

Conscientious objection and European vision of human rights

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ABSTRACT

The development of biomedical sciences and techniques, despite the undeniable positives, brings with it new threats, also for human rights and democratic society. The most serious concern is possibility of modification of the biological nature of human beings –which might entail limitations of human freedom. The modification of the human genome, brain and mind control, mechanization of human body, creating digital copies of human beings are now the most widely discussed threats , for human rights and the rule of law. Aside to the mentioned risks directly related to the development of biomedical technologies, the subject of much

controversy is the relationships between the beneficiaries of progress in biomedicine (patients), and those who provide defined benefit plans (primarily physicians). The question is whether the physician is obliged to provide every medical service or may refuse to provide those which are opposed to his ethical judgements? The problem of the status of conscientious objection arises in above mentioned context. This paper presents the issue of conscientious objection from the perspective of the Council of Europe regulations.

Keywords: conscientious objection, human rights and medical profession, abortion, freedom of thought, medical ethics

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The discussion on the possibilities as well as the purposefulness of restricting medical conscience clause has been ongoing for quite a long time in Europe, the United States, Canada, Australia as well as other states of law. In certain states, e.g. in Poland, such controversies and doubts have arisen that it is necessary for the constitutional court to take its stance on the issue. Indeed, the issue is important and serious. Contrary to the image propagated by some of the milieux (bioethicists, politicians, journalists, physicians, lawyers and other *big shots*), the conscience clause is not a tool whose main purpose is to be used by extreme fanatical conservatives (which in the case of Europe – according to the above-mentioned milieux – denotes particularly Catholics) trying to make the world resemble their vision of it. Quite the opposite, the clause is a tool to prevent it.

Coming back to what should be obvious, it needs emphasising that freedom of thought, conscience and religion vested in each citizen is a *sine qua non* condition for the existence of any democratic society which additionally purports to be a state of law [1]. Without it, the autonomy of entities in the public sphere – necessary both for the existence of a state of law as well as a democratic society – and in extreme cases also in the private sphere, would be nothing but a fiction. In a state of law, each individual has and must have the right to make their autonomous choices in terms of the objectives they want to pursue, the model of life they want to follow, the system of values against which they want to evaluate the surrounding world and make choices and even in terms of deciding what is right and wrong [2] – obviously, as long as the choices they make do not violate the system of values applicable in a given state of law. Furthermore, each individual has the right to manifest their beliefs, practice their religion, express opinions and assessments as well as refuse to perform acts which are contradictory to their system of values. To arbitrarily restrict the aforesaid autonomy would be, in fact, equivalent to attacking the individual and the rights vested in the individual as well as the state of law.

The significance and exceptional position of the above-mentioned right has been clearly emphasised in the human rights protection system of the Council of Europe. In the treaty constituting the conclusion or even the basis of the system, i.e. in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 [3] commonly referred to as the European Convention on Human Rights (hereinafter referred to as ECHR), the right to execute freedom of thought, conscience and religion was explicitly expressed in article 9 section 1: *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community*

with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

The freedom referred to in the above quotation can be examined on both internal and external level [4]. The internal level comprises the so-called spiritual freedom, that is, in a broad sense, the sphere of one's beliefs. From the regulation of the convention it follows that an individual has a full right to exercise the autonomy of thought, conscience and religion. It is therefore each individual's right to provide answers to such questions as: how should I live my life, what is my imperative, what model of life do I want to follow, etc.? As Søren Kierkegaard put it, from this point of view an individual, to some extent, becomes *a task given to him and set by him* [5]. To put it in other words, an individual is guaranteed, among others, freedom to choose the system of values to follow and according to which this individual wants to evaluate and assess the surrounding reality. To use the byword in order to figuratively describe the internal freedom, one might say that *my home is my castle*.

As much as the sphere of one's internal freedom is not subject to any restrictions, the act of leaving one's internal stronghold and manifesting one's beliefs must take the reality of the society into account. In the external sphere, freedom of thought, conscience and religion can and in some cases even must – in order to avoid its hypertrophy and paralysis of the society – be subject to limitations. Accordingly, article 9, section 2 of ECHR reads as follows: *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*. Consequently, each attempt on the part of the state to limit the said freedoms must pass a threefold test: of legality, necessity and purposefulness.

The legality test, in its initial stage, comes down to identification of the relevant legal basis legitimizing introduction of certain limitations by the state. Additionally, in the context of judicial decisions of the Strasbourg authorities, several requirements could be formulated regarding legal regulations forming the basis for state actions limiting freedom to manifest one's religion or beliefs. First of all, the regulations should include accurately identified criteria based on which the interested party could assess the probability of state interference in the sphere of its freedom. Furthermore, the said regulations should provide the individual with legal tools for protection against the arbitrariness of the public authority. Moreover, the said acts must be characterized by an appropriate degree of accuracy when describing

types of conduct that an individual may engage in [6].

The assessment of the need to undertake limitative measures by the state in terms of freedom to manifest one's religion or beliefs remains partly within the so-called margin of appreciation of the state [7]. What it means is that the state independently determines if and to what extent such a limitation is required in a democratic society. Nevertheless, in the context of a democratic society it seems that the activity of the state in terms of limiting the above-mentioned freedoms should be characterised by particular caution and moderation. As stated in the opening section, limitative measures pertaining to freedom of thought, conscience and religion, or even expression of the same, are in fact *an operation on a live tissue of a «democratic society» within the meaning of the Convention (...). The inherent pluralism of a democratic society which has been fought for with dedication over many centuries depends on it* [8].

The third of the listed criteria for assessment of legality of limitation of freedom to manifest one's religion or beliefs, directly related to the criterion of necessity, pertains to its purposefulness. In a democratic society, limitative measures undertaken by the state must be extremely well-founded axiologically and must be related to protection of another – at least equally important – value. The list of the said values can be found in the aforementioned article 9 section 2. It needs emphasising though that the said list is of *numerus clausus* nature and therefore the state may not refer to other reasons while limiting the said freedom.

Moving on to the basic problems of this article, it must be stressed that – in line with one of the fundamental laws of thought, i.e. *dictum de omni* principle being juridically reflected in the *lege non distinguente* directive – the above observations apply to healthcare professions to the full extent. As a result, their right to exercise freedom of thought, conscience and religion in the internal sphere is absolute and unlimited. Only manifestation of one's religion or beliefs may be subject to limitations, provided that the above-mentioned conditions are met. Apart from legality, the necessity of protection of health, which is one of the responsibilities of the state, will be of paramount importance in this respect.

Taking into account the essence of the dilemmas brought about by the development of medical sciences and technology, the state-imposed limitation of the right to manifest religion or beliefs of healthcare professionals must be extremely cautious. This is because limitations in this area may affect the essence of the system of values recognised by a given individual and apart from limiting their manifestation might lead to limitation of freedom of thought, conscience and religion in itself. It should be noted that in the case

of values constituting the foundations of a given axiological system, it is often impossible to separate the internal and the external sphere. Refraining from certain actions on the part of an individual or from opposing certain attitudes or actions may become equivalent to rejection of the values constituting the essence of a given religion or a system of beliefs. In such situations, the state should undertake measures which would allow an individual – a healthcare professional – to maintain their internal autonomy and at the same time provide given healthcare services. In practice, this means that a healthcare professional may not be forced to engage in activities contradictory to their system of beliefs. The above opinion was explicitly expressed by Bruno Nascimbene, a member of the EU Network of Independent Experts on Fundamental Rights, who stated that *no reasonable person can think that in a society inspired by the values of freedom and western democracy, physicians and nurses who consider abortion to be an act of killing can be obliged to perform the procedure. If we allow such a loophole in the right to freedom of conscience, we may be following a very dangerous path* [9]. At the same time, the state is obliged to secure the patients' right to protect their health, which in practical terms means that each patient should be able to receive healthcare services from another healthcare service provider.

To sum up the above section of the argument, it should be acknowledged that in the light of the above described article 9 of ECHR, a healthcare professional has the right to refuse to provide healthcare services inconsistent with their system of values – the so-called right of conscientious objection or conscience clause [10]. At the same time, the state is obliged to secure the patients' rights, who must be able to receive healthcare services from another healthcare service provider. The viewpoint seems to have been confirmed in judicial decisions of the European Court of Human Rights (hereinafter referred to as ECHR). For example, in the well-known case *Tysiqc vs. Polska*, despite the fact that the plaintiff explicitly claimed that by invoking the conscience clause, the gynaecologist caused deterioration of her health [11], with no legal mechanisms in place which would make it possible to hold the gynaecologist accountable for refusing to provide the healthcare service, the Court focused on the problem of violation of the right to privacy, leaving the problem of the conscience clause outside of the scope of analyses. As pointed out by the commentators, no reference on the part of the Court to this aspect should be deemed a conscious choice, which actually confirms the principle of freedom of conscience vested in healthcare professionals [12].

A situation similar to the above-mentioned one could be observed in relation with the case *R.R. vs. Polska* [13]. The plaintiff claimed that the

refusal to issue a referral for detailed prenatal examination (genetic tests), motivated by conscience-related considerations, deprived her of the possibility to undergo a legal abortion procedure. Even though the ECHR ruling referred, among others, to the opinion of the United Nations High Commissioner on Human Rights, according to which a state vesting the right to invoke conscientious objection in healthcare professionals must provide patients with a possibility to obtain a given healthcare service, including abortion, from another healthcare service provider, in no way did it question the validity of the conscience clause. On the contrary, the Court pointed to the need to secure execution of both the rights of healthcare professional, including chiefly the right to invoke conscientious objection, as well as the rights of patients, particularly the right to protect their health (access to healthcare services).

The above-mentioned stance of the Court is perfectly consistent with the measures undertaken with the objective to promote the conscience clause by the Council of Europe authorities within the last 50 years. So far, these measures pertained mainly to the problem of refusal to perform military service on the grounds of religious considerations. When reconstructing the significance assigned to the conscience clause in a democratic society, one of the recent ECHR rulings should be pointed to, the subject of which pertained to the matter. It was the case of Vahan Bayatyan, an Armenian, who was drafted in 2001 [14]. Bayatyan, on the grounds of religious considerations (Jehovah's Witness), refused to perform military service and declared his readiness to perform an alternative service as a substitute. Nevertheless, the Armenian law did not provide for such an alternative. As a result, Bayatyan was sentenced to 2.5 years of imprisonment. The court of cassation, which examined the case in the last instance on the state level, while upholding the ruling, noticed that freedom of thought, conscience and religion guaranteed in the Armenian Constitution may be limited, among others, on the grounds of the need to ensure safety of the state, public safety and public order. It needs emphasising at this point that the European Convention on Human Rights, in article 4, section 3b, provides for a possibility of performing an alternative service by conscientious objectors; yet, it does not establish on the part of the state an obligation to provide the individual with such a possibility. Similarly, article 9 of ECHR does not impose on the state an obligation to acknowledge the refusal to perform military service by an individual. In spite of the above, the Court stated that the refusal to perform military service on religious grounds, particularly on the grounds of a conflict of conscience, is within the sphere of freedom of an individual as defined in article 9 of ECHR. As a result, the state sentencing Bayatyan to

imprisonment breached the sphere of freedom of religion of the individual. The interference was deemed unfounded, as despite the fact that Armenia did not acknowledge the option of performing an alternative service by the individual, the interference in the sphere of freedom of religion did not seem to meet the necessity condition (the said limitation was not necessary in the democratic society).

In the aforementioned ruling, the Court emphasised that the state had the margin of appreciation at its disposal in terms of assessment of the need to limit an individual's freedom of religion, including the assessment of the purposefulness of providing an individual with a possibility to perform alternative forms of military service. Nevertheless, according to the Court, a state which fails to provide an individual with alternatives to military service must, on each occasion, prove that interference in the sphere of an individual's freedom of religion is justified by *an urgent public need*.

The above-mentioned case, which is a kind of culmination of the trend visible in the judicial decisions related to the applicability of the conscience clause hitherto, explicitly points to the position which the institution of conscience clause enjoys in the Council of Europe system of human rights protection [15]. Taking the said position into account and considering the importance of the dilemmas associated with making medical decisions (e.g. discontinuation of a therapy resulting in a patient's death; abortion; selection of human embryos, etc.) it should be stated that the arguments in favour of application of the conscience clause with reference to healthcare professionals seem to be considerably stronger than in the case of individuals refusing to perform military service. Consequently, it is difficult to imagine a situation, where the Council of Europe authorities would acknowledge limitation of freedom of conscience vested in healthcare professionals. Undoubtedly, such a step would be inconsistent with the over forty years' long tradition of applicability of the conscience clause [16]. The argument is additionally reinforced if one considers the fact that in the case of military service, there are often relevant legal norms which impose on an individual the obligation to perform the service, whereas in the case of controversial medical decisions, e.g. regarding abortion or euthanasia, there are no such obligations resting upon healthcare professionals whatsoever [17].

When describing decisions issued by ECHR regarding the right of conscientious objection vested in healthcare professionals, it should be emphasised that the Strasbourg authorities decided to limit the said right, where the relation between a given practice and the arguments which justified invoking the conscience clause by

an individual did not exist or were significantly weakened. For instance, in the case *Jean Bouessel du Bourg vs. France* [18], the European Commission of Human Rights stated that the refusal by the taxpayer to pay taxes on the grounds that the funds collected by the state in this manner could be allocated to financing practices which are not accepted by the taxpayer, such as abortion, may not be interpreted in the categories of execution of the right of conscientious objection, as the relation between the payment of tax and abortion is too flimsy.

An even further reaching limitation of the right of conscientious objection applied to pharmacists. In the well-known ruling regarding *Pichon and Sajous vs. France* [19], the Court stated that pharmacists, with relation to performance of their professional responsibilities, may not invoke the conscience clause if this would lead to imposing their religious beliefs on others. In the said case, the co-owners of the pharmacy refused to sell contraceptives to patients holding correctly issued prescriptions on the grounds of religious reasons. When justifying their actions, Pichon and Sajous stated, among others, that there was no legal norm which would impose on a pharmacist an obligation to sell contraceptives or abortifacients. The state courts did not find such explanations convincing and a fine was imposed on the pharmacists.

Since they were of the opinion that France violated their right to manifest their religion, the pharmacists lodged a complaint with ECHR. Having examined the possibility of invoking the institution of the *conscience clause* on the part of the co-owners of the pharmacy, the Court stated that in a situation, where the sale of contraceptives is legal and pharmacies are the only points where contraceptives can be bought, refusal to sale such medicines can not be classified as a form of application of the said institution. At the same time, the Court emphasised that the obligation to issue contraceptives imposed on the pharmacists does not deprive them of the possibility to manifest their religious beliefs, as they have numerous alternative possibilities to express their attitude to various forms of contraception which do not limit the patients' rights.

While referring to the above-mentioned grounds enabling the limitation of the right of conscientious objection, it should be explicitly emphasised that the option does not seem to apply to healthcare professionals. In the light of all the arguments put forward so far in the text, such a limitation would clearly violate health professionals' right to freedom of thought, conscience and religion; additionally, it would meet the description of prohibited discrimination (article 14 of ECHR). Similarly, in the described case of *Pichon and Sajous vs. France*, the national court emphasised that ethical or religious grounds, which

do not entitle a pharmacist to refuse to issue contraceptives, do apply to physicians, midwives and nurses in terms of their decision regarding an abortion.

When analysing decisions issued by the Court regarding the right of conscientious objection vested in healthcare professionals, it should be additionally stressed that in line with the trend visible in the issued decisions, the right is vested in natural as well as legal persons. What follows is that institutions providing healthcare services, such as hospitals, can – by referring to the professional ethos or other systems of values – oblige their employees to refrain from providing particular services, e.g. performing an abortion. Such a practice was deemed consistent with the Convention, among others, with relation to the case *Rommelfange vs. Federal Republic of Germany* [20]. The European Commission of Human Rights stated that dismissal of a physician, who violated the ethical standards set by the employer, by publicly supporting abortion, was not an instance of violation of the provisions of the Convention.

Moreover, the above interpretation of the conscience clause was fully confirmed in the wording of the document, which should be deemed a summary of the stance of the Council of Europe on the medical conscience clause and at the same time the Council's response to those demanding introduction of limitations in this area, i.e. in the Resolution of the Parliamentary Assembly of the Council of Europe 1763 on the right of conscientious objection in lawful medical care of 7 October 2010. The document, as its title clearly indicates, is not an act binding on Council of Europe member states. As a resolution, it entails no legal consequences and particularly, it does not impose any obligations on the Council of Europe member states. Nevertheless, taking into consideration the fact that the Parliamentary Assembly of the Council of Europe is an important European forum, where members of parliaments of all European states voice their opinions, the significance of the resolutions is not purely symbolic any more.

When attempting to analyse the wording of the Resolution No. 1763, it should be noted that the said document is an answer to the report of the Committee on Social, Health and Family Affairs prepared under the leadership of Christine McCafferty, titled: *Women's access to lawful medical care: the problem of unregulated use of conscientious objection* [21] and the draft of the resolution contained in it. The latter focuses on the problems related to human procreation and mainly on the issue of legal abortion. Without going into details of its content, it should be noted that in line with the focus adopted in the document, abortion is considered a form of *healthcare* and a woman is said to have a *fundamental right to abortion*.

Consequently, it is argued that the obligation of the state is to secure the means for execution of the said right. Taking the above into account, the change in the final wording of the title of the resolution should be considered very significant. According to its wording, the centre of gravity was moved from the women's right to the issue of the conscience clause in the context of healthcare – and broader – to the right of conscientious objection vested in healthcare professionals.

Moving on to the description of the wording of the resolution, it should be noted that already in the first section of the document the Parliamentary Assembly of the Council of Europe recommends that member states should adopt a principle, according to which no individual, hospital or institution can be forced to perform a procedure aiming at aborting pregnancy or inducing miscarriage, euthanasia or any action which could result in a death of a human embryo or foetus, or be held accountable and discriminated against, in any manner whatsoever, for refusal to perform or assist in such a procedure. By the same token, in line with the observations made in the opening section, it should be noted that healthcare professionals as well as the institutions being their employers maintain an autonomy in terms of the decisions to engage or refrain from engaging in medical interventions concerning controversial issues related to conception or termination of a human life.

Subsequently, the Parliamentary Assembly (section 2) points out that the right of conscientious objection should go hand in hand with the patient's right to obtain healthcare services provided in the appropriate time-frame. Therefore, the Assembly emphasises that the state shall secure the said right – undoubtedly rightly considered to be one of the fundamental patient's rights. The Assembly expresses particular concern with possible consequences of invoking the conscience clause on the part of healthcare professionals with reference to healthcare services addressed to women, particularly those with low income as well as those living in rural areas.

In the course of assessment of particular legislative solutions which regulate the problems of the conscience clause in the Council of Europe member states, the Parliamentary Assembly concluded that in the majority of the cases, these should be assessed as clearly positive. The solutions are comprehensive and simultaneously transparent. Additionally, they maintain, in an appropriate manner, the balance between the right of conscientious objection vested in the entities providing healthcare services and the interests and rights of the patients, particularly by providing the patients with a guarantee that their rights will be respected, protected and executed (section 3).

In the final – fourth – section of the described recommendation, the Parliamentary

Assembly reminded, once again, that the member states are obliged to:

1^o ensure access to lawful healthcare and secure the right to health protection;

2^o ensure observance of the right to freedom of thought, conscience and religion vested in healthcare professionals.

Referring to the above-mentioned legislative practices, the Parliamentary Assembly addressed all member states of the Council of Europe and requested development of comprehensive and clear provisions regulating the problems of the conscience clause with reference to healthcare professionals, which would:

1. guarantee the right of conscientious objection vested in healthcare professionals with reference to their participation in the procedures questioned by the same,
2. guarantee to the patients that in the case of a refusal voiced by a healthcare professional, they would have enough time to obtain the healthcare service from another service provider,
3. guarantee to the patient reception of appropriate healthcare services, particularly in emergencies.

The above mentioned observations clearly lead to the conclusion that freedom of thought, conscience and religion in itself, and particularly the possibility of its existence with reference to a particular group of individual, cannot be the subject of a reasonable discourse in a state of law from the perspective of the system of human rights protection of the Council of Europe. This is because its existence is a prerequisite for existence of a state of law and a democratic society. This kind of discourse would inevitably go beyond their paradigms. Each member of a democratic society enjoys freedom of thought, conscience and religion as well as the right of conscientious objection simply due to being its member or, even more broadly speaking, a human being. The discussion may go as far as to the following question: are there reasons to, in a given case and as an exception, limit one's freedom? Nevertheless, it will always be an exception, not a rule.

Moving on to the philosophy of law area, one could state that freedom of conscience of an individual and the related right of conscientious objection is not a right, for the existence of which the lawmaker's will is required. An individual does not have to point to any particular legal act and the right provided for in such an act in order to have the right to refuse to engage in actions inconsistent with their conscience. In such a case, we are dealing with freedom resulting from the very human nature. A free individual, capable of making independent decisions and choices, also of ethical nature, constitutes, so to say, the existing reality as found by the lawmaker. Therefore, the lawmaker must

refer to that reality. In a democratic state of law – in line with its logic – the obligation of the authority is, first of all, to secure and support it. Subsequently – in the event the said freedom is in conflict with other freedoms – its limitation may be considered. As a result, detailed, most frequently statutory, legal regulations pertaining to the conscience clause – from the above-mentioned perspective – never constitute the source of the right, they limit the same.

It may seem that in democratic states of law, reminding of the above is needless and that the need to secure the ability to freely express one's thoughts and follow one's ethical compass (needless to say, as long as this does not lead to violation of rights and freedoms of other individuals) should not be open to any doubts. It is those freedoms that are particularly valuable from the point of view of a democratic society, as they are enshrined in its deepest essence, its *live tissue*. Without them, there is no and there could be no democratic state of law.

Finally, when reflecting on the medical conscience clause, we should seriously ask ourselves the following, by no means rhetorical, question: is a stance adopted by a physician, who refuses to provide a healthcare service, which according to their sincere belief is ignoble and contradictory to the essence of a physician's mission, inconsistent with the system of constitutional values and norms? Is there really no place in a state of law for someone who interprets, instead of objectifying, and tries to put into practice the wording of the Hippocratic oath: *I will comport myself and use my knowledge in a godly manner*. Cannot a physician, who refuses to e.g. abort a pregnancy or prescribe an abortifacient, be a physician?

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Conflicts of interest

The authors declare no conflicts of interest.

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10. Both phrases are considered synonymous in this analysis.
11. *Subsequently, the intervener noticed that in line with the regulation of 1997, the physicians were left with the task of identification of the conditions, in which abortion could be performed due to medical indications. The circumstances indicating that the pregnancy poses a threat to life or health of the woman had to be confirmed by a consultant specialising in the relevant field of medicine due to the*

woman's condition. Nevertheless, the gynaecologist had the right to refuse to perform the abortion by invoking the conscience clause. For this reason, the patient was unable to hold the physician accountable for refusal to perform the procedure and thus cause the physician to be found guilty of deterioration of her health following the delivery.

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14. Judgment of 7 July 2011 in the case *Bayatyan vs. Armenia*, Application No. 23459/03.
15. The position was explicitly stressed in the wording of the Recommendation of the Parliamentary Assembly of the Council of Europe No. 1518 (2001) on exercise of the right of conscientious objection to military service in Council of Europe member states (section 2): *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.*
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