



UNIVERSITÀ
DEGLI STUDI DI BARI
ALDO MORO



DIPARTIMENTO JONICO IN SISTEMI
GIURIDICI ED ECONOMICI DEL MEDITERRANEO
SOCIETÀ, AMBIENTE, CULTURE
IONIAN DEPARTMENT OF LAW, ECONOMICS
AND ENVIRONMENT

ANNO VI ANNALI 2018 DEL DIPARTIMENTO JONICO

ESTRATTO

KRZYSZTOF ORZESZYNA

The right of conscientious objection in a democracy
in light of polish legal solutions



DIRETTORE DEL DIPARTIMENTO

Bruno Notarnicola

DIRETTORE DEGLI ANNALI

Nicola Triggiani

COMITATO DIRETTIVO

Nicola Triggiani, Paolo Pardolesi, Giuseppe Tassielli,
Danila Certosino, Laura Costantino, Nicola Fortunato,
Patrizia Montefusco, Angelica Riccardi, Maurizio Sozio

COMITATO SCIENTIFICO

Maria Teresa Paola Caputi Jambrenghi, Domenico Garofalo,
Francesco Mastroberti, Bruno Notarnicola, Riccardo Pagano,
Giuseppe Tassielli, Nicola Triggiani, Antonio Felice Uricchio,
Massimo Bilancia, Annamaria Bonomo, Daniela Caterino,
Gabriele Dell'Atti, Michele Indellicato, Ivan Ingravallo,
Antonio Leandro, Giuseppe Losappio, Pamela Martino,
Francesco Moliterni, Concetta Maria Nanna, Fabrizio Panza,
Paolo Pardolesi, Giovanna Reali, Umberto Salinas,
Paolo Stefani, Laura Tafaro, Umberto Violante

RESPONSABILE DI REDAZIONE

Patrizia Montefusco

Contatti:

Prof. Nicola Triggiani

Dipartimento Jonico in Sistemi Giuridici ed Economici
del Mediterraneo: Società, Ambiente, Culture

Convento San Francesco

Via Duomo, 259 74123 Taranto, Italy

e-mail: annali.dipartimentojonico@uniba.it

telefono: + 39 099 372382 • fax: + 39 099 7340595

<http://edizionidjsge.uniba.it/>

SAGGI

KRZYSZTOF ORZESZYNA

THE RIGHT OF CONSCIENTIOUS OBJECTION IN A DEMOCRACY IN LIGHT OF POLISH LEGAL SOLUTIONS*

ABSTRACT

Nell'articolo viene discussa la questione del diritto all'obiezione di coscienza in uno Stato di diritto democratico prendendo in considerazione le soluzioni giuridiche polacche. Il diritto garantito è una reale attuazione del diritto dell'uomo alla libertà di coscienza. Mediante le normative i diritti dell'uomo esprimono la dignità umana innata il che costituisce la fonte dei diritti dell'individuo. Il nucleo della cosiddetta clausola di coscienza prevede la possibilità di reagire qualora una norma di legge imponga al suo destinatario un tipo di comportamento contrario alla sua coscienza, di conseguenza violando l'essenza della legge e della libertà dell'uomo ad agire secondo la propria coscienza. Pertanto senza la protezione del diritto all'obiezione di coscienza la protezione dei diritti dell'uomo alla libertà di coscienza ha un carattere apparente e illusorio. La clausola di coscienza che dovrebbe costituire un'eccezione e non una regola, realizza questo diritto che, in alcune situazioni, richiede che vengano imposti dei limiti di legge.

The article presents the issue of the right of conscientious objection in a democracy governed by the rule of law, with attention to Polish legal solutions. The guarantee of this right is a true realization of the human right to freedom of conscience. Human rights express normatively the innate human dignity that is the source of the rights of the individual. The essence of the "conscience clause" is the response in a situation where a legal norm requires the addressee to act contrary to conscience, thus interfering in the essence of the human right of freedom of conscience. Thus, without protection of the right of conscientious objection, protection of the human right of freedom of conscience is a sham or façade. The conscience clause, which should be the exception and not the rule, is the realization of this right in situations where its statutory limitation is necessary.

PAROLE CHIAVE

Obiezione di coscienza / clausola di coscienza / Stato di diritto democratico.

Conscientious objection / conscience clause / democratic rule of law.

SOMMARIO: 1. Relationship between the set of norms of behavior and the system of ethical norms. – 2. Right of conscientious objection in the universal and European systems of human rights protection. – 3. Right of conscientious objection in the Polish legal system.

* Saggio sottoposto a referaggio secondo il sistema del doppio cieco.

1. It seems indisputable to observe that the essence of a democratic society is pluralism¹. In democratic states debates are conducted and attempts are made to reach compromise in the event of conflict between various hard-to-reconcile world views and philosophical and religious positions. One such difficult issue is the right of conscientious objection², which is part of the human right to freedom of thought, conscience and religion³. This right means that the state has a duty to protect this particular entitlement in a manner enabling it to be effectively realized⁴. Freedom of conscience is a fundamental value, an original value arising directly from human dignity, and thus the “conscience clause” established in positive law for certain professions should not be understood as the legal basis of this freedom. Freedom of conscience and the right to follow one’s own conscience does not require an express statutory basis. Such a basis would require limitation of the right to follow one’s own conscience. The freedom to follow one’s own conscience cannot be subjected to oversight from the perspective of its compliance with the Polish Constitution. Rather, such oversight should apply to the restrictions on the right to follow one’s own conscience arising under the norm containing the conscience clause⁵. A conscience clause is a legal means of expressing the right of conscientious objection. A conscience clause should be interpreted within an appropriately narrow and precisely understood scope. Thus it must be stressed that in the law, a conscience clause should be the exception, not the rule.

In reflecting on the so-called conscience clause in the context of positive law, the relationship should be pointed out between two sets of norms: the set of norms of behaviour comprising the system of positive law, and the system of ethical norms. In defining the relationship existing between these normative systems, it must be stated that in a given territory constituting the scope of jurisdiction of a given state authority, only one system of positive law may be in force with respect to the residents subject to that jurisdiction, but in the same territory, the residents may be bound by various systems of ethical norms, depending on differences in culture and world view among the residents of the given territory⁶.

Ethical norms and legal norms run independently of one another; that is, there are ethical norms that have no counterpart in legal norms, and there are legal norms unsupported by ethical norms, and there are also ethical and legal norms overlap-

1. Nawrot, 2015, 17.

2. The simplest definition of “conscience” is that it is a person’s moral self-awareness. Chyrowicz, 2014, 120.

3. Orzeszyna, 2017, 17.

4. Skwarzyński, 2015, 16.

5. Zoll, 2014a, 102.

6. Zoll, 2014b, 77.

ping as to the command or prohibition contained in the norm. In a democracy governed by the rule of law, only norms of positive law carry state sanction. One may demand legal protection and enforcement of one's claims solely pursuant to a legal basis. But a situation can also be imagined where a legal norm prohibiting or commanding certain behaviour, and thus imposing on the addressee of the norm an obligation to take certain action or refrain from taking certain action, conflicts with the prohibitions of the system of ethical norms existing within the given society. Then the legal norm requires behaviours which from the point of view of the ethical norms binding on persons are regarded by them as wrong, contrary to their individual conscience⁷.

Positive law makes concrete the norms of natural law and grounds them within the realities of the given state. It is now an era of human rights, and although it would be risky to identify human rights with natural law, it is hard to deny a connection between the two. Human rights lay claim to the role of a pre-statutory basis relied on by the creators of positive law, and human rights are treated as belonging to a person as such, rooted in human nature. In light of the specific personal character of human existence, a person is entitled to the inalienable value of dignity and equally inalienable rights, including a fundamental right to life. This is not far from natural law. Positive law is situated at the level of concrete codification of human rights.

Freedom of conscience is found at the epicentre of all human rights, as inseparably bound up with human dignity and individual freedom. The effective respect for freedom of conscience is the measure of the true rule of law of the state, security against practices befitting a totalitarian state⁸.

Conscientious objection (Polish *sprzeciw sumienia*, French *l'objection de conscience*) is an individual objection of the subject against a legal norm formally governing him or her, and not disputing the binding force of the entire legal system governing the state. In concept, acting in accordance with conscientious objection is aimed at reforming the society by correction of a binding but, in the belief of the person exercising the right of conscientious objection, wrongful law⁹. Conscientious objection is involved when due to a citizen's own beliefs, the citizen cannot respect binding law¹⁰. A wise lawmaker will try to avoid such situations and formu-

7. Zoll, 2014b, 80.

8. Bosek, 2014, 104.

9. Szostek, 2013, 7–8.

10. Sometimes in the spirit of natural law state authority may set aside one's conscientious objection. This may happen in the case of a decision to conduct a blood transfusion for a child when it is the only way to save the child's life or health, over the objections of parents who are Jehovah's Witnesses.

late the law so that it allows room for respecting differences in world view leading to a conflict of conscience¹¹.

2. Freedom of conscience is one of the fundamental values European legal orders are founded on. The issue of individuals being guided by their own conscience – an individually recognized system of values and the related view of reality – immediately touches on the essence of a democratic society¹² and its juridical reflection, the principle of a democracy governed by the rule of law, as well as the axioms of contemporary systems for protection of human rights. The possibility for the individual to exercise free choices within the grounds of the law constitutes a condition for realization of the individual's dignity and freedom, which, being innate, takes precedence over any acts of legislative authority¹³. These values constitute the basis for systems of protection of human rights. They are inscribed in human nature, in the construction of the individual, and as long as the individual exists, these values exist¹⁴. In a democracy governed by the rule of law, persons have the right to autonomous choice of the aim they wish to realize, their model of life and system of values, and even to define what is good and what is bad¹⁵. Thus here is the place for a “conscience clause” which should help resolve what is in essence a conflict of values and the norms protecting those values¹⁶.

Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR)¹⁷ provides: «Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.» Externally, in certain instances the freedom of thought, conscience, and religion must undergo restrictions. The ICCPR mentions these limitations in Article 18(3): «Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.».

Conscientious objection is not expressly protected in the ICCPR, but is allud-

11. Szostek, 2013, 12–14.

12. ECtHR 25.05.1993 *Kokkinakis v Greece*, app. no 14307/88, *ECHR*, 1993, 20, para 31.

13. Art. 1 of the Universal Declaration of Human Rights (UN General Assembly 1948).

14. Nawrot, 2014, 111.

15. Garlicki, 2010, 557.

16. Zoll, 2014b, 80.

17. International Covenant on Civil and Political Rights promulgated in Poland at *Journal of Laws Dz.U.* 1977 no. 38 item 167.

ed to in Article 8(3)(c)(ii)¹⁸. The position of the United Nations Human Rights Committee (HRC) concerning recognition of the right of conscientious objection has evolved over the years. In the case of *L.T.K. v Finland*, the petitioner was convicted of refusal to perform military service or even alternative service. The HRC pointed out that the petitioner had not been convicted due to his beliefs or opinions as such, but for his refusal to perform military service, and further pointed out that the ICCPR lacks any provisions enshrining a right of conscientious objection¹⁹.

Several years later the HRC changed its view. In General Comment 22, it stated that individuals have claimed the right of conscientious objection, and in consequence more and more states provide for an exemption from military service, replacing it with an alternative national service. Recognizing that the ICCPR does not expressly refer to a right to conscientious objection, the HRC found 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»²⁰. In line with this finding, military service of an unarmed nature or during peacetime need not give rise to a right of conscientious objection. However, as stressed by Hipólito Solari Yrigoyen in a dissenting

18. «Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors».

19. «The Human Rights Committee observes in this connection that, according to the author's own account he was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service. The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3(c)(ii) of article 8, can be construed as implying that right. The author does not claim that there were any procedural defects in the judicial proceedings against him, which themselves could have constituted a violation of any of the provisions of the Covenant, or that he was sentenced contrary to law.» HRC 09.07.1985 *L.T.K. v Finland*, Communication no 185/1984, para 5.2.

20. General Comment 22 (48th session, 1993), 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 not 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 recognized 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.».

opinion in the case of *Westerman v the Netherlands*, «even in peacetime, military service is connected with war»²¹. In this respect, a majority of the members of the HRC held there was no violation of Article 18 because the provision concerning conscientious objection was consistent with the interpretation of Article 18 in General Comment 22. *Westerman* «failed to satisfy the authorities of the State party that he had an “insurmountable objection of conscience to military service... because of the use of violent means”» and the committee refused «to substitute its own evaluation of this issue for that of the national authorities.»²². However, six members of the committee²³ found a violation of Article 18, thus recognizing conscientious objection entitling the individual to manifest his beliefs²⁴.

Consequently, the right of conscientious objection is now recognized by the HRC and appears to be quite broadly accepted by states²⁵. Although conscientious objection is most commonly cited with respect to refusal to perform military service²⁶, nonetheless there are cases where the petitioners rely on conscientious objection to avoid paying taxes, arguing that they object to spending a portion of their taxes for example for military purposes. The established case law of the HRC confirms that the guarantees under Article 18 ICCPR do not provide an exemption from performing lawfully imposed obligations, particularly with regard to payment of taxes²⁷. The HRC accepts that Article 18 ICCPR protects the right to «hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures»²⁸. However, in this context the HRC holds that «the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article»²⁹.

21. HRC 13.12.1999 *Westerman v the Netherlands*, Communication no. 682/1996.

22. Cited by de Beausse de La Hougue, 2011, 432.

23. Cecilia Medina Quiroga, Prafullachandra Natwarlal Bhagwati, Louis Henkin, Fausto Pocar, Martin Scheinin, and Hipólito Solari Yrigoyen.

24. De Beausse de La Hougue, 2011, 432.

25. De Beausse de La Hougue, 2011, 432.

26. Sudre, 2008, 517–519.

27. Joseph, Castan, 2013, 584.

28. Nawrot, 2015, 20.

29. HRC 08.11.1991 *J.P. v Canada*, Communication no. 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.»; HRC 23.07.1992

However, vital issues of conscientious objection by medical personnel have yet to be presented to the HRC. Particularly notable here is conscientious objection by medical personnel with respect to acts contrary to their principles, primarily involving the taking of human life through termination of pregnancy³⁰.

In the case of medical personnel, the public authorities should be particularly cautious in imposing limitations in light of the seriousness of the dilemmas brought by the development of science and medical technologies. Conflicts of conscience seem particularly critical as they involve values that are the most fundamental, also from the perspective of the values of the rule of law³¹. Thus, the obligations of the state include creation of a system guaranteeing that medical professionals can maintain their internal autonomy and also guaranteeing that patients receive certain medical services³². If physicians recognize under their own adopted principles that an unborn child is also a patient, such physicians cannot be accused of being «blinded by their own moral rules» and failing to perceive anything beyond them. The legal permissibility of conducting abortions in certain situations obliges the state, and not the physician, to ensure the possibility of conducting it³³.

As in the case of the United Nations' universal system for protection of human rights, also in the system of the Council of Europe the freedom of thought, conscience and religion has the nature of an innate right. Thus the content of this freedom and the rights tied to it cannot be laid down exclusively by norms of the legal system in the positivist sense³⁴.

The freedom of thought, conscience and religion is expressed in Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (European Convention on Human Rights–ECHR)³⁵ and Article 10 of the Charter of Fundamental Rights of the European Union³⁶.

Under the ECHR, the individual has a full right to autonomy of thought, conscience and religion. Thus, among other things, freedom is guaranteed with respect to choice of the system of values one wishes to be guided by and through which one will assess the surrounding reality. While the sphere of internal/spiritual

J.v.K. and C.M.G.v.K.–S. v the Netherlands, Communication no. 483/1991, para 4.2; HRC 08.04.1994 *K.V. and C.V. v Germany*, Communication no. 568/1993, para 4.3.

30. De Beausse de La Hougue, 2011, 433.

31. Nawrot, 2014, 113.

32. Nawrot, 2014, 113.

33. Chyrowicz, 2014, 121.

34. Nawrot, 2015, 21.

35. European Convention for the Protection of Human Rights and Fundamental Freedoms promulgated in Poland at Journal of Laws Dz.U. 1993 no. 61 item 284, as amended.

36. Official Journal of the European Union [2010] C 83/389.

freedom is not subject to any limitations, its externalization must reflect the realities, particularly the overall system of values, of a democracy governed by law. Consequently, in the external sphere, manifestation of the freedom of thought, conscience and religion may, and in some instances must, be subject to limitations (art. 9(2) ECHR).

The Strasbourg judicial bodies have very rarely decided to limit the right of conscientious objection, and when they have done so, they have pointed to a too-weak connection between the practice and the grounds for assertion of conscientious objection. In *Bouessel du Bourg v France*³⁷ the European Commission of Human Rights (EComHR) held that a taxpayer's refusal to pay taxes because the state might spend some portion of it for example on abortion cannot be regarded as exercise of the right of conscientious objection. In the view of the commission, the connection between collection of tax and termination of pregnancy is too weak.

Bayatyan v Armenia (2011)³⁸ involved a citizen of Armenia who for religious reasons (as a Jehovah's Witness) refused to perform military service but also declared that he was prepared to perform alternative service³⁹. But this option was not provided for by Armenian law. The petitioner was sentenced to two and a half years in prison. The European Court of Human Rights (ECtHR) held that the state could exercise its margin of appreciation in evaluating the necessity to limit the religious freedom of the individual⁴⁰. But a state which has not decided to provide the individual with the possibility of performing alternative service must demonstrate in each case that intrusion in the sphere of the individual's freedom of religion was justified by "a pressing social need"⁴¹.

In *Eweida v United Kingdom*⁴², two applicants, Nadia Eweida and Shirley Chaplin, claimed that the ban on wearing a cross in the workplace violated Article 9 ECHR with respect to manifestation of their convictions, and two other applicants with respect to conscientious objection. In its judgment of 15 January 2013, the ECtHR upheld only the application by Eweida. In the court's opinion, refusal to perform a legal obligation due to conflict with religious convictions falls within the scope of protection of Article 9 ECHR also when it does not involve

37. EComHR 18.02.1993 *Bouessel du Bourg v France*, app. no. 20747/92, *EHRR*, 1993, 16, CD49.

38. ECtHR 07.07.2011 *Bayatyan v Armenia*, app. no. 23459/03, *ECHR*, 2011, 1095, para 110: «In this respect, the Court notes that Article 9 does not explicitly refer to a right to conscientious objection.»

39. Amos, 2014, 535–536.

40. Renucci, 2013, 161–162.

41. Cumper, 2014, 601–602.

42. ECtHR 15.01.2013 *Eweida v United Kingdom*, apps. no. 48420/10, 59842/10, 51671/10, 36516/10, *ECHR*, 2013, 37.

military service. Moreover, this is also possible with respect to a person exercising a public function⁴³. The court held that within the margin of appreciation of the local authorities, they could in this case give priority to protection against access to public services by gay couples and the requirement that employees act in a manner free from discrimination, and thus the aim of the action was justified⁴⁴. The *Eweida* ruling demonstrates an evolution in the position of the ECtHR concerning recognition of conscientious objection under Article 9 of the convention⁴⁵.

Similarly, under Article 9 ECHR, a representative of the health service has the right to refuse to perform a service violating the system of values he or she subscribes to – the right of conscientious objection (conscience clause). However, the state bears the obligation of ensuring the rights of the patient, who must be able to obtain the medical service from another provider. This position is supported by the case of *R.R. v Poland*⁴⁶. There the applicant alleged that the refusal to issue her a referral for detailed prenatal testing (genetic tests), motivated by considerations of conscience, denied her the ability to undergo a lawful abortion. Although in its judgment the ECtHR cited *inter alia* the position of the United Nations High Commissioner for Human Rights that in enabling health service workers to exercise a right of conscientious objection, the state must guarantee patients the ability to obtain the medical service in question, including abortion, from another service provider, the court did not dispute the soundness of the notion of a conscience clause as such. To the contrary, the court pointed to the necessity to ensure the possibility of realizing both the rights of the health service employee, including first and foremost the right of conscientious objection, and the rights of the patient, in particular the right to healthcare (access to medical services).

The line of case law on the application of conscientious objection to date clearly indicates the position that the institution of a conscience clause plays in the Council of Europe's system of human rights protection. This position is well-illustrated in resolution 1763 of the Parliamentary Assembly from 2010⁴⁷, point 1 of which confirms the fundamental nature of freedom of conscience and the need for express determination of limitations with respect to acting in accordance with conscience. The assembly indicated that each state has a dual obligation in this

43. Skwarzyński, 2013, 15–17.

44. ECtHR 15.01.2013 *Eweida v United Kingdom*, apps. no. 48420/10, 59842/10, 51671/10, 36516/10, *ECHR*, 2013, 37, para 105.

45. McCrea, 2014, 305.

46. ECtHR 26.05.2011 *R.R. v Poland*, app. no. 27617/04, *ECHR*, 2011, 828; as well as ECtHR 20.03.2007 *Tysiqc v Poland*, app. no. 5410/03, *ECHR*, 2007, 219.

47. Resolution 1763, «The right to conscientious objection in lawful medical care» (2010), Final version, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17909&lang=en>

regard: to healthcare providers (freedom of thought, conscience, and religion), and to patients (access to lawful medical care). The state should thus develop comprehensive and clear regulations defining and ensuring the ability to exercise the conscience clause by healthcare providers⁴⁸. This resolution recognized the validity of the conscience clause not only with respect to individuals, which is obvious, but also – which may be controversial – to collective entities (eg hospitals). The resolution may be read as a premise for expanding the integrity and autonomy of legal persons in light of their legal nature, eg religious congregations, or in light of their purpose or fundamental activity, eg operating a hospice, school or hospital, which may be grounded on a certain essential ethical choice by their members, owners or founders⁴⁹.

Article 10(1) of the Charter of Fundamental Rights of the European Union provides: «Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.» The charter also provides for a right of conscientious objection in Article 10(2): «The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.»⁵⁰. As compared to the previous protection, this is a new guarantee of the right to conscientious objection expressly stated in the European system of human rights, indicating the process for specifying the rights and freedoms of the individual⁵¹. The charter protects the right to conscientious objection within the bounds provided by national law, as indicated by a literal interpretation of Article 10(2)⁵².

3. In several articles, including articles 31, 35(2), 47, 48, and 53, the Polish Constitution of 1997⁵³ guarantees the freedom of convictions, conscience, and the ethical system endorsed by each person based on their adopted world view. Thus statutory regulation of the “conscience clause”, ie refusal to comply with a legal norm because the person reaches a negative moral assessment of the behaviour provided

48. Radlińska, Kolwicz, 2015, 464.

49. Bosek, 2011, 24–25.

50. In Polish: «Uznaje się prawo do odmowy działania sprzecznego z własnym sumieniem, zgodnie z ustawami krajowymi regulującymi korzystanie z tego prawa.» In French: «Le droit à l'objection de conscience est reconnu selon les lois nationales qui en régissent l'exercice.» Official Journal of the European Union [2010] C83/389.

51. McCrea, 2014, 305–306.

52. Skwarzyński, 2013, 12.

53. Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Constitution of Republic of Poland dated 2 April 1997), Journal of Laws Dz.U. 1997 no. 78 item 483, as amended.

for in the legal norm, cannot be regarded as some kind of privilege or a specific form of expression of attitudes of human conscience⁵⁴.

In its ruling of 15 January 1991 (issued under the Polish Constitution of 1952), the Polish Constitutional Tribunal held: «Freedom of conscience does not mean only the right to represent a certain world view, but primarily the right to act in accordance with one's own conscience, the freedom from compulsion to act contrary to one's own conscience»⁵⁵.

Both the Polish Constitution 1997 (art. 31(3)) and the acts of international law discussed above provide for a substantive legal basis for limiting persons' freedom to act in accordance with their own conscience, which may take the form of the rights and freedoms of others or public safety and order. Such limitations may be introduced only by statute and in a manner that does not violate the essence of the freedom. Thus, as the rule is freedom of conscience, including the freedom to refrain from actions conflicting with one's own conscience, limitation of the rule – as an exception – must be justified under art. 31(3) of the Constitution, and not the other way around⁵⁶. Freedom to recognize a certain world view, to profess a certain religion, must go hand in hand with recognition and tolerance of the freedom of another person from recognition of that world view as correct and from professing that religion. In a democracy governed by the rule of law, the right of tolerance must be symmetrical.

The obligation to act or refrain from acting arising out of such legal norms may consist of an obligation to take certain behaviours for the common good (eg military service) or for another person when he or she has a claim based on such norm for delivery of certain consideration (eg medical care). What will be decisive of this issue will be the weight of the good which is violated as a result of performance of the command set forth in the norm. If this good has a high value, it may be the case that realization of the obligation set forth in the legal norm may eradicate the essence of the freedom of conscience. That would be contrary to art. 31(3) of the Constitution⁵⁷.

The conscience clause is a legal method of expression of the right of conscientious objection. We typically refer to it with a view of physicians and within a fairly

54. Olszówka, 2016, 1263.

55. Polish Constitutional Tribunal 15.01.1991 case no. U. 8/90, *Orzecznictwo Trybunału Konstytucyjnego* (Constitutional Tribunal Case Law) 1991, I, item 8.

56. Olszówka, 2016, 1263.

57. Art. 31(3): «Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.».

narrow scope, mainly in the context of abortion. However, a broad scope of the clause follows from the very principle of equality, and thus that it also applies to other persons and areas of life⁵⁸. Nonetheless, it must be remembered that in law, the conscience clause should be the exception and not the rule. According to Andrzej Zoll, in the Polish legal system, the conscience clause with respect to goods of high value (such as human life at every stage of development) has a constitutional foundation⁵⁹. In practice, the conscience clause in Poland with respect to physicians most often has to do with lawful abortions as well as issuance of referrals for prenatal testing as the basis for termination of pregnancy. Other indications are *in vitro* fertilization or refusal to prescribe abortifacients⁶⁰.

A conscience clause is set forth in art. 39 of the Act on the Professions of Physician and Dentist⁶¹. Under that provision, «A physician may refrain from providing healthcare services contrary to his or her conscience....». Thus, insofar as defined in that provision, physicians enjoy full legal guarantees of the autonomy of their conscience in the sphere of professional decisions⁶². However, art. 39 must be read in the context of art. 30 of the act, which refers to a physician's duty to provide healthcare if there is an urgent need due to a threat to life or health or other instance requiring immediate action. Here, "other instance" may be understood also to mean various medical services or procedures which may also be covered by the conscience clause, but art. 39 states that the conscience clause does not apply to situations covered by art. 30. In other words, then the physician would not be free to refuse to act⁶³. The reference to art. 30 means that in any instance where art. 30 applies, the physician must act contrary to conscience. The blanket reference to art. 30 means that the physician must act contrary to conscience in any instance "not admitting delay"⁶⁴. Art. 39 of this act, expressing the conscience clause for physicians, should thus be modified along the lines of art. 12(2) of the Act on the Professions of Nurse and Midwife⁶⁵, which excludes the possibility of relying on the conscience clause if delay in providing healthcare could cause sudden deterioration in the patient's health⁶⁶.

58. For example the conscience clause in the legal profession.

59. Zoll, 2014b, 81.

60. Radlińska, Kolwicz, 2015, 464.

61. Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentystry, Journal of Laws Dz.U. 2008 no. 136 item 857, as amended.

62. Żelichowski, 2005, 73.

63. Zoll, 2014a, 103.

64. Bosek, 2014, 109–110.

65. Ustawa z dnia 15 lipca 2011 r. o zawodach pielęgniarzy i położnej, Journal of Laws Dz.U. 2011 no. 174 item 1039, as amended.

66. Zoll, 2014a, 103.

According to a judgment of the Constitutional Tribunal⁶⁷, art. 39 has ceased to be in force with respect to requiring a physician to provide a patient information on the possibility of obtaining a healthcare service. In the tribunal's view, this obligation should be borne by the public authorities⁶⁸.

It thus appears that the conscience clause in the medical sphere is from the legal point of view a resolution by the legislature of the conflict between the freedom of healthcare professionals to act in accordance with their own conscience, and other persons' right to require specific medical action by that professional⁶⁹.

The "conscience clause" may also apply to other persons in the healthcare sphere, such as pharmacists, in particular with respect to prescribed abortifacients. Thus the position of the Committee on Bioethics at the Polish Academy of Sciences according to which pharmacists cannot rely on the "conscience clause" should be rejected⁷⁰.

In summary, it should be stated that human rights express normatively the innate human dignity that is the source of the rights of the individual⁷¹. The right of conscientious objection has gradually assumed its place in the system of human rights. It is part of the right to freedom of thought, conscience, and religion. Exercise of this freedom is possible only when it is not unlawful. The essence of the "conscience clause" is the response in a situation where a legal norm requires the addressee to act contrary to conscience, thus interfering in the essence of the human right of freedom of conscience. Thus, without protection of the right of conscientious objection, protection of the human right of freedom of conscience is a sham or façade. The conscience clause, which should be the exception and not the rule, is the realization of this right in situations where its statutory limitation is necessary.

67. Polish Constitutional Tribunal 07.10.2015 case no. K 12/14, *Orzecznictwo Trybunału Konstytucyjnego – A* (Constitutional Tribunal Case Law – A) 2015, 9, item 143.

68. Brzozowski, 2017, 34.

69. Zoll, 2015, 126.

70. Position of the Committee on Bioethics of the Presidium of the Polish Academy of Sciences of 12.11.2013 no. 4/2013 on the "conscience clause".

71. Orzeszyna, 2013, 18.

RIFERIMENTI BIBLIOGRAFICI

- Amos M. (2014). *Human Rights Law*, Oxford–Portland: Bloomsbury Publishing.
- de Beausse de La Hougue C. (2011), Article 18 in E. Decaux, ed. *Le Pacte International relatif aux droits civils et politiques. Commentaire article par article*, ed. Emmanuel Decaux, Paris: Economica, p. 432 ss.
- Bosek L. (2011). Klauzula sumienia (The conscience clause), in M. Safjan, ed. *Prawo wobec medycyny i biotechnologii. Zbiór orzeczeń z komentarzami* (Law in the face of medicine and biotechnology: A collection of rulings with commentaries), Warsaw: Wolters Kluwer, pp. 21–26.
- Bosek L. (2014). Klauzula sumienia – czy ustawa o zawodach lekarza i lekarza dentystry jest zgodna z Konstytucją RP (The conscience clause: Is the Act on the Professions of Physician and Dentist consistent with the Polish Constitution?), *Medycyna Praktyczna*, 1, p. 104 ss.
- Brzozowski W. (2017). Prawo lekarza do sprzeciwu sumienia (po wyroku Trybunału Konstytucyjnego) (A physician's right to conscientious objection (following the Constitutional Tribunal judgment)), *Państwo i Prawo*, 7, pp. 23–36.
- Chyrowicz B. (2014). Moralna autonomia i klauzula sumienia (Moral autonomy and the conscience clause), *Medycyna Praktyczna*, 1: p. 120 ss.
- Cumper P. (2014). Article 9: Freedom of Thought, Conscience, and Religion in D. Harris, M. O'Boyle, E. Bates, C. Buckley, eds. *Law of the European Convention on Human Rights*. Oxford: Oxford University Press, pp. 592 ss.
- Garlicki L. (2010). Commentary to art. 9 in L. Garlicki, ed. *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Komentarz do artykułów 1–18* (Convention on Protection of Human Rights and Fundamental Freedoms: Commentary on articles 1–18). Warsaw: C.H. Beck, p. 557 ss.
- Joseph S., Castan M. (2013). *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. Oxford: Oxford University Press.
- McCrea R. (2014). Article 10 – Right to Freedom of Thought, Conscience and Religion in S. Peers, T. Hervey, J. Kenner, A. Ward, eds. *The EU Charter of Fundamental Rights: A Commentary*. Oxford and Portland: Bloomsbury publishing, p. 291 ss.
- Nawrot O. (2014). Sumienie lekarza a prawa człowieka w świetle standardów Rady Europy (A physician's conscience and human rights under the standards of the Council of Europe), *Medycyna Praktyczna*, 1, p. 111 ss.
- Nawrot O. (2015). Sprzeciw sumienia a prawa człowieka i ich filozofia (Conscientious objection, human rights and their philosophy), in O. Nawrot, ed. *Klauzula sumienia w państwie prawa* (The conscience clause under the rule of law), Sopot: Fundacja na rzecz Polskich Związków Kredytowych – Instytut Stefczyka, p. 12 ss.
- Olszówka M. (2016). Objasnienia do art. 53 (Analysis of art. 53), in M. Safjan, L. Bosek, eds. *Konstytucja RP, tom. I, Komentarz, Art. 1–86* (The Polish Constitution, vol. 1: Commentary to Art. 1–86), Warsaw: C.H. Beck, p. 1263 ss.
- Orzeszyna K. (2013). Godność ludzka podstawą praw człowieka (Human dignity—the foundation of human rights), in R. Tabaszewski, ed. *Człowiek – jego prawa i odpowiedzialność* (Human rights and responsibility), Lublin: Wydawnictwo KUL, p. 15 ss.
- Orzeszyna K. (2017). Klauzula sumienia jako gwarancja realizacji prawa do wolności

- sumienia (The conscience clause as a guarantee of exercise of the right of freedom of conscience), *Medyczna Wokanda*, 9, p. 17 ss.
- Radlińska I., Kolwitz M. (2015). Klauzula sumienia realizowana w prawie zawodów medycznych w Polsce w kontekście realizacji Europejskiej konwencji praw człowieka (The conscience clause realized in the law of the medical professions in Poland in the context of realization of the European Convention on Human Rights), *Pomeranian Journal of Life Sciences*, 4, pp. 466–466.
- Renucci J.–F. (2013). *Droit européen des droits de l'homme. Droits et libertés fondamentaux garantis par CEDH*. Paris: L.G.D.J.
- Skwarzyński M. (2013). Sprzeciw sumienia w europejskim i krajowym systemie ochrony praw człowieka (Conscientious objection in the European and Polish systems of human rights protection), *Przegląd Sejmowy*, 6, p. 9 ss.
- Skwarzyński M. (2015). Korzystanie z klauzuli sumienia jako realizacja wolności wewnętrznej czy/i zewnętrznej (Exercise of the conscience clause as realization of internal and/or external freedom), *Opolskie Studia Administracyjno–Prawne* 13, 4, p. 9 ss.
- Sudre F. (2008). *Droit européen et international des droits de l'homme*. Paris: Presses Universitaires de France.
- Szostek A. (2013). Sprzeciw sumienia a prawo naturalne (Conscientious objection and natural law), *Teologia i Moralność*, 2 (14), p. 7 ss.
- Zoll A. (2014a). Charakter prawny klauzuli sumienia (The legal nature of the conscience clause), *Medycyna Praktyczna*, 1, p. 99 ss.
- Zoll A. (2014b). Klauzula sumienia (The conscience clause), in P. Stanisz, J. Pawlikowski, M. Ordon, eds. *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne* (Conscientious objection in medical practice: Ethical and legal aspects). Lublin: Wydawnictwo KUL, p. 77 ss.
- Zoll A. (2015). Klauzula sumienia w medycynie – gwarancja czy ograniczenie wolności sumienia pracowników służby zdrowia? (The conscience clause in medicine: Guarantee or limitation of the freedom of conscience of healthcare workers?), in O. Nawrot, ed. *Klauzula sumienia w państwie prawa* (The conscience clause under the rule of law), Sopot: Fundacja na rzecz Polskich Związków Kredytowych – Instytut Stefczyka, pp. 116–126.
- Żelichowski M. (2005). Klauzula sumienia – aspekt prawny (The conscience clause: Legal aspect), *Medycyna Praktyczna – Ginekologia i Położnictwo*, 6, p. 72 ss.