

FREEDOM OF CONSCIENCE AS A HUMAN RIGHT AND CONSCIENCE CLAUSE AS A LEGAL INSTITUTION IN THE INTERNATIONAL SYSTEM OF HUMAN RIGHTS PROTECTION (SPECIAL FOCUS ON EUROPEAN CONTEXT)

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Abstract. The United Nations recognized the right to conscientious objection to military service only in 2004, with far-reaching restrictions. At the Council of Europe, interpretation for the purpose of issuing ruling was derived from the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, however it has never been given autonomous treaty-based legal regulation. Dispositions such as resolution 1763 (2010) of the Council of Europe or Strasbourg judicial decisions, respecting a recognition margin, could only call for recognition or observance of conscience clause by the states – parties to the Convention. These states, however, already as member states of the European Union – signatories of Treaty of Lisbon – although actually recognising Article 10 of the EU Charter of Fundamental Rights as specification of freedom of conscience, still retained a far-reaching autonomy in its legal configuration. This paper answers the following research questions: is recognition of freedom of conscience as a human right, justifying the right for conscientious objection, requisite for the necessity to adopt conscience clause into the international system of human rights protection, and, consequently, in the state legal orders; if so, is the “universal” mandate of transnationally recognized right for conscientious objection strong enough to overcome the arbitrariness of statutory solutions of state legal orders?

Keywords: right, conscience, objection, freedom, clause

INTRODUCTION

“The guardian of [...] freedom [of conscience] is the right to invoke the conscience clause and to refuse to perform an act contrary to one’s conscience. [...] It is impossible to genuinely protect inviolable rights of a human being without protecting their conscience. It is because freedom of conscience reflects human dignity. Its protection is necessary to guarantee the material content of certain fundamental rights, such as freedom to express one’s ethical, philosophical or religious beliefs. [...] The possibility of invoking conscience clause is considered to be a fundamental right which may be restricted only in exceptional circumstances” [Johann and Lewaszkiwicz–Petrykowska 1999, 21; Waszczuk–Napiórkowska 2012, 231–53].¹

The aforementioned view of the legal scholars and academics quoted in court rulings presents a close relationship between the guarantees of freedom of reli-

¹ Cf. judgment of the Polish Constitutional Tribunal of 7 October 2015, ref. no. K 12/14, OTJ ZU 9A/2015, sect. 143, items 3.3.1; 4.4.1.

gion and of respect for conscience and beliefs, nowadays most often expressed in a triple formula “freedom of thought, conscience and religion,” constituting the ground for international and regional human rights instruments, and a conscience clause – a legal institution recognizing the right to refuse to perform a legal obligation by invoking so-called conscientious objection.

Legal scholars usually do not contest the special role of freedom of conscience as the one to which the other freedoms of thought and religion refer [Lugli and Pistolesi 2003, 36–37]. Neither the so-called *freedom to believe* – using the classic *Bill of rights* of 1791 distinction – is contested, as nobody forbids anybody to hold certain beliefs. The so-called *freedom to act*, namely freedom to manifest one’s beliefs, is worded in various ways in different legal systems, due to different understanding of the restrictions necessary in a democratic society. Thus, not everyone sees the relationship between freedom of conscience as a human right and the necessity to introduce conscience clause to a legal system.

This paper answers the following research questions: is recognition of freedom of conscience as a human right, justifying the right for conscientious objection, a requisite for the necessity to adopt conscience clause into the international system of human rights protection, and, consequently, in the state legal orders; if so, is the “universal” mandate of transnationally recognized right for conscientious objection strong enough to overcome the arbitrariness of statutory solutions of state legal orders?

A legal dogma-based method was adopted for the research. The classical division into international, regional and supra-state levels has been applied. Based on the analysis of the UN legal provisions and standards, the author analyses the legal documents concerning the member states of the Council of Europe and the European Union. Due to the universal and doctrinal nature of the examined issues, the author acknowledges that the research results – limited to the European human rights system – may be considered representative, also for human rights systems other than European, regional and supranational. The author assumes that the conclusions of the analysis presented at the final part of the paper, should entitle the final thesis, presented as postulate for the future.

1. INTERNATIONAL LEVEL – UNITED NATIONS

Marek Piechowiak, analysing Article 1 of the Universal Declaration of Human Rights, stating, among others, that all people [...] are endowed with reason and conscience” points out that “law is based on the recognition of a human being as intrinsically moral, who, in their free and rational behaviour, is subject to cognisable, normative criteria of behaviour, independent of themselves” [Piechowiak 1999, 98].²

² *The Universal Declaration of Human Rights* (Paris, 10.12.1948) [hereinafter: UDHR], <https://www.un.org/en/universal-declaration-human-rights/> [accessed: 08.03.2021], Article 1.

Article 18 UDHR, recognising freedom of conscience together with freedom of thought and religion, states that “this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” The provisions of Article 18 have been included, in the same or slightly modified wording, in various legal documents protecting human rights, having international, regional or supra-national range. It is because UDHR – a document which, in principle, does not have the force of a treaty – was supposed to proclaim human rights as international standard, at the same time indicating the basic content of the term “human rights” used in the Charter of the United Nations [Kędzia 2018, 14; Zanghì 2013, 24–29]. The intention of the writers of the UDHR regarding its nature had been explained by Chairperson Roosevelt who, introducing the project of the UDHR under debate, stated, among others, that UDHR was to serve as “a common standard to be achieved by all peoples from all states” [Kędzia 2018, 16]. Standards formulated in the document have been further elaborated on in treaties and *soft law* acts referring to the UDHR, adopted in the form of the United Nations resolutions [ibid., 14]. Thus, Article 18 UDHR may be considered a certain *matrix* for statutory provisions on freedom of conscience.

The intuitions contained in the UDHR have been developed in the form of a treaty as the International Covenant on Civil and Political Rights³ which stipulates in Article 18(1) that “everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” The only limitations of such freedoms foreseen in Article 18(3) may be the limitations “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” For many years, the Human Rights Committee⁴ had been refusing to recognise the right to conscientious objection on the grounds of the right to freedom of conscience, as exemplified by the ruling of 1984 [Orzeszyna 2017, 20].⁵ A few years later, the Committee, in the context of refusal to commence military service, acknowledged the possibility to interpret the right to conscientious objection from Article 18 CCPR, with a proviso that military service may not be refused on the grounds of conscientious objection during peacetime [ibid.]. Only in 2004, while examining Morocco’s report, the Committee stated that: “the state party must fully recognise the right to conscientious objection in the hypothesis where military service is compulsory” [ibid., 22]. Hence, the Committee ackno-

³ International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49 [hereinafter: CCPR], <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed: 12.03.2021].

⁴ Hereinafter: Committee.

⁵ Human Rights Committee, *LTK v. Finland*, Admissibility, Communication No. 185/1984, UN Doc. CCPR/C/25/D/185/1984, IHRL 2795 (UNHRC 1985), 9th July 1985.

wledges the right to conscientious objection to perform military service, also pointing out the issue of the provisions discriminating the objectors (refusing to perform military service on conscientious grounds), assigned to a substitute civilian service [ibid., 21]. However, the Committee does not consider it legitimate to invoke conscience when refusing to pay taxes on the grounds that the said taxes have been intended for military purposes [ibid., 22].

2. REGIONAL LEVEL – COUNCIL OF EUROPE

At Council of Europe, Article 18 UDHR has been further developed in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶ Dynamic interpretation applied in the rulings by European Court of Human Rights in Strasbourg – intended, at least in principle, to improve the effectiveness of the European human rights system – makes the history of interpretation of conscience clause in judicial decisions on the grounds of Article 9 ECHR impossible to be categorised as explicitly evolutionary.

The history of interpreting Article 9 ECHR based on judicial decisions and views of legal scholars and commentators, freedom of thought, conscience and religion is considered to entail three different freedoms, together constituting one law, however having slightly different scopes, hence allowed to be analysed separately. Recognition of freedom of conscience within the meaning of Article 9 signifies, first and foremost, that the state undertakes not to exert influence on any individual conscience and it will take into consideration the conscience-driven decision of individual citizens [Lugli, Pasquali Cerioli, and Pistolesi 2008, 70–71; Kubala 2012, 393]. Theoretical nature of this assumption has been verified in section 2 of Article 9, specifying the boundary of delimitative activities of the state in the scope of exercising by the citizens their right to freedom of thought, conscience and religion.⁷ Systemic implementation of these assumptions requires finding a balance between a guarantee of fundamental rights uniform for everyone and respect for specificity of various cultural and national backgrounds.

2.1. Conjunction between freedom of conscience and conscience clause in legal documents of the Parliamentary Assembly of the Council of Europe and the judicial decisions of the European Court of Human Rights

The oldest group of petitions where the petitioners were trying to derive their right to conscientious objection from Article 9 ECHR, were complaints regarding refusal to perform military service on conscientious grounds [Bielecki 2016, 107–28]. Legal action has also been taken in this context at the Parliamentary Asse-

⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter: ECHR], https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed: 08.03.2021].

⁷ Cf. Article 9 and 14 ECHR.

mbody of the Council of Europe. Recognition of the right to conscientious objection in the context of refusal to perform military service was advocated, among others, in Resolution 337 of 26 January 1967 or Recommendation 816 of 7 October 1977.⁸ The Committee of Ministers of the Council of Europe have responded negatively to these documents [Banaś 2015, 71–80; Kubala 2012, 399–400]. The statement by European Commission of Human Rights of 5 July 1977 emphasised that ECHR does not guarantee any right to conscientious objection [Renucci 2004, 7]. It was only on 9 April 1987 that the Committee of Ministers of the Council of Europe adopted a Recommendation R (87) 8 presenting conscience clause as a legal proposal [Biesemans 1994, 16–18].⁹ In 1990, at a Copenhagen conference on safety and cooperation in Europe, many states – parties to the ECHR – signed the protocol containing a paragraph on conscience clause.¹⁰ In May 1993, during the meeting of Parliamentary Commission, a project of a conscience clause resolution was being discussed; it was, however, left without vote [Kubala 2012, 399–401]. A new protocol, containing conscience clause, have not been introduced to the ECHR so far.

In the light of the international legal documents of the Parliamentary Assembly described above, each State is free to recognise or not conscientious objection to military service and to possibly punish those who refuse such service [ibid., 401]. Recognizing the moral grounds for conscientious objection, the state had the right to impose an obligation to perform alternative civilian service on a conscript. Until 1998, that is until preliminary examination of a case depended on *European Commission on Human Rights* (before it was dissolved under Protocol 11 to the ECHR),¹¹ cases regarding conscientious objection to perform military service had hardly been brought to the European Court of Human Rights.¹² When dismissing the complaints, the Commission used the same arguments, highlighting the possibility to perform alternative service and the right of every state – arising from the ECHR – to recognise or not the conscientious objection in a particular case. This can be exemplified by the case *Grandrath v. Germany*, where the applicant – a Jehovah’s Witness – was convicted because being a “mi-

⁸ Council of Europe [Parliamentary Assembly], Resolution 337 (1967), *Right of conscientious objection*, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15752&lang=en> [accessed: 13.03.2021]; Recommendation 816 (1977), *Right of conscientious objection to military service*, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14850&lang=en> [accessed: 13.03.2021].

⁹ Recommendation No. R (87) 8 of the Committee of Ministers to Member States Regarding Conscientious Objection to Compulsory Military Service (Adopted 9 April 1987), <https://www.refworld.org/docid/5069778e2.html> [accessed: 13.03.2021].

¹⁰ *Dokument spotkania Kopenhaskiego Konferencji w sprawie ludzkiego wymiaru KBWE* (29.06.1990), <https://bisnetus.wordpress.com/2016/07/31/dokument-spotkania-kopenhaskiego-konferencji-w-sprawie-ludzkiego-wymiaru-kbwe/> [accessed: 13.03.2021].

¹¹ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, https://www.echr.coe.int/Documents/Library_Collection_P11_ETS155E_ENG.pdf [accessed: 09.03.2021].

¹² Hereinafter: ECtHR.

nister of the sect,” he objected not only to performing military service, but also to performing any kind of substitute service, comparing himself to Catholic or Protestant ministers who could refuse to perform military service [Jasudowicz 2013, 28].¹³ The Commission, invoking Article 9 and 14 in conjunction with Article 4 found no violation of the ECHR, deeming the order that the applicant perform military service or at least substitute civilian service justified, as well as stating the possibility of the court imposing sanctions on him in case of refusal [Banaś 2015, 74; Kubala 2012, 401].

The first judgment where ECtHR stated violation of Article 9 ECHR is commonly considered to be the judgment of 1993, in the case *Kokkinakis v. Greece*, regarding conviction of Jehova’s Witnesses for proselytism illegal in Greece [Renucci 2004, 62–65].¹⁴ Other cases where violation of Article 9 ECHR has been examined include the cases concerning the obligation to take a religious oath when accepting secular office [ibid., 71–73],¹⁵ cases concerning the relationship between freedom of religion and the right to education,¹⁶ as well as cases concerning termination of employment relationship for ideological reasons,¹⁷ or the display of religious symbols or wearing religious clothing in public [ibid., 56].¹⁸ ECtHR judgments falling into the aforementioned topic groups, define understanding of freedom of thought, conscience and religion in judicial decisions, helping to outline the grounds for revisiting the right to conscientious objection on the grounds of the provisions of the ECHR.

When it comes to deriving the conscience clause from the provisions of the ECHR based on judicial decisions, the judgment in the case *Bayatyan v. Armenia* is considered to have been a breakthrough [Banaś 2015, 82; Kubala 2012, 402]. The Armenian, a Jehovah’s Witness, Vahan Bayatyan, was sentenced to prison in 2001 for refusal to perform military service. A year before, Armenia joined Council of Europe and in January 2001 it undertook to introduce legislation on civilian substitute service and to release all those imprisoned for that reason. Therefore, the original sentence was all the more surprising – a year and a half custodian sentence – increased to two and a half years in prison, later upheld by Armenian Court of Cassation, following the prosecutor’s appeal claiming such refusal to be unfounded and dangerous [Bielecki 2016, 124; Kubala 2012, 42]. In 2009

¹³ Application no. 2299/64 by Albert Grandrath against the Federal Republic of Germany. Report of the Commission, [https://hudoc.echr.coe.int/eng#{"itemid":\["001-73650"\]}](https://hudoc.echr.coe.int/eng#{) [accessed: 13.03.2021].

¹⁴ Judgment of the ECtHR of 25 May 1993, case: *Kokkinakis v. Greece* (Application no. 14307/88), cf. the judgments of 25 May 1993, Series A no. 260–A, and 26 September 1996, *Reports of Judgments and Decisions* 1996–IV.

¹⁵ For example: judgment of the ECtHR of 18 February 1999, case: *Buscarini and others v. San Marino* (Application no. 24645/94).

¹⁶ For example: judgment of the ECtHR of 15 June 2010 [final 22 November 2010], case: *Grzelak v. Poland* (Application no. 15472/02).

¹⁷ For example: judgment of the ECtHR of 3 February 2011, case: *Siebenhaar v. Germany* (Application no. 18136/02).

¹⁸ For example: rejected case: *Dahlab v. Switzerland* (Application no. 42393/98), decision 15 February 2001, ECHR 2001–V.

ECtHR issued a negative judgment; however, following an appeal, the Grand Chamber, quoting universality of substitute military service arrangements and reminding Armenia of its international obligations, issued another judgment on 7 July 2011, acknowledging that Article 9 protects religious groups opposed to military service.¹⁹ ECtHR decided that punishing the applicant may not be considered an interference necessary in a democratic society within the meaning of Article 9.²⁰ Such arguments have also appeared for example in the judgment in the case *Erçep v. Turkey*.²¹

As Oktawian Nawrot reminds, quoting an excerpt from *Kokkinakis v. Greece* judgment: “acknowledging the need for state action to limit freedom of expression indeed leaves authorities a certain margin of appreciation in deciding whether and to what extent an interference is necessary. However, the actions of public authorities must always take into consideration the context of a democratic society and its axiology” [Nawrot 2014, 108]. In this context, judgments in the cases *Bayatyan v. Armenia* and *Erçep v. Turkey*, may be perceived as a courageous attempt to overcome the tension observed in Article 9(2) ECHR, consisting in reference of the rules of democratic society to human conscience as the axiological foundation organising the common social space for world-view expression [Kubala 2012, 403].

Such reasoning was presented by ECtHR in the judgments concerning cases where the applicants denied doctor’s right to invoke conscience clause, e.g. *Tysiç p. Polska*,²² *R.R. p. Polska*,²³ *P i S. p. Polska*.²⁴ In those cases, ECtHR either did not refer to the structure of conscience clause, or directly highlighted the rights of healthcare worker to conscientious objection, pointing out that the organisers of healthcare system are obliged to provide the patient with access to legally admissible healthcare services [Nawrot 2014, 110].

2.2. McCafferty Report and the right to conscientious objection in Resolution 1763 (2010) of the European Council

On 20 July 2010, a report was presented, prepared by Commission for Social Affairs, Family and Health of the Council of Europe Parliamentary Assembly, led by Christine McCafferty (hence the name: *McCafferty Report*), presenting the draft resolution and the recommendations to be put to the vote at the sitting of the Council of Europe Parliamentary Assembly of 8 October 2010.²⁵ The authors of

¹⁹ Judgment of the Grand Chamber of the European Court of Human Rights of 7 July 2011, case of *Bayatyan v. Armenia* (Application no. 23459/03) [2011] ECHR 1095 [2012] 54 EHRR 15.

²⁰ *Ibid.*, p. 128.

²¹ Judgment of the ECtHR of 22 November 2011, case: *Erçep v. Turkey* (Application no. 43965/04).

²² Judgment of the ECtHR of 20 March 2007, case: *Tysiç v. Poland* (Application no. 5410/03).

²³ Judgment of the ECtHR of 28 November 2011, case: *R.R. v. Poland* (Application no. 27617/04).

²⁴ Judgment of the ECtHR of 30 October 2012, case: *P. i S. v. Poland* (Application no. 57375/04).

²⁵ Cf. Social Health and Family Affairs Committee (rapporteur: Mc Cafferty), Doc. 12347: *Women’s access to lawful medical care: the problem of unregulated use of conscientious objection*,

the report express their worries over the excessive use of conscience clause by healthcare professionals. They hold the view that the institution of a conscience clause is inadequate and largely unregulated and, at the same time, they advocate balancing the right of conscientious objection with the right of each patient to access full medical care. There was also a demand to equate the right to conscientious objection with the right to health. One of the last postulates formulated in the document is suspending the right to conscientious objection in the so-called emergencies, such as danger to the patient's life or when referral to another healthcare provider is hindered [Kubala 2013, 115].

On 17 September 2010, *European Centre for Law and Justice* issued *Memorandum*, also referred to as *Puppink's Report*, disputing the report of *Commission for Social Affairs, Family and Health*.²⁶ The document recalls Recommendation 1518 (2001) of the Council of Europe Parliamentary Assembly of 5 October 2005, stating: "The right of conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the Universal Declaration of Human Rights and the European Convention on Human Rights" [Banaś 2015, 77].²⁷ The authors of *Memorandum*, mentioning a strong positive position of the right to conscientious objection, list the relevant regulations of the United Nations, international NGOs – such as *International Federation of Gynaecology and Obstetrics* and statutory regulations in individual states recognising the right to conscientious objection for health professionals. The authors of *Memorandum* indicate absence of legal grounds for the postulates of McCafferty Report and asking not to include it in the final resolution [Kubala 2013, 115–18].

Eventually, the resolution of the Parliamentary Assembly of the Council of Europe no. 1763 of 7 October 2010 includes the arguments presented in *Memorandum*, not McCafferty Report.²⁸ The adopted document reads that no person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12506&lang=en> [accessed: 13.03.2021].

²⁶ European Centre for Law and Justice, *ECLJ memorandum on the PACE report (Doc. 12347, 20 July 2010) on "Women's access to lawful medical care: the problem of unregulated use of conscientious objection"* Page 1 MEMORANDUM ON THE PACE Report, Doc. 12347, 20 July 2010 "WOMEN'S ACCESS TO LAWFUL MEDICAL CARE: THE PROBLEM OF UNREGULATED USE OF CONSCIENTIOUS OBJECTION" that will be discussed and voted in Strasbourg on 7th October 2010 [hereinafter: *Memorandum*], https://7676076fde29cb34e26d-759f611b127203e9f2a0021aa1b7da05.ssl.cf2.rackcdn.com/eclj/ECLJ_MEMO_COUNCIL_OF_EUROPE_CONSCIENTIOUS_OBJECTI_ON_McCafferty_EN_Puppink.pdf [accessed: 13.03.2021].

²⁷ Council of Europe [Parliamentary Assembly], Recommendation 1518 (2001), *Exercise of the right of conscientious objection to military service in Council of Europe member states*, 23 May 2001, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16909&lang=en> [accessed: 13.03.2021].

²⁸ Council of Europe [Parliamentary Assembly], Resolution 1764 (2010) [final version], *The right to conscientious objection in lawful medical care*, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17909&lang=en> [accessed: 13.03.2021].

could cause the death of a human foetus or embryo, for any reason [Prieto 2012, 40–42]. Parliamentary Assembly emphasised the need to affirm the right of conscientious objection should come together with patient’s right to access lawful medical care [Nawrot 2014, 111]. While the said document does not impose any obligations on the Member States of the Council of Europe, its assessment of particular legislative solutions governing the issue of conscience clause in the Member States of the Council of Europe leads to the conclusion that these solutions are comprehensive and transparent, hence the recommendations to Member States contained in paragraph 4 of Resolution 1763 are intended to again remind Member States of the positively established standards for the application of the conscience clause [ibid., 112].

3. SUPRANATIONAL LEVEL – THE EUROPEAN UNION

The Treaty on European Union (consolidated version of 2016), in Article 6(2) states: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”²⁹ Article 6(3) further stipulates: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

Regardless of the fact that the Union has not formally acceded the ECHR, it should be noted that the Court of Justice of the European Union³⁰ had previously referred to the judicial decisions by ECtHR [Marzocchi 2020; Zanghì 2013, 376; Wieruszewski 2008, 54–57], and that all Member States of the European Union are also members of the Council of Europe, i.e., parties to the ECHR. Thus, Strasbourg judicial decisions and those by ECtHR constitute a significant part of *acquis* in the field of human rights, or, in CJEU terms, *fundamental rights* (CJEU is consistent in using the term *fundamental rights*) [Sozański 2013, 119–21; Kubala 2015, 206].

A human rights document binding on the Member States of the European Union is the *Charter of Fundamental Rights*, dubbed “Declaration on European morals” at the Nice summit [Piechowiak 2003, 5]. The European Council decided to draw up this document in Cologne on 3–4 June 1999 and it was published already on 7 December 2000 (the document is now used in the version adapted to the Lisbon Treaty).³¹ CFR summarizes long tradition of reference to human rights in the states forming the European Communities, or European Union [Wieru-

²⁹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (Consolidated version 2016), Official Journal of the European Union 202.7.6.2016.

³⁰ Hereinafter: CJEU.

³¹ Charter of Fundamental Rights of the European Union (2012/C 326/02) [hereinafter: CFR], Official Journal of the European Union, C 326, 26 October 2012.

szewski 2008, 42–46, 52–53; Wyrozumska 2008, 26–27]. In Article 6(1) as amended by the Treaty of Lisbon (13 December 2007), the Treaty on European Union,³² states that “the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights [...] which shall have the same legal value as the Treaties.”³³

Thus, Article 10 CFR should be interpreted taking into account the aforementioned historic contexts of interpretation. The Article states in section 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 community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.” *Explanations relating to the Charter of Fundamental Rights* published together with the CFR in the Official Journal of the EU, clarify the understanding of Article 10: “The right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52 (3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”³⁴ Although such clarifications are not legally binding, they are providing a line of interpretation for Article 10 of the Charter, locating it in a wide context of interpretation of freedom of thought, conscience and religion based on judicial decisions and views of legal scholars and commentators, both for Article 9 ECHR and Article 18 UDHR and Article 18 CCPR [Zanghì 2013, 313–16, 380–83]. Therefore, we can assume also in the case of Article 10 that the freedoms expressed therein are three manifestations – of different scope – of one right. J.T. Martín de Agar proposes the following definition of scopes constituting Article 10 – the right to freedom of thought as the right protecting the individual in their cognitive search for truth; the right to freedom of religion as the right to a free, individual response to questions concerning transcendence (usually identified with God); the right to freedom of conscience as the right to distinguish freely between what is considered to be good or evil, right or wrong, what one should do and what one should avoid [Martín de Agar 2013, 975–77]. From the formal point of view, it should be noted that Article 10(1), lists freedoms of thought, conscience and religion and later describes the scope (manifesting, teaching, practice) of freedom to change religion or belief, not mentioning the freedom of conscience. The words translated in Article 10 CFR as *beliefs*, translates in the French version as *convictions* [Kubala 2015, 207–208].

³² Hereinafter: TEU.

³³ Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community signed at Lisbon 13 December 2007 (2007/C 3006/01), Official Journal of the European Union C 306 of 17 December 2012.

³⁴ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Official Journal of the European Union, C 303 of 14 December 2007, “Explanation on article 10 – Freedom of thought, conscience and religion” [hereinafter: Explanations CFR].

This conclusion is part of the interpretative tradition of Article 10 of the Charter, as this interpretation also leads to the conclusion that freedom of thought and religion would fall within a scope of freedom of conscience, especially given the fact that beliefs of a religious or non-religious nature may constitute the grounds for the person's moral actions [ibid.]. Thus, freedom of conscience, also in the meaning of Article 10, as was the case of Article 9 ECHR, should be understood as "capability to act in line with own beliefs or convictions, even if such action was contrary to particular legal norms" [Martín de Agar 2013, 981], meaning, in the first place, apart from the right to represent particular world-view (*forum internum*), the right to act according to one's conscience, right to freedom from coercion to act against one's conscience (*forum externum*) [Waszczuk-Napiórkowska 2012, 252–53]. In the light of the above, it should be assumed that defining the permissible scope of action by the legislator, in relation to the fulfilment of a citizen's right to freedom of conscience, within the meaning of Article 10(1) of the Charter, are those described in Article 9(2) ECHR. Therefore, another conclusion seems legitimate with reference to Article 10, based on, for example, ECtHR decisions in *Bayatyan v. Armenia* and *Erçep v. Turkey*, namely delimitative actions by the state, motivated by the principles of a democratic society, should refer to the human conscience as the axiological foundation of social interactions.

Such a strong positive mandate in Article 10(1) of the Charter, presumes the necessity to expressly state the right for conscientious objection, as it has been done in Article 10(2) of the Charter, stating: "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right." It is further elaborated on in *Explanations relating to the Charter of Fundamental Rights*: "The right guaranteed in paragraph 2 corresponds to national constitutional traditions and to the development of national legislation on this issue." In this context, conscience clause should be considered a result of the development of constitutionalism and, in general, legislation of the member states of the European Union.

CONCLUSIONS

With particular focus on the European context, this paper proves that in the international human rights system, freedom of conscience is often treated as a sufficient basis for recognising – although with certain limitations – the right to conscientious objection as one aspect of freedom of conscience itself.

Although Article 18 UDHR, defining freedom of conscience and considered a certain doctrinal and defining matrix for freedom of conscience, has been developed in Article 18 International CCPR, the right to conscientious objection in relation to military service, with far-reaching limitations, was only recognised at the United Nations in 2004.

Although within the European Council, dispositions such as resolution 1763 (2010) of the Council of Europe or Strasbourg judicial decisions, respecting a re-

cognition margin, could only call for recognition or observance of conscience clause by the states – parties to the ECHR, these states, already as Member States of the European Union – signatories of the Lisbon Treaty – by recognising Article 10(2) CFR, actually recognised the conscience clause as a legal instrument which is a development or positive specification of freedom of conscience [Kubala 2015, 211].

Making the possibility of invoking conscience clause subject to national constitutional traditions and development of national legislation in Article 10(2) CFR, as well as – one might add – on the adopted additional protocols to the Lisbon Treaty (e.g. the Republic of Poland signed Protocol No. 30 to the Lisbon Treaty – the so-called *British Protocol* – an *opt-out* clause, restricting in its entirety the invocation of the Charter’s provisions by Polish and British citizens, although no longer relevant in the case of the latter) [Książniakiewicz 2012, 333–48], makes Article 10 CFR, perhaps, a somewhat fictitious provision, should the need to exercise the right to conscientious objection arise in a situation where no conscience clause has yet been provided for in a given state legal order or the right to conscientious objection has been prohibited in a given case.

Considering the above, it is justified – though a bit utopian – to postulate the future creation of a uniform – implementing the postulate of “universality” of human rights recognised on treaty level – interpretation standard for Article 10, legislatively binding on all the Member States of the European Union. Such standard of interpretation would actually force the necessity to recognize, at a national level, the right for conscientious objection as a fundamental right, being a part of the legal tradition of European countries. Argument supporting such a postulate might be, for example, introduction of EU citizenship in TEU (Article 9 TEU), which, although ancillary to and not replacing national citizenship, in view of the diversity of national legal solutions for the application of the right to conscientious objection, provides opportunity for potential violation of one of the core values of the Constitutions of the Member States, namely the equality of citizens before the law [Kubala 2015, 211–12]. Such attempt to uniformly oblige Member States, could be considered as a negation of the current trends in the international protection of human rights, which CFR is a part of, turning away from the ECHR’s striving towards narrow juridisation, which postulates – as M. Piechowiak writes – “avoiding formulas with open meaning, which certainly include provisions concerning values” [Piechowiak 2003, 29], in favour of a “holistic” [Kędzia 2018, 5–23] view of human rights, where universality of a provision guarantees it does not quickly becomes obsolete due to changing social conditions. Adopting such a holistic perspective makes it difficult, or even impossible, to specify and hold uniform axiological reference. On the other hand, if – according to some – such axiological consistency would neither be possible in the case of too narrow juridisation, as it is impossible to take into consideration all, often contradicting, points of view, a question arises, whether it is possible to call the right to freedom of conscience, and thus the right of conscientious objection, or all human

rights in general, as “fundamental” – that is, inherent in human by its very nature and therefore deserving independence from the arbitrariness of statutory state decisions.

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