

PROTECTING CONSCIENTIOUS OBJECTION AS THE “HARD CORE” OF HUMAN DIGNITY*

MICHAŁ SKWARZYŃSKI**

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1. INTRODUCTION

The aim of this article is to present the results of research on the source of conscientious objection, i.e. human dignity. It seems that the system of human rights has the task to provide a normative expression of human dignity. The essence of the protection of these rights is based precisely on anchoring in dignity. If, therefore, it is proved that conscientious objection should be protected in the system of human rights, then a natural problem arises of indicating what element of dignity it applies to.

This is a matter of a specific, effective and current interaction of soft law, hard law and *ius cogens* of international law related with conscientious objection. The problem of conscientious objection is currently the subject of the analysis of the doctrine in connection with the judgment of the Polish Constitutional Tribunal of 7 October 2015 in case K 12/14, which concerned the doctor's conscience clause.¹

Of course, these considerations cannot include the whole analysis of the essence of *ius cogens* or soft law in international law. It is clear that in international law the catalogue of *ius cogens* is not closed and there are views that it also includes the obligation to respect human rights. This has some justification in the jurisprudence of international courts, as well as in the fact that the position of human rights is so

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** PhD, Assistant Professor at the Department of Human Rights, Faculty of Law, Canon Law and Administration of John Paul II Catholic University of Lublin; e-mail: michal.skwarzynski@gmail.com; ORCID 0000-0002-4357-8035

¹ The conscience clause is recognized as “the right to act in accordance with one’s conscience, and consequently also freedom from compulsion to act against one’s conscience”, cf.: P. Stanisław, Klauzula sumienia, [in:] A. Mezglewski, H. Misztal, P. Stanisław (eds), *Prawo wyznaniowe*, Warsaw 2011, p. 104, point 111.

strong that they lead to non-application of state immunity.² In the author's opinion, it seems that human rights are *ius cogens*, because their source lies directly in human dignity.³

Since human rights have the task to provide a normative expression, more or less successful, of the inherent human dignity, consequently it is a normative system closest to dignity, which is the source of all individual rights. Undoubtedly, normative sources of human rights in the system of international law are hard law, and the principle of interaction between soft law and hard law is noticeable here. It also translates into analogous interaction between soft law and *ius cogens*. A multi-source international placement of conscientious objection, as well as the constitutional perspective, allows one to show the role of protection of conscientious objection as an element protecting the basic core of human dignity.

2. CONCEPT OF CONSCIENTIOUS OBJECTION AS A STATUTORY RIGHT, NOT BASED ON THE HUMAN RIGHT TO FREEDOM OF CONSCIENCE AND RELIGION

The analysis of the doctor's right to conscientious objection after the judgment of the Polish Constitutional Tribunal of 7 October 2015, case K 12/14, is, of course, the right voice in the scientific discourse.

It should be noted that the above judgment received the greatest criticism from W. Brzozowski.⁴ Certainly, I see the Tribunal's failure to mention the legal argumentation presented so far by the author in the doctrine, but the Tribunal's practice in this area is known and it is not an isolated case.

Referring to the kind, nearly two-hour discussion on the judge's conscientious objection that I had with Professor Brzozowski during the XIV National Symposium

² For more, see: C. Mik, *Ius cogens we współczesnym prawie międzynarodowym*, [in:] A. Wnukiewicz-Kozłowska (ed.), *Aksjologia współczesnego prawa międzynarodowego*, Wrocław 2011, pp. 179–210, 222–224; M. Pazdan (ed.), *Prawo prywatne międzynarodowe*, [in:] *System Prawa Prywatnego*, Vol. 20A, Warsaw 2014, p. 153, point 380; A. Wyrzumska, *Umowa międzynarodowa. Teoria i praktyka*, Warsaw 2006, p. 287; R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warsaw 1994, p. 91 ff.; S. Janczarek, *Immunitet jurysdykcyjny państwa a bezwzględnie obowiązujące normy prawa międzynarodowego*, *Państwo i Prawo* No. 12, 2009, pp. 57–68; W. Czapliński, *Interwencja w Iraku z punktu widzenia prawa międzynarodowego*, *Państwo i Prawo* No. 1, 2004, pp. 18–34.

³ For more on personal dignity and dignity of personality, see: K. Orzeszyna, *Godność ludzka podstawą praw człowieka*, [in:] R. Tabaszewski (ed.), *Człowiek i jego prawa i odpowiedzialność*, Lublin 2013, p. 23 ff.; J. Krukowski, *Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki*, [in:] L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warsaw 1997, pp. 39–42; W. Jedlecka, J. Policiewicz, *Pojęcie godności na tle Konstytucji RP*, [in:] A. Bator (ed.), *Z zagadnień teorii i filozofii prawa. Konstytucja*, Wrocław 1999, p. 146; J. Zajadło, *Godność jednostki w aktach międzynarodowej ochrony praw człowieka*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 2, 1989, p. 111; K. Complak, *Uwagi o godności człowieka oraz jej ochrona w świetle nowej konstytucji*, *Przegląd Sejmowy* No. 5, 1998, p. 42 ff.

⁴ W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia (po wyroku Trybunału Konstytucyjnego)*, *Państwo i Prawo* No. 1, 2017, pp. 23–30.

on Religious Law on 9 May 2017,⁵ and to the encouragement from the author to the debate on conscientious objection expressed in the text covered by the polemic,⁶ I would like to speak, this time in writing, in opposition to the author's theses contained in the article mentioned above.

I cannot agree with the main theses of the author who focused on undermining⁷ the source of conscientious objection adopted by the Constitutional Tribunal, i.e. the freedom of conscience and religion in international law on human rights⁸ and the adopted standard of control under Article 53 of the Constitution⁹ of the Republic of Poland of 2 April 1997¹⁰. This is where the basic problem materialises: what is conscientious objection, what is its normative purpose and what is the legal meaning of such an institution? W. Brzozowski's analysis of these issues seems to be insufficient. In my opinion, the sources of conscientious objection in the system of human rights, their nature and multiplicity, as well as the evolution of the jurisprudence of international bodies indicate that conscientious objection protects human dignity at its basic and most important level.

Of course, the Constitutional Tribunal, in fact, emphatically rejects the view seeking a source of conscientious objection elsewhere than the human right to freedom of conscience and religion. The Constitutional Tribunal estimates that it is "in clear contradiction" with international standards and the constitutional status of freedom of conscience and religion.¹¹ It seems that the Tribunal could present its arguments more broadly or refer to the existing literature in this regard.

Therefore, the author's thesis that "the categorical tone of this assessment is surprising, because if the right to conscientious objection really resulted from the very idea of freedom of conscience and religion, it would be difficult to understand what the dispute is about"¹² is too far-reaching. The author ignores well-known views of the doctrine as well as elements of international jurisprudence, and thus duplicates the practice of the Constitutional Tribunal. The justification for the latter is that it does not invoke the majority of doctrinal views, perhaps because of the fear of "standardising" the views of other authors.

W. Brzozowski's argument that the Constitutional Tribunal established an international standard in a manner that deviates from the criteria listed in the judgment of the European Court of Human Rights in Strasbourg in the *Eweida*¹³ case is a valid one, yet it is a minor deviation, determined by the axiology of the

⁵ XIV Ogólnopolskie Sympozjum Prawa Wyznaniowego: *Prawo wyznaniowe formalne*, Zielona Góra-Kęszczyca Leśna, 8–10 May 2017.

⁶ W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 23.

⁷ *Ibid.*, pp. 25–33.

⁸ Judgment of the Constitutional Tribunal of 7 October 2015, case K 12/14, OTK ZU 9A/2015, item 143, points 3.2.3, 3.2.4, 4.4.1, 4.4.5.

⁹ *Ibid.*, points 4.4.5, 4.5.

¹⁰ Journal of Laws [Dz.U.] of 1997, No. 78, item 483, as amended; hereinafter the Polish Constitution.

¹¹ W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 25.

¹² *Ibid.*

¹³ *Ibid.*, p. 30.

Polish Constitution, and the Tribunal had no obligation to apply the Strasbourg standard in full but could establish a higher standard.

However, W. Brzozowski totally ignores the research in the doctrine concerning international sources of conscientious objection. The author conducted a thorough, but not complete, analysis of normative sources of conscientious objection in international law yet omitted uncomfortable elements from the Strasbourg jurisprudence.

Nevertheless, in many places the author's analyses are accurate and legitimately raise objections against the judgment of the Constitutional Tribunal. The author is right to accuse the Tribunal of restricting its comments on the International Covenant on Civil and Political Rights¹⁴ to the normative content of the provision,¹⁵ but it is possible to find broader sources that contradict the theses adopted by the author and confirm the Tribunal's argumentation, which will be discussed below.

W. Brzozowski rightly indicates that in the judgment of the ECtHR in the case of *Bayatyan v. Armenia*, "there was not a single claim that would allow one to assume that on the basis of Article 9 ECHR protection is granted to conscientious objection in the scope unrelated to refusal of military service" and the author assesses a different doctrinal view as premature.¹⁶ However, the author perfectly knows the results of research in this matter and omits both them and the key element of the ECtHR judgment in the *Eweida* case.¹⁷ W. Brzozowski, referring to my article, claims that the author's assessment is accurate and says that "the author – being an advocate of finding the right to conscientious objection in Article 9 ECHR – admits that the ECtHR 'avoids (...) issuing a clear decision stating that conscientious objection results from the essence of the right to freedom of conscience and religion'".¹⁸ However, in that Article I criticized the ECtHR for statements essentially concerning conscientious objection in cases other than refusal of military service, where the ECtHR used replacement expressions.

At the same time, W. Brzozowski's assessment is right. He – being an opponent of finding the right to conscientious objection in Article 9 ECHR – all the same admits that "the only mentioned (...) act of international law that really supports the reasoning of the Tribunal is Resolution 1763 of the Parliamentary Assembly of the Council of Europe on the right to conscientious objection in lawful medical care".¹⁹ The author, however, omits the remaining soft law documents and depreciates the

¹⁴ International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966, annex to Journal of Laws [Dz.U.] of 1977, No. 38, item 167; hereinafter ICCPR.

¹⁵ W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 26.

¹⁶ *Ibid.*, p. 26.

¹⁷ ECtHR judgment of 15 January 2013, *Eweida and Others v. the United Kingdom*, applications no. 48420/10, 59842/10, 51671/10 and 36516/10, points 105, 106, 107.

¹⁸ W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 27, and M. Skwarzyński cited therein; M. Skwarzyński, *Orzecznictwo Europejskiego Trybunału Praw Człowieka w zakresie klauzuli sumienia*, [in:] P. Stanisz, A.M. Abramowicz, M. Czelny, M. Ordon, M. Zawislak (eds), *Aktualne problemy wolności myśli, sumienia i religii*, Lublin 2015, p. 292.

¹⁹ W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 29.

impact of this type of instrument on international law and the case law of the ECtHR.²⁰

One cannot agree with W. Brzozowski's analysis regarding the Charter of Fundamental Rights of the European Union (CFR),²¹ where the author omits the Explanations to the CFR as well as problems with various language versions of Article 10 para. 2 CFR. This is related to the concretisation of human rights and the concept of the margin of appreciation.²²

It is also important to consider W. Brzozowski's fears that recognising conscientious objection as a personal right stemming directly from the Constitution and international law should not automatically mean that: other professions are also entitled to it;²³ the provision specifying conscience clause has no normative meaning;²⁴ the doctor's conscience can become an absolute category in opposition to the patient's rights;²⁵ therefore conscientious objection, understood as a personal right having its source in the freedom of conscience and religion, requires detailed statutory regulation in order to counteract abuse.²⁶

However, these fears arise from the lack of distinction between conscientious objection and conscience clause, inconsistent analysis of the role of the state in the implementation of patient's rights and human rights, inconsistent application of the prohibition of discrimination, and lack of willingness to indicate a framework for conscientious objection, which can be reconstructed on the basis of the case law of the ECtHR and the Polish Constitutional Tribunal.

3. NORMATIVE SOURCES OF CONSCIENTIOUS OBJECTION IN INTERNATIONAL LAW

It should be indicated that the human right to freedom of conscience and religion seems to be the normative source of conscientious objection. In the universal system it is Article 18 ICCPR.

One cannot agree with W. Brzozowski's claim that "the necessity for the state to respect the right to conscientious objection was obviously based on Article 18 ICCPR, because neither its editorial form nor the practice of its application give grounds for such a statement".²⁷ Well, it results from the General Comment No. 22, where the need to protect conscientious objection against compulsory military

²⁰ *Ibid.*

²¹ *Ibid.*, p. 27.

²² L. Garlicki, *Komentarz do art. 9 EKPCz*, [in:] L. Garlicki, P. Hofmański, A. Wróbel (eds), *Konwencja o ochronie praw człowieka i podstawowych wolności. Komentarz do artykułów 1–18*, Vol. 1, Warsaw 2010, p. 552, point 4; *idem*, as cited in A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie ETPCz*, Gdańsk 2008, pp. 130–131, pp. 136, 187.

²³ W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 31.

²⁴ *Ibid.*, p. 31 *in fine*.

²⁵ *Ibid.*, p. 32.

²⁶ *Ibid.*, p. 30 *in fine*.

²⁷ *Ibid.*, p. 25.

service was indicated.²⁸ Of course, there was some evolution, but the conclusion is right: the state must recognize the right to conscientious objection if military service is compulsory, and currently, the right to conscientious objection is therefore recognized by the United Nations Human Rights Committee and seems to be widely accepted by states.²⁹ What is more, the Committee states that the framework of protection under Article 18 ICCPR includes protection of refusal to pay taxes for military purposes, although this is not evident.³⁰ There are no statements from the Committee regarding the rights of medical staff.³¹ However, Article 18 ICCPR also treats the jurisprudence of the European Court of Human Rights as a source of conscientious objection, presenting the whole evolution of the Committee's position.³² This allows the assumption that the scope of Article 18 ICCPR includes protection of conscientious objection, and it is for the states to provide a detailed regulation of mutual interactions between conscientious objection and the rights of other individuals, especially in the sensitive matter of conflicts between the rights

²⁸ General Comment 22, para. 11: "Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under Article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognised by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under Article 18 and on the nature and length of alternative national service"; for more, see: C. de la Hougue, *Article 18*, [in:] E. Decaux (ed.), *Le Pacte International relatif aux droits civils et politiques. Commentaire Article par article*, Paris 2011, p. 432; F. Sudre, *Droit européen et international des droits de l'homme*, Paris 2008, pp. 517–519.

²⁹ For more, cf. K. Orzeszyna, *Klauzula sumienia jako gwarancja realizacji prawa do wolności sumienia*, Medyczna Wokanda, Naczelna Izba Lekarska No. 9, 2017, pp. 20–21 and references cited therein.

³⁰ UN Human Rights Committee, case *JP v. Canada*, conclusion of 8 November 1991, Communications, n° 446/1991, para. 2.1: "The author is a member of the Society of Friends (Quakers). Because of her religious convictions, she has refused to participate in any way in Canada's military efforts. Accordingly, she has refused to pay a certain percentage of her assessed taxes, equal to the amount of the Canadian federal budget earmarked for military appropriations. Taxes thus withheld have instead been deposited with the Peace Tax Fund of Conscience Canada, Inc., a non-governmental organisation"; para. 4.2: "Although Article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures, the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article"; O. Nawrot, *Sprzeciw sumienia a prawa człowieka i ich filozofia*, [in:] O. Nawrot (ed.), *Klauzula sumienia w państwie prawa*, Sopot 2015, p. 20; S. Joseph, M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, Oxford 2013, p. 584.

³¹ For more, cf. K. Orzeszyna, *Klauzula sumienia jako gwarancja...*, p. 22.

³² ECtHR judgment of 7 June 2016, *Enver Aydemir v. Turkey*, application no. 26012/11, points 44, 47, 48; ECtHR judgment of 23 March 2016, *F.G. v. Sweden*, application no. 43611/11, points 60–64.

of patients and of medical staff.³³ However, this does not depreciate the rights of doctors, nurses or members of technical staff.

The relevant regulations in the European-continental system are Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950³⁴ and Article 10 para. 2 of the Charter of Fundamental Rights of 7 December 2000³⁵.

Moreover, in the international soft law, the right to conscientious objection was verbalised in Resolution No. 337, Recommendation No. 478 and Resolution No. 1763 of the Parliamentary Assembly of the Council of Europe. It should be noted that it is not possible to discuss the entire soft law concerning the right to refuse military service or the right to use conscience clause in other cases.³⁶ The three above-mentioned documents will be discussed because they had a real impact on the national law and the jurisprudence of the Polish Constitutional Tribunal.

Chronologically, the first was Resolution No. 337 of the Parliamentary Assembly of the Council of Europe of 26 January 1967 on the right to conscientious objection to military service in the Member States of the Council of Europe,³⁷ followed by Recommendation No. 478 of the Parliamentary Assembly of the Council of Europe of 26 January 1967 on the right to conscientious objection,³⁸ and the third document is Resolution No. 1763 of the Parliamentary Assembly of the Council of Europe of 7 October 2010 on the right to conscientious objection in lawful medical care³⁹.

In its introduction Resolution 337 indicates that it concerns the interpretation of Article 9 ECHR, which obliges states to respect the freedom of individual conscience, and the substantive part of this Resolution concerns the refusal of military service. What is important, Resolution 337 specifies in point 1.1. that the refusal of military service due to beliefs of conscience is personal, while in point 2.3. it speaks directly about the right to conscientious objection. A similar content may be found in point a. of the Recommendation, which indicates the right to conscientious objection.⁴⁰ The most detailed analysis of the issue of the right to conscientious objection may

³³ For more, see C. de la Hougue, *Article 18...*, p. 433.

³⁴ Journal of Laws [Dz.U.] of 1993, No. 61, item 284, as amended; hereinafter ECHR.

³⁵ OJ EU C 83/02 of 2010, p. 389.

³⁶ For more, cf. H. Takemura, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders*, Berlin, Heidelberg 2009, pp. 90–96.

³⁷ Assembly debate on 26 January 1967 (22nd sitting), the text adopted by the Assembly on 26 January 1967 (22nd sitting), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16909&lang=en> (accessed on 1/09/2016); hereinafter Resolution 337.

³⁸ Assembly debate on 26 January 1967 (22nd sitting), the text adopted by the Assembly on 26 January 1967 (22nd sitting), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14515&lang=en> (accessed on 1/09/2016); hereinafter Recommendation 478.

³⁹ Assembly debate on 7 October 2010 (35th sitting), the text adopted by the Assembly on 7 October 2010 (35th sitting), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17909&lang=en> (accessed on 1/09/2016); hereinafter Resolution 1763.

⁴⁰ The documents that also refer to earlier regulations are: Recommendation No. 816 of 7 October 1977 on the right to conscientious objection to military service, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14850&lang=en> (accessed on 1/09/2016), as well as Recommendation No. 1518 of 26 May 2001 on exercise of the right of conscientious objection to military service in Council of Europe Member States, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16909&lang=en> (accessed on 1/09/2016).

be found in Resolution 1763, which is why it has been broadly discussed in the doctrine.⁴¹ One should agree with the statement of J. Pawlikowski that, despite various arguments during the work on Resolution 1763, it ultimately confirms the existence of a fundamental right to conscientious objection.⁴² The resolution itself specifies in point 1 that no person, hospital or institution may be forced, held liable or discriminated in any way because of refusing to perform an abortion or euthanasia. Point 2 emphasizes the need to confirm the right to conscientious objection, and points 3 and 4 also refer to it.

4. ISSUE OF CONSCIENTIOUS OBJECTION IN THE CHARTER OF FUNDAMENTAL RIGHTS

Article 10 CFR contains a similar standard to that provided in Article 9 ECHR defining freedom of thought, conscience and religion. As assumed by the European legislator, the scope of Article 10 para. 1 CFR was to correspond to the content of the entire Article 9 ECHR, since in the explanations to the CFR it was indicated that “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 Convention”.⁴³

However, the key regulation for this analysis is Article 10 para. 2 CFR, which in the official Polish translation of the official language version specifies “uznaje się prawo do odmowy działania sprzecznego z własnym sumieniem, zgodnie z ustawami krajowymi regulującymi korzystanie z tego prawa”⁴⁴ (“the right to refuse acting against one’s conscience is recognized in accordance with national regulations concerning the exercise of this right”). Compared with the previous protection, this is a new guarantee⁴⁵ given *expressis verbis* in the European system of human rights, indicating the process of specifying the rights and freedoms of the individual.

It seems that the wording of Article 10 para. 2 CFR in both English: “the right to conscientious objection is recognised, in accordance with the national laws governing

⁴¹ For more, cf. J. Pawlikowski, *Prawo do sprzeciwu sumienia w ramach legalnej opieki medycznej. Rezolucja nr 1763 Zgromadzenia Parlamentarnego Rady Europy z dnia 7 października 2010 r.*, *Studia z Prawa Wyznaniowego* No. 14, 2011, p. 313 ff, pp. 333–337; L. Bosek, *Komentarz do art. 53 Konstytucji RP*, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP*, Vol. 1: *Komentarz do art. 1–86*, C.H. Beck 2016, pp. 1249–1251, 1250 ff, point 7.

⁴² J. Pawlikowski, *Prawo do sprzeciwu...*, pp. 316–333, 336.

⁴³ Explanations relating to the Charter of Fundamental Rights, OJ C 303/2007, p. 21, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:PL:PDF> (accessed on 30/09/2018).

⁴⁴ Translation into Polish provided in the Official Journal of the European Union of 2010, C. 83, p. 389, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:PL:PDF> (accessed on 30/09/2018).

⁴⁵ Similar to J. Duffar, *Commentaire art. II–70*, [in:] L. Burgorgue-Larsen, A. Levade, F. Picod (eds), *Traité établissant une Constitution pour l’Europe. Commentaire Article par article. Partie II, La Charte des droits fondamentaux de l’Union*, Brussels 2005, p. 167.

the exercise of this right",⁴⁶ and French: "le droit à l'objection de conscience est reconnu selon les lois nationales qui en régissent l'exercice"⁴⁷ allows claiming that the correct translation should be "the right to conscientious objection is recognised (...)". However, the official Polish version does not use this term directly, it contains an equivalent expression. Therefore, the Charter of Fundamental Rights protects the right to conscientious objection within the limits provided for by national law.

However, it should be borne in mind that the German version of CFR has the following content "das Recht auf Wehrdienstverweigerung aus Gewissensgründen wird nach den einzelstaatlichen Gesetzen anerkannt, welche die Ausübung dieses Rechts regeln",⁴⁸ which should be literally translated as "the right to refuse military service on the grounds of conscience is recognized by the laws of individual states⁴⁹ regulating the exercise of this right". This is due to the fact that the phrase *Wehrdienstverweigerung* has obvious military connotations, because *wehrdienst* means military service. Therefore, there is a difference in the content of CFR in different language versions. Nevertheless, it is obvious from the content of CFR in Polish, English and French that there is a provision to protect conscientious objection, which is not guaranteed explicitly in the content of the ECHR, but is protected in some European constitutions. One can see here the phenomenon of concretisation of human rights, which, as a living instrument, give the basis for the interpretation that defines new rights resulting from a specific human right. Therefore, since the new document on human rights, i.e. the Charter of Fundamental Rights, defines the protection of conscientious objection, it is an expression of acknowledgement of the existence of a partial power in the form of conscientious objection, the source of which is the freedom of conscience and religion. However, in accordance with Article 10 para. 2 CFR, the scope of conscientious objection is defined by national laws, and in the Polish legal system the key regulation in this regard is Article 53 of the Polish Constitution specifying the right to freedom of conscience and religion.

5. IMPACT OF SOFT LAW ON THE ECtHR JURISPRUDENCE CONCERNING CONSCIENTIOUS OBJECTION

In the case of conscientious objection, the ECtHR case law can be divided into three groups of cases: military service, medical professions and other professions. In view of the case law, one can observe the development of the Court's jurisprudence and a certain normative, logical and semantic inconsistency is noticeable. It should be

⁴⁶ Translation provided in the Official Journal of the European Union of 2010, C. 83, p. 389, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF> (accessed on 24/09/2012).

⁴⁷ Translation provided in the Official Journal of the European Union of 2010, C. 83, p. 389, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:FR:PDF> (accessed on 24/09/2012).

⁴⁸ Translation provided in the Official Journal of the European Union of 2010, C. 83, p. 389, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:DE:PDF> (accessed on 24/09/2012).

⁴⁹ In the meaning of the High Contracting Parties.

stated that the right to refuse military service is the most common case of protection of conscience clause by the ECtHR.⁵⁰ The most important is the ECtHR judgment of 7 July 2011 in the case of *Bayatyan v. Armenia*, where the ECtHR indicated that the regulation provided for in Article 9 para. 1 ECHR “does not explicitly refer to a right to conscientious objection”, although it is the source of protection against obligatory military service.⁵¹ This view, in my opinion, is contradictory, and it was articulated by the ECtHR in spite of the fact that Article 10 para. 2 CFR determines the right to invoke one’s conscience and conscience clause in accordance with national law.⁵² What is more, in this judgment the ECtHR refers to the content of Resolution 337 and Recommendation 478⁵³, nevertheless it argues that conscientious objection does not fall within the scope of Article 9 ECHR.

It should also be indicated that the ECtHR jurisprudence has accepted the need to protect conscience in the case of medical personnel. The Court held that “States are obliged to organise the health services system in such a way as to ensure an effective exercise of the freedom of conscience of health professionals”,⁵⁴ and this view was expressed on the basis of the case law that concerned performing the abortion procedure.

Another ruling is the case of a civil registrar and psychotherapist and the *Eweida* case.⁵⁵ In this judgment the ECtHR often refers to the conscience clause. Unfortunately, the ECtHR’s avoidance of making explicit reference to the phrase conscience clause or conscientious objection was also evident in this case. The ECtHR dismissed the question of conscientious objection, even though one of the applications directly referred to its violation.⁵⁶

It seems clear that the Court is trying to avoid stating that the scope of Article 9 para. 1 ECHR, so the right to freedom of conscience and religion, does not include the conscience clause. However, it indicates cases that fall within the scope of protection under Article 9 ECHR, and it is undoubtedly the right to refuse military service due to conscientious objection. Unfortunately, the inconsistencies in the ECtHR case law, especially at the terminological level, make it difficult to establish the Court’s

⁵⁰ In the following ECtHR cases: *Tsaturyan v. Armenia*, application no. 37821/03, judgment of 10 January 2012; *Bukharatyan v. Armenia*, application no. 37819/03, judgment of 10 January 2012; *Thlimmenos v. Greece*, application no. 34369/97, judgment of 6 April 2000; *Ülke v. Turkey*, application no. 39437/98, judgment of 24 January 2006; *Jehovah’s Witnesses in Moscow and Others v. Russia*, application no. 302/02, judgment of 10 June 2010, amended on 18 August 2010, *TAGANROG LRO and others v. Russia*, application no. 32401/10; *Bayatyan v. Armenia*, application no. 23459/03, judgment of 7 July 2011.

⁵¹ *Bayatyan v. Armenia*, ECtHR judgment of 7 July 2011, point 110, as well as points 46, 49, 128; for more, cf. J-F. Renucci, *Droit européen des droits de l’homme. Droits et libertés fondamentaux garantis par CEDH*, Paris 2013, pp. 161–162; P. Cumper, *Article 9: Freedom of Thought, Conscience, and Religion*, [in:] D. Harris, M. O’Boyle, C. Warbrick (eds), *Law of the European Convention on Human Rights*, Oxford 2014, pp. 601–602; M. Amos, *Human Rights Law*, Oxford and Portland, Oregon 2014, pp. 535–536.

⁵² For more, cf. M. Skwarzyński, *Sprzeciw sumienia w europejskim i krajowym systemie ochrony praw człowieka*, *Przegląd Sejmowy* No. 6, 2013, p. 12 ff.

⁵³ *Bayatyan v. Armenia*, ECtHR judgment of 7 July 2011, points 51, 52.

⁵⁴ *R.R. v. Poland*, application no. 27617/04, ECtHR judgment of 26 May 2011, point 206.

⁵⁵ *Eweida and Others v. the United Kingdom*, ECtHR judgment of 15 January 2013.

⁵⁶ *Ibid.*, point 70.

position. In the end, it decided that the refusal to fulfil the legal obligation due to the conflict with religious beliefs falls within the scope of protection under Article 9 ECHR, also in cases other than the duty of military service.⁵⁷ Nevertheless, the view that the *Eweida* judgment on conscientious objection is ambiguous and not clear is valid.⁵⁸

6. INFLUENCE OF INTERNATIONAL LAW CONCERNING CONSCIENTIOUS OBJECTION ON NATIONAL LAW

The scope of the influence of the international hard law and soft law on the Polish law on conscientious objection is evident in the jurisprudence of the Polish Constitutional Tribunal. The judgment of the Constitutional Tribunal of 7 October 2015 in case K 12/14, which concerned the doctor's conscience clause,⁵⁹ as well as earlier⁶⁰ and later scientific research,⁶¹ showed that the source of conscientious objection is the human right to freedom of conscience and religion. The main direction of scientific research on conscientious objection concerns the rights of the doctor and nurse,⁶² possibly axiological issues concerning conscience⁶³ or axiological normative context⁶⁴ are indicated, and less frequently conscience clause is connected with legal professions.⁶⁵

⁵⁷ *Ibid.*, point 105.

⁵⁸ As in: W. Brzozowski, *Orzeczenie: Eweida i inni v. Wielka Brytania*, <http://prawaczlowieka.edu.pl/index.php?orzeczenie=8d8e8ea7b076c177ecd21e2d0d7e52fa74c48f3c-b0> (accessed on 1/09/2016).

⁵⁹ Judgment of the Constitutional Tribunal of 7 October 2015, K 12/14, points 3.2.3, 3.2.4, 4.4.1, 4.4.5.

⁶⁰ M. Skwarzyński, *Sprzeciw sumienia w europejskim...*, pp. 9–26.

⁶¹ L. Bosek, *Komentarz do art. 53 Konstytucji RP...*, pp. 1249–1251, 1257–1258, 1263–1264, points 5, 33, 50, 51.

⁶² P. Stanisławski, J. Pawlikowski, M. Ordon (eds), *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, Lublin 2014, *passim*; A. Zoll, *Prawo lekarza do odmowy udzielenia świadczeń zdrowotnych i jego granice*, *Prawo i Medycyna* No. 13, 2003, p. 18; L. Bosek, *Prawo osobiste do odmowy działania sprzecznego z własnym sumieniem na przykładzie lekarza*, *Forum Prawnicze* No. 1, 2014, p. 17; L. Bosek, *Problem zakresowej niekonstytucyjności art. 39 ustawy o zawodach lekarza i lekarza dentystry*, [in:] P. Stanisławski, J. Pawlikowski, M. Ordon (eds), *Sprzeciw sumienia w praktyce medycznej...*, pp. 96–100; O. Nawrot, *Klauzula sumienia w zawodach medycznych w świetle standardów Rady Europy*, *Zeszyty Prawnicze Biura Analiz Sejmu* No. 3, 2012, pp. 12–16.

⁶³ A. Szostek, *Kategoria sumienia w etyce*, [in:] P. Stanisławski, J. Pawlikowski, M. Ordon (eds), *Sprzeciw sumienia w praktyce...*, pp. 15–25.

⁶⁴ A. Zoll, *Klauzula sumienia*, [in:] P. Stanisławski, J. Pawlikowski, M. Ordon (eds), *Sprzeciw sumienia w praktyce...*, pp. 77–85; M. Skwarzyński, *Sprzeciw sumienia w europejskim...*, pp. 17–21; L. Bosek, *Prawo osobiste...*, pp. 87–89, 92–95; L. Bosek, *Problem zakresowej...*, pp. 87–90, 100–103; O. Nawrot, *Prawa człowieka, sprzeciw sumienia i państwo prawa*, [in:] P. Stanisławski, J. Pawlikowski, M. Ordon (eds), *Sprzeciw sumienia w praktyce...*, pp. 107–109.

⁶⁵ For more, cf. A. Machnikowska, *Klauzula sumienia w zawodzie prawnika*, [in:] O. Nawrot (ed.), *Klauzula sumienia w państwie...*, pp. 127–142; J. Zajadło, *Sędzia pomiędzy moralnym przekonaniem a wiernością prawu (na przykładzie orzecznictwo sądów amerykańskich w sprawach niewolnictwa)*, [in:] O. Nawrot (ed.), *Klauzula sumienia w państwie...*, pp. 143–161; Z. Cichoń, *Klauzula sumienia w różnych zawodach*, [in:] *Prawnik katolicki a wartość prawa*, Kraków 1999, pp. 44–51.

Of course, the author is familiar with Professor J. Pawlikowski's view, expressed at many scientific conferences, that conscience clause is included in a specific provision of the Act, which gives the right of invoking conscientious objection, whose source is hierarchically higher. The postulate of terminological ordering is obviously correct, nevertheless, these concepts function interchangeably both in the doctrine and in jurisprudence. What is more, it seems that there is a requirement that the conscience clause be understood as a statutory provision; a statutory clause is understandable in the case of a doctor or a nurse, where such a provision is included in corporate law. In the case of a normative analysis based on the system of human rights and one's profession, where the clause is not explicitly specified in corporate regulations, this differentiation does not matter that much. However, they must be distinguished in order not to invoke the lack of conscience clause as binding for the non-existence or sources of conscientious objection.

In its ruling, the Constitutional Tribunal rightly stated that freedom of conscience "being a fundamental human right is also a source of many other rights and freedoms, it is a specific 'right of rights'"⁶⁶ and its essence "is sometimes considered to be over-positive, axiologically related to human nature, an important element of his dignity. Hence, a legal system that would not guarantee it would be 'ab initio incomplete, ineffective and inefficient, and consequently also undemocratic, because it would deviate from the model of the state respecting the necessary *minimum minorum* in the field of protection of human rights' (J. Szymanek, *Wolność sumienia i wyznania...*, p. 39). The need to respect it is closely linked to respect for and protection of human dignity, which is the responsibility of public authorities"⁶⁷.

The Constitutional Tribunal's conclusions resulted from the correct analysis of international law on human rights, both in the universal⁶⁸ and in the European system. In the latter case, the Constitutional Tribunal referred to the analysis of the ECHR and six ECtHR judgments,⁶⁹ i.e.: judgment of 13 December 2001, *Église métropolitaine de Bessarabie and others v. Moldova*, application no. 45701/99; judgment of 25 May 1993, *Kokkinakis v. Greece*, application no. 14307/88; judgment of 6 November 2008, *Förderkreis e.V. and Others v. Germany*, application no. 58911/00; decision of 6 December 1991, *Tomi Autio v. Finland*, application no. 17086/90; judgment of 7 July 2011, *Bayatyan v. Armenia*, application no. 23459/03; judgment of 10 January 2012, *Bukharatyan v. Armenia*, application no. 37819/03.

It is also important that the Constitutional Tribunal referred directly to the international soft law, i.e. Resolution 337, Recommendation 478 and Resolution 1763, and for obvious reasons paid greatest attention to the last one.⁷⁰ The Constitutional Tribunal found that "although the Council of Europe Resolution of 7 October 2010 is not binding, it could not have been irrelevant to the considerations in this case, because it establishes a universal standard of protection for persons performing medical professions (see O. Nawrot, *Klauzula sumienia w zawodach medycznych...*,

⁶⁶ Judgment of the Constitutional Tribunal of 7 October 2015, K 12/14, point 4.1.1.

⁶⁷ *Ibid.*, point 4.1.2.

⁶⁸ *Ibid.*, point 3.2.2.

⁶⁹ *Ibid.*, point 3.2.3.

⁷⁰ *Ibid.*, points 3.2.4., 6.2.3.

pp. 20–22). In its light, the right to conscientious objection is very broadly marked both subjectively and personally, as it also includes entities other than natural persons providing medical services".⁷¹ It was after the analysis of the ECtHR jurisprudence and the development of soft law that the Constitutional Tribunal indicated that "the possibility to use conscience clause is one of human rights".⁷²

In its argument the Constitutional Tribunal, having analysed hard law, the ECtHR jurisprudence and soft law in accordance with the concept of the margin of assessment, came to the right conclusions: "there is no basis for the formulation of a separate right to 'conscience clause' and, consequently, there is no doubt that the legislator cannot arbitrarily shape this 'privilege' or abolish it, but must respect the constitutional conditions of establishing restrictions on the freedoms and rights of human and citizen (Article 30 and Article 31 para. 3 of the Constitution). In the Tribunal's opinion, the doctor's, as well as any other person's, right to refrain from acting against his own conscience stems directly from the freedom guaranteed by the Constitution".⁷³

This conclusion, on account of the order of the analyses conducted by the Constitutional Tribunal and the presented reasoning, was drawn by the Tribunal i.a. also due to the significance and influence of international law. This applies to both soft and hard law. This means that the source of conscientious objection is the freedom of conscience and religion, because of the subject of protection of this human right. The Tribunal's view met with the acceptance of the doctrine also internationally.⁷⁴

7. SUMMARY

In my opinion, the position of the Constitutional Tribunal in case K 12/14 is also a manifestation of an interaction between international hard law and soft law and it is correct. Elaborating the Constitutional Tribunal's argumentation, one should try to assume that this human right to freedom of conscience and religion is not the one that would be

⁷¹ *Ibid.*, point 3.2.4.

⁷² *Ibid.*, point 3.2.4. *in fine*.

⁷³ *Ibid.*, point 4.4.5.

⁷⁴ For more, cf.: P. Stanisz, J. Pawlikowski, *Il diritto dei medici all'obiezione di coscienza in Polonia: recenti sviluppi*, Quaderni di diritto e politica ecclesiastica No. 2, 2017, pp. 459–471; T. Koncewicz, M. Zubik, M. Konopacka, K. Staškiewicz, *Developments in Polish Constitutional Law: The Year 2016 in Review*, [in:] R. Albert, D. Landau, P. Faraguna, S. Drugda (eds), *The I-CONnect-Clough Center 2016 Global Review of Constitutional Law*, Boston 2017, p. 165; *Women's Sexual and Reproductive Health and Rights in Europe*, Council of Europe 2017, p. 23; J. Pawlikowski, *Conscientious Objection of Health Care Workers in the Context of Genetic Testing*, [in:] *Philosophy and Medicine*, Vol. 128: M. Soniewska (ed.), *The Ethics of Reproductive Genetics: Between Utility, Principles, and Virtues*, 2018, pp. 103–113; G. Puppinc, *Conscientious Objection and Human Rights: A Systematic Analysis*, Brill Research Perspectives in Law and Religion Vol. 1, No. 1, 2017, pp. 13, 15, 16, 24; A. Ciucă, *The Right to Conscientious Objection*, Logos Universality Mentality Education Novelty, Section: Law Vol. 5, No. 1, 2017, pp. 17, 18, 23–25; M. Hill, *Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in Eweida and others v. United Kingdom*, Ecclesiastical Law Journal Vol. 15, No. 2, 2013, pp. 199, 200, 203; D. Gamper, *Conscientious Objection to Same-Sex Marriage: Politics by Other Means*, [in:] F. Requejo, C. Ungureanu (eds), *Democracy, Law and Religious Pluralism in Europe: Secularism and Post-secularism*, London–New York 2014, pp. 165, 166.

the source of protection of conscience, and another axiological source should be found, which would be expressed in the normative standard of human rights. However, it is impossible to indicate another human right and avoid falling into logical contradictions, ignoring the human right to freedom of conscience and religion.

If one assumes that conscientious objection is a statutory right, detached from human dignity and the axiological order expressed in the system of human rights, it is only possible if one also assumes a positive system of law, which directly leads to effects similar to the genocide crime of the Third Reich due to religious denomination or racial origin.

Of course, the right to invoke conscientious objection is not an unlimited right. Firstly, objection should be a subsidiary right, i.e. one that can be implemented as the ultimate way to protect human rights to freedom of conscience and religion, and if it is impossible to resolve the conflict in any other way. Secondly, the use of the right to conscientious objection must be justified in each case, and the helpful criterion seems to be whether it is aimed at safeguarding protected goods in a positive or non-positive legal system, natural law. The Strasbourg Court has defined a reference to the criterion of views that have reached an adequate level of persuasion, seriousness, coherence or importance in society.⁷⁵ Thirdly, the good that the person invoking conscientious objection wants to protect should also be commensurate, i.e. proportional to the obligations imposed by the law, which the obligated person cannot perform due to the conflict of conscience.⁷⁶

Therefore, it seems that the normative source, which is the human right to freedom of conscience and religion, is sufficient to protect conscientious objection of every human being, due to his inherent dignity. One's occupation cannot determine the possibility of exercising human rights. This means that the doctor, attorney, and nurse have the right to use conscience clause, despite the lack of a clear basis in the corporate act or professional ethics. The consequence of this is the state's positive obligations, because in this respect conscientious objection is protected as a human right, not as human freedom. Therefore, much wider obligations on the part of the state are required.

The human right to freedom of conscience and religion is one of the closest, if not the closest, to dignity of the human being. If the human right to conscientious objection did not exist as an element of human rights, it would not protect the individual, and, in fact, this element of a person's dignity would not be protected, because free will would not be protected. If conscientious objection did not have the nature of a human right, then the protection of this sphere of human dignity, expressed normatively in the right to freedom, would only be facade protection. After all, one cannot dehumanize the individual more than by forcing him to act against his own conscience. This indicates that conscientious objection protects the hard core of dignity and its essence. At the same time, it does not mean giving

⁷⁵ ECtHR judgments: of 7 July 2011, *Bayatyan v. Armenia*, point 110; of 15 January 2013, *Eweida and Others v. the United Kingdom*, point 82; of 7 December 2010, *Jakóbski v. Poland*, application no. 18429/06, point 44; of 6 November 2008, *Leela Förderkreis e.V. and Others v. Germany*, application no. 58911/00, point 80.

⁷⁶ For more, cf. M. Skwarzyński, *Sprzeciw sumienia w europejskim...*, pp. 23–26.

consent to whims of conscience, that is why the above-mentioned conditions for invoking conscientious objection are necessary.

It should be borne in mind that conscience as a normative category or, more broadly, morality and values, as the imperative and determinant of behaviour, is reflected in the legal order. If conscientious objection was a statutory right, it would make no sense to refer to conscience in a series of oaths or vows, as a category to be followed by representatives of specific professions. Such references would only work if there was a specific statutory right to object, and it is reserved exclusively for the doctor and nurse, although the category of conscience is also referred to in many other professions. It would also raise obvious doubts about the prohibition of discrimination and equality before the law. It cannot be the case that a physician deciding in the same situation as a lawyer, such as a judge, will be able to protect his conscience through objection and others will not. Dignity, as a normative source for the system of human rights, enforces equal protection of the rights of all people.

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PROTECTING CONSCIENTIOUS OBJECTION AS THE "HARD CORE" OF HUMAN DIGNITY

Summary

The article is an analysis of legal and axiological source of conscientious objection. The study was based on the European and national system of human rights protection. Freedom of conscientious objection is recognized by both Article 9(1) of the European Convention on Human Rights and Article 10(2) of the Charter of Fundamental Rights of the European Union. The problem of conscientious objection is the subject of the analysis of the doctrine in connection with the judgment of the Polish Constitutional Tribunal of 7 October 2015 in case K 12/14, which concerned the doctor's conscience clause. The conscientious objection protects the hard core of dignity and its essence. The human right to freedom of conscience and religion is one of the closest, if not the closest, to dignity of the human being. The author also points out the scope of the human right to conscientious objection and claims that it should have a subsidiary character, be limited to justified cases, as well as seek to protect the interests stipulated in the systems of natural law or positive law.

Keywords: conscientious objection, human dignity, human right to freedom of conscience and religion

OCHRONA SPRZECIWU SUMIENIA JAKO „TWARDEGO RDZENIA” GODNOŚCI CZŁOWIEKA

Streszczenie

Artykuł jest analizą źródła normatywnego i aksjologicznego dla sprzeciwu sumienia. Badanie opierało się na europejskim i krajowym systemie ochrony praw człowieka. Prawo do sprzeciwu sumienia uznaje zarówno art. 9 ust. 1 Europejskiej Konwencji Praw, jak i art. 10 ust. 2 Karty Praw Podstawowych Unii Europejskiej. Problem sprzeciwu sumienia jest obecnie przedmiotem analizy doktryny w związku z wyrokiem Trybunału Konstytucyjnego z dnia 7 października 2015 r., w sprawie sygn. akt K 12/14, który dotyczył klauzuli sumienia lekarza. Sprzeciw sumienia chroni „rdzeń” godności człowieka i jej istotę. Prawo człowieka do wolności sumienia i wyznania jest jednym z najbliższych, jeśli nie najbliższym, istoty godności ludzkiej. Autor wskazuje również na zakres prawa człowieka do sprzeciwu sumienia i twierdzi, że powinien on mieć charakter pomocniczy, subsydiarny, ograniczony do uzasadnionych przypadków, a także dążyć do ochrony interesów określonych w systemach prawa naturalnego lub w prawie pozytywnym.

Słowa kluczowe: sprzeciw sumienia, godność człowieka, prawo człowieka do wolności sumienia i religii

PROTECCIÓN DE OBJECIÓN DE CONCIENCIA COMO “MÉDULA DURA” DE LA DIGNIDAD HUMANA

Resumen

El artículo analiza la fuente normativa y axiológica de la objeción de conciencia. El estudio se basa en el sistema europeo y nacional de protección de derechos humanos. El derecho a la objeción de conciencia está reconocido tanto en el art. 9 ap. 1 de la Convención Europea de Derechos Humanos (CEDH) como en el art. 10 ap. 2 de la Carta de Derechos Humanos de la Unión Europea. El problema de la objeción de conciencia en actualidad es un objeto de análisis en relación con la Sentencia del Tribunal Constitucional de 7 de octubre de 2015, causa núm. K 12/14 que se refiere a la cláusula de objeción de conciencia de los médicos. La objeción de conciencia protege la “médula dura” de la dignidad humana y su naturaleza. El derecho de ser humano a la libertad de conciencia y de religión es muy cercano, si no es el más cercano, a la naturaleza de la dignidad humana. El autor señala también que el ámbito de ser humano a la objeción de conciencia ha de tener carácter auxiliar – subsidiario, limitado a casos fundados y también encaminado a proteger intereses determinados en los sistemas de derecho natural o en el derecho positivo.

Palabras claves: objeción de conciencia, dignidad humana, derecho humano a la libertad de conciencia y religión

ПРАВО НА ВОЗРАЖЕНИЕ ПО СООБРАЖЕНИЯМ СОВЕСТИ В КАЧЕСТВЕ «ТВЁРДОГО ВНУТРЕННЕГО СТЕРЖНЯ» ЧЕЛОВЕЧЕСКОГО ДОСТОИНСТВА

Резюме

Статья представляет собой анализ нормативно-аксиологического источника возражения по соображениям совести. Исследование основывалось на европейской и отечественной системе защиты человеческих прав. Право на возражение по соображениям совести предусмотрено как ст. 9 п. 1 Европейской конвенции о правах человека (ЕКПЧ), так и ст. 10 п. 2 Хартии Европейского союза об Основных правах. Проблематика возражения по соображениям совести в настоящее время является предметом анализа доктрины в связи с решением Конституционного трибунала от 7 октября 2015 года, дело № К 12/14, касающегося положения о совести врача. Право на возражение по соображениям совести обеспечивает защиту «твердого стержня» человеческого достоинства и его сущности. Право человека на свободу совести и религии является одним из самых близких, если не самым близким, сущности человеческого достоинства. Автор также указывает на объем применения права человека на возражение по соображениям совести и утверждает, что он должен иметь вспомогательный характер, или субсидиарный, ограниченный подтверждёнными случаями, а также защищать интересы, определенные в системах естественного права или позитивного права.

Ключевые слова: возражение по соображениям совести, достоинство человека, право человека на свободу совести и религии

VERWEIGERUNG AUS GEWISSENSGRÜNDEN ALS „HARTER KERN“ DER MENSCHENWÜRDE

Zusammenfassung

Der Artikel ist eine Analyse der normativen und axiologischen (wertlehrebezogenen) Verweigerung aus Gewissensgründen. Die Untersuchung stützte man auf europäischem und einheimischem Menschenrechtsschutzsystem. Das Recht zur Verweigerung aus Gewissensgründen wird sowohl unter Art. 9 Abschn. 1 der Europäischen Konvention zum Schutz der Menschenrechte (EKSM), als auch unter Art. 10 Abschn.2 der Grundrechtskarte der Europäischen Union anerkannt. Die Verweigerung aus Gewissensgründen ist Gegenstand gegenwärtiger Analyse der Doktrin aus Anlass des Verfassungsgerichtsspruches vom 07. Oktober 2015 bezüglich Aktenzeichen K12/14 betreffend der Gewissensklausel des Arztes. Die Verweigerung aus Gewissensgründen schützt den „harten Kern“ der Menschenwürde und sein Kernstück. Das Recht des Menschen zur Gewissensfreiheit und Bekenntnisfreiheit ist eines der nächsten, wenn nicht das allernächste des Wesens einer Menschenwürde. Der Autor weist auch auf den Menschenrechtsbereich zur Verweigerung aus Gewissensgründen hin und meint ebenso, dass der Bereich einen behilflich-subsiidiären Charakter haben sollte, begrenzt zu begründeten Fällen; weiterhin sollte der Bereich den Interessenschutz bestimmt in Systemen des Naturrechtes und des positiven Rechtes.

Schlüsselwörter: Verweigerung aus Gewissensgründen, Menschenwürde, Recht des Menschen zur Gewissensfreiheit und Bekenntnisfreiheit

PROTECTION DE L'OBJECTION DE CONSCIENCE EN TANT QUE «NOYAU DUR» DE LA DIGNITÉ HUMAINE

Résumé

L'article est une analyse d'une source normative et axiologique d'objection de conscience. L'étude était basée sur le système européen et national de protection des droits de l'homme. Le droit à l'objection de conscience est reconnu à la fois à l'article 9 paragraphe 1 de la Convention européenne des droits de l'homme (CEDH), ainsi qu'à l'article 10 paragraphe 2 de la Charte des droits fondamentaux de l'Union européenne. Le problème de l'objection de conscience fait actuellement l'objet d'une analyse de la doctrine dans le cadre de l'arrêt du Tribunal constitutionnel du 7 octobre 2015, affaire n° K 12/14, qui concernait la clause de conscience du médecin. L'objection de conscience protège le «noyau dur» de la dignité humaine et de son essence. Le droit humain à la liberté de conscience et de religion est l'un des plus proches, sinon le plus proche, de l'essence de la dignité humaine. L'auteur indique également la portée du droit de l'homme à l'objection de conscience et affirme qu'il devrait être accessoire, subsidiaire, limité aux cas justifiés, et s'efforcer de protéger les intérêts définis dans les systèmes de droit naturel ou dans le droit positif.

Mots-clés: objection de conscience, dignité humaine, droit humain à la liberté de conscience et de religion

PROTEZIONE DELL'OBIEZIONE DI COSCIENZA COME "NUCLEO DURO" DELLA DIGNITÀ UMANA

Sintesi

L'articolo è un'analisi della fonte normativa e assiologica per l'obiezione di coscienza. La ricerca si è basata sul sistema europeo e nazionale di tutela dei diritti umani. Il diritto all'obiezione di coscienza riconosce sia l'articolo 9. paragrafo 1 della Convenzione europea dei diritti dell'uomo (CEDU) che l'articolo 10. paragrafo 2 della Carta dei diritti fondamentali dell'Unione europea. Il problema dell'obiezione di coscienza è attualmente oggetto di un'analisi dottrinale in relazione alla sentenza della Corte Costituzionale del 7 ottobre 2015, causa n. K 12/14, che riguardava la clausola di coscienza del medico. L'obiezione di coscienza tutela il "nucleo duro" della dignità umana e il suo principio. Il diritto umano alla libertà di coscienza e di religione è uno dei più vicini, se non il più vicino al principio della dignità umana. L'autore indica anche la portata del diritto umano all'obiezione di coscienza e sostiene che esso dovrebbe avere un carattere sussidiario, limitato ai casi giustificati, e dovrebbe cercare di proteggere gli interessi definiti nei sistemi di diritto naturale o di diritto positivo.

Parole chiave: obiezione di coscienza, dignità umana, diritto umano alla libertà di coscienza e di religione

Cytuj jako:

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