

In times of conscription, it has been generally required of applicants that they satisfy government tribunals of the sincerity and significance of their objections. Depending upon the precise character of said objections, the decisions might involve results such as a complete exemption from military service, an exemption from frontline duties only, or a refusal of the application. The category most analogous to that of civil service conscientious objectors would be the second, in which the objector accepts the requirement of alternatives to particular tasks, while continuing to work for the same organisation that implements them.

In a recent critical treatment of conscientious objection in the health professions,¹³ M. Gordon complains that the acceptance of conscientious objection in some North American jurisdictions, most notably in California, has

¹¹ In a future work, to appear next year, I intend to examine the real and at times perilous moral dilemmas generated by the choices required of civil servants working in authoritarian societies.

¹² On military conscientious objectors in the UK, see C. Braithwaite, *Conscientious Objections to Various Compulsions under British Law* (1995).

¹³ M. Gordon, *Medical Professionalism and Conscientious Objection: Are the Two Compatible?*, 34 *Journal of the Royal College of Physicians of Edinburgh* 296 (2004).

lead to a shift away from patient autonomy and towards a renewal of paternalism on the part of physicians and nurses. Gordon claims that healthcare providers can all too easily invoke the notion of ‘moral distress’ in order to withdraw or avoid treating patients in a manner inconsonant with their ethical and/or religious beliefs, and therefore advocates a return to a completely conformist model that denies the significance of professionals’ moral autonomy.¹⁴ The solution to this problem is not, as Gordon suggests, to change both professional education and institutional culture so as to eliminate conscientious objection, but rather to allow for conscientious objection under more prudent and selective guidelines.

This latter approach would recognise the legitimacy of personal conscience and moral autonomy in the treatment of controversial questions, but also the need to balance these important values with procedural virtues.

For example, consider the case of a legislative drafter who is charged with drawing up a bill liberalising stem-cell legislation in the EU. The proposed legislation represents a major violation of their personal values. What is to be done?

Firstly, it is very unlikely that this individual exists in professional isolation. Rarely is it the case that only one individual can draw up a given act of legislation, as a primary drafter. If, as is likely, it is possible to reassign the dissenter to a different task informally, then the solution to the problem may be straightforward. Given the possibility that the given case of objection should prove to be more of a procedural challenge, then there ought to be a procedure in place to expedite its resolution. In the case of physicians applying for the status of conscientious objector, Gordon¹⁵ cites a set of recommended steps first articulated by C. Meyers and RD Woods as follows, in order to determine:

1. if the applicant has a sincere scruple-based objection,
2. if the scruple fits an otherwise coherent system of beliefs,
3. if the scruple is consistent with other beliefs and actions, and
4. if the scruple is a key component of the petitioner’s moral or religious framework. If an exception is granted, all reasonable alternatives should be explored to ensure that physicians fulfil their obligation to provide service, including having the petitioner provide only follow-up.

To which a fifth condition might be added:

5. if the applicant understands that this procedure is to be invoked only exceptionally, in keeping with the above conditions.

The purpose of this last condition would be to reserve the indicated procedure for matters of genuine ethical significance, thus reducing the likelihood of trivial or ill-considered cases. As such, it would be appropriate for use by civil servants, including drafters.

The reference to follow-up services in the fourth condition would find its public sector homologue in the possible requirement of applicants to assist indirectly in the *processing* of the given piece of legislation or regulation, if only by virtue of their continued employment in a given ministry. This may be seen

¹⁴ *Id.*

¹⁵ *Id.*, at 299.

as a compromise of sorts between the dogmatic ultimatum of strict conformity or resignation, and on the other hand, an excessively lax institutional procedure that might compromise organisational efficiency. As such, if properly interpreted with due attention to the particular features of cases, it is the best method for harmonising the moral autonomy of public servants with the procedural virtues required of them in their roles as employees and representatives of the EU.

E. Conclusion

Reflecting upon the recent history of Europe, and cases such as that of Rocco Buttiglione, leads to a realisation of the growing ethical and religious heterogeneity of European society. It also underlines the importance of reconciling the moral autonomy of individuals and the procedural virtues of institutions such as the EU in an equitable manner. Such a reconciliation must involve the recognition of conscientious objection as a human right that extends beyond the refusal of military service. In particular, it ought to encompass moral and religious questions pertaining to sexuality and the family, and the complexity of human roles. It is likely that mixed systems of legal and moral justification will be invoked in order to accommodate the at times delicate tension between personal and professional roles, as well as the varying demands of faith and citizenship. Existing EU legislation and procedural rules, such as the European Union Charter of Fundamental Rights ought to be extended and interpreted so as to reflect the complexity of the issues here discussed. Not to do so can only lead to an aggravation of ethical and religious conflict within a Europe that has made great progress in alleviating such polarisation.