SCOPE OF PROTECTION OF THE FREEDOM OF CONSCIENCE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract

Due to increasing secularisation and individualisation of European societies there is a need for a broad interpretation of the freedom of conscience under Article 9 (1) ECHR that would comprise the right to act in conformity with mandates of one's conscience, including the right to conscientious objection. Such a right would be subject to the limitation clause of Article 9 (2), which would avert the danger of possible abuse. However, the adoption of such a broad interpretation requires a change in the approach to Article 9 in the jurisdiction of the European Court of Human Rights that would in greater extent take into account moral beliefs of minorities and of individuals.

Keywords: conscientious objection, limitation on freedom of conscience, religion and belief, the doctrine of generally applicable and religiously neutral laws.

Resumen

«Ámbito de protección de la libertad de conciencia en el Convenio Europeo de los Derechos Humanos». Debido a la creciente secularización e individualización de las sociedades europeas es menester que se adopte una amplia interpretación de la libertad de conciencia prevista en el Artículo 9 del Convenio Europeo de los Derechos Humanos que comprendiera el derecho a actuar según mandatos de la propria conciencia, incluyendo el derecho a la objeción de conciencia. Este derecho estaría sujeto a la cláusula limitativa del Artículo 9 (2) CEDH lo que prevendría sus posibles abusos. Sin embargo, la adopción de tan extensiva interpretación de la libertad de conciencia requeriría el cambio del planteamiento respecto al Artículo 9 CEDH en la jurisprudencia del Tribunal Europeo de Derechos Humanos que de un modo más amplio tomaría en consideración las convicciones morales de grupos minoritarios y aquellas de los particulares.

Palabras clave: objeción de conciencia, limitación de la libertad de conciencia, religión y de convicciones, doctrina de leyes ideológicamente neutrales de aplicación general.

1. INTRODUCTION

The inclusion of the freedom of conscience into a legal system of the protection of human rights, national or international, seems to create a paradox. On the one hand, the freedom of conscience has the potential to become a legal basis for establishing exemptions from generally applicable legal obligations in favour of individuals whose most profound moral convictions are irreconcilable with views on the right and wrong of a given majority entrenched in provisions of generally binding law. By guaranteeing the freedom of conscience, the lawgiver takes account of and shows respect for axiological beliefs that diverge from mainstream ideologies and thus protects human dignity and autonomy. What is of paramount importance, the protection offered by this freedom is not only directed to minorities, but extends to individual persons. In such a way, legal systems are enriched and humanised; at the same time, the perception of the enforcement of law based on the idea of formal legality is replaced by the endeavour to realise substantial justice[1]. On the other hand, the individual who objects to comply with a legal norm by invoking the superior mandates of conscience seems to usurp the hegemony over the legal order, since from their perspective the binding force of the law depends on their subjective moral criteria. For this reason freedom of conscience is sometimes perceived "as quite anarchic in its tendencies"[2]. Given that individual conscience is a deeply personal instance, the protection of its freedom may undermine the principle of democracy as well as the principle of rule of law and thus entail a danger for the stability of the legal order[3].

The mentioned paradox is inherent in Article 9 of the European Convention on Human Rights (hereinafter: Article 9) which alongside the freedom of thought, religion and belief stipulates the right to freedom of conscience. Taking into account the developments of the theory and practice of human rights at the time of signing of the Convention, one can argue that its drafters could not regard the freedom of conscience as a separate right to moral self-determination and self-realisation, detached from the 'traditional' freedom of religion and belief. Nonetheless, according to constant jurisprudence of the Strasbourg bodies the rights and freedoms laid down in the Convention should be subject to dynamic and evolutionary interpretation. This means that the Convention is designed to guarantee not rights that are

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[1] Reina, V., Reina, A., Lecciones de derecho eclesiástico español, PPU-Promociones Publ. Univ., Barcelona, 1983, pp. 415 ff.

[2] Quinn, G., Conscientious objection in labour relations (civil service and liberal professions), in: Council of Europe, Freedom of conscience. Seminar organised by the Secretariat General of the Council of Europe in co-operation with the F. M. Van Asbeck Centre for Human Rights Studies of the University of Leiden. Leiden (Netherlands), 12-14 November 1992, Council of Europe, Strasbourg, 1993, p. 109.

[3] As it has been concisely expressed by the Spanish Constitutional Court, the right to conscientious objection of a general character, i.e. the right to be exempted from a constitutional or statutory obligation whose compliance is contrary to convictions of the individual, is inconceivable; its recognition in a legal order whatsoever would therefore be tantamount to the negation of the idea of the statehood. See: Judgment of 27.10.1987 on conscientious objection to military service (STC 161/1987, F. J. 3.).

theoretical or illusory but rights that are practical and effective[4]. Such an approach is supposed to do justice both to dramatic changes occurring in modern societies and to increasing expectations as to standards of the protection of human rights. Referring the above-mentioned remarks to the freedom of conscience, it should be assumed that due to he increasing ideological pluralisation of modern European societies and the concomitant 'privatisation' or individualisation of ethical beliefs there is an emergent need to open Article 9 towards a wider interpretation that would afford a more effective protection to people that profess less common or even individualistic sets of beliefs, including the ethical ones. On the other hand, the attempts at deriving the right to conscientious objection from Article 9 are fraught with dogmatic difficulties resulting not only from its textual ambiguities but also from the need to harmonise individual interests with the principle of democracy and the principle of the rule of law. The objective of this paper is to show that despite these difficulties and a rather restrictive approach to the scope of freedoms laid down in Article 9 taken by the Strasbourg bodies, it is still possible and desirable to construe this provision in a way that includes the right to conscientious objection to generally binding legal obligations without the threat of a considerable detriment to general interests of the state and society.

2. INTERPRETATION OF THE FREEDOM OF CONSCIENCE UNDER ARTICLE 9 ECHR IN THE LEGAL DOCTRINE

2.1. Individual conscience as the "object" of the protection under Article 9 ECHR

The elucidation of the "substance" of the right to freedom of conscience is not possible without the presupposition of an understanding of the 'object' of its protection, i. e. of the phenomenon described as "conscience", that would be satisfactorily operative in the realm of legal sciences. Although the issue of conscience has been discussed within various disciplines (theology, philosophy, psychology and sociology) since Antiquity, the views as to its nature and functions are highly divergent and fraught with ideological controversies. Legal theory and practice cannot directly and one-sidedly resort to one of them for the simple reason that the state, that is supposed to be impartial in matters of religious and philosophical beliefs, would thus take sides in ideological disputes[5]. On the other hand, the concept of conscience that would workable within the province of law cannot be completely subjectified. In other words, it cannot be left to the individual concerned to decide what conscience means, even if one assumes that the very function of the freedom of conscience

[4] Nowicki, M. A., Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka, Lex Wolters Kluwer Business, Warszawa, 2010, pp. 224 ff.

[5] Muckel, S., Art. 4 Glaubens-und Gewissensfreiheit, in: Friauf, K. H., Höfling, W., Berliner Kommentar zum Grundgesetz, Schmidt Verlag, Berlin, 2008, marginal number (Rn.) 57.

is to protect their moral autonomy and self-determination. The individual's perceptions are certainly to be taken into account when applying the human rights, however the law must at least define the limits of what it is willing to guarantee.

Given that a notion of conscience acceptable within the ambit of juridical sciences can be one-sidedly influenced neither by a religion or philosophy nor by subjective beliefs of the individual, the only possibility of its constructing is to draw upon an elementary understanding of conscience "as a phenomenon that occurs in social life and that an individual is able to experience"[6]. Such a formal approach to conscience has been propounded by German Constitutional Court that has described a decision of conscience as "any serious moral decision based on the categories of 'good' and 'evil' which the individual experiences as binding and absolutely obligatory for themselves in a particular situation, so that they could not act against it without suffering severe pangs of remorse."[7] According to this approach, the 'substance' of conscientious decisions and judgments is determined by subjective and individual criteria, however, in order to be qualified as such, the decision of conscience has to meet some formal (objectified) requirements, especially it has to attain a considerable degree of seriousness and coherence[8]. What distinguishes conscience from other inner processes is the binding force of its precepts for the individual concerned. The mandates of conscience are experienced as serious moral obligations and not as mere opinions or preferences as to what kind of conduct in a particular situation would be appropriate, expedient, reasonable or desirable. As A. Peters has noted, the freedom of conscience protects the individual in the circumstances described by Martin Luther in his famous statement: "here I stand and I cannot do otherwise", pronounced at the Diet of Worms in 1521[9]. Some scholars influenced by the developments of the doctrine of German constitutional law[10] have rightly pointed out that the discussed approach to conscience could be of assistance when interpreting Article 9. Indeed, given its formal and at the same time comprehensive character, the propounded definition could constitute a methodological foundation of the nascent protection of the right to conscientious objection at international level.

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[6] Loschelder, W., The non-fulfillment of legally imposed obligations because of conflicting decisions of conscience – the legal situation in the Federal Republic of Germany (FRG), in: European Consortium for Church-State Research, Conscientious objection in the EC Countries. Proceedings of the Meeting Brussels-Leuven, December 7-8, 1990, Giuffrè, Milano, 1992, p. 30.

[7] Decisions of the German Constitutional Court, volume 12, pp. 45 and 55 (BverfGE 12, 45, 55).

[8] Grabenwarter, Ch., Artikel 9, in: Internationaler Kommentar zur Europäischen Menschenrechtskonvention mit einschlägigen Texten und Dokumenten, Heymanns, Köln, München, 2007, p. 20.

[9] Peters, A., Einführung in die Europäische Menschenrechtskonvention, C.H. Beck, München, 2003, p. 222.

[10] Von Ungern-Sternberg, A., Religions –und Gewissensfreiheit, in: Karpenstein, U., Mayer, F. C., Konvention zum Schutz der Menschenrechte und Grundfreiheiten; Kommentar, C. H. Beck, München, 2012, p. 254; Blum, N., Die Gedanken–, Gewissens –und Religionsfreiheit nach Art. 9 der Europäischen Menschenrechtskonvention, Duncker und Humblot, Berlin, 1990, p. 156; Frowein, J. A., in: Frowein, J. A., Peukert, W., Europäische Menschenrechtskonvention. EMRK-Kommentar, Engel, Kehl 1996, Artikel. 9, marginal note (Rn.) 3.

It results from the foregoing remarks that the main characteristic of conscience is the orientation towards its "acting realization"[11]. In other words, conscience can be described as an inner human faculty whose function consists not only in establishing criteria for moral evaluation of one's decisions and conduct but first and foremost in urging the individual to a particular action or omission. For this reason, any attempt at reducing the scope of freedom of conscience to the inner sphere of individual beliefs concerning the morally right and wrong would not do justice to these functions of conscience. As N. Blum has rightly noted, "every decision of conscience urges to its practical realisation. Without freedom to act in conformity with one's conscience, the right to freedom of conscience would be devoid of its essential element."[12] Indeed, reducing the scope of freedom of conscience to the sphere of inner beliefs would render this right almost impractical and meaningless; such a right "can be guaranteed by every dictator as long as he does not resort to methods described by George Orwell"[13]. If the scope of the freedom of conscience were limited to the *forum internum*, its inclusion into the text of legal provision could be regarded as superfluous and dispensable[14].

2.2. The "emancipation" of freedom of conscience from freedom of religion

Historically, the term "freedom of conscience and religion" was applied to describe one and indivisible freedom aimed at protecting human activity related to satisfying the religious needs. Within this approach the freedom of conscience was understood as a right to adopt and hold particular religious beliefs without any coercion on the part of the state. However, even when conflated with freedom of religion, the freedom of conscience has always been oriented to guarantee the right to behave in conformity with one's deepest convictions. This historical experience indicates that every legal safeguard of this freedom must be construed as inclusive of the aspect of the *forum externum*, i.e. of the right to live in accordance with principles the individual is firmly convinced that they are true or morally right.

Nowadays, if freedom of conscience is to gain practical significance, it has to be construed as a separate right, conceptually detached and independent from the freedom of religion. In other words, freedom of conscience and freedom of religion are to be juxtaposed as individual rights, each one performing

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[11] Walter, Ch., Religions – und Gewissensfreiheit, in: Dörr, O., Grote, R., Marauhn, T., Konkordanzkommentar zum deutschen und europäischen Grundrechtsschutz, Mohr Siebeck, Tübingen, 2006, p. 829.

[12] Blum, N., *op. cit.*, p. 157.

[13] Walter, Ch., *op. cit.*, p. 829.

[14] Von Ungern-Sternberg, A., *op. cit.*, p. 254.

its own specific protective function[15]. As noted above, the need for conceptual separation of freedom of conscience is the result of social and political changes towards the increasing secularisation and individualisation. The methodological consequence of this approach for the European Court of Human Rights would be that whenever it reaches the conclusion that an applicant's behaviour does not constitute a direct manifestation of a religion or belief and thus does not fall within the scope of the right to freedom of religion, there could be a religiously or philosophically motivated position of conscience that merits examination, since it may still be covered by the freedom of conscience. The latter freedom could therefore play the role of the "last resort', which means that cases of conscientious objection may require double examination under Article 9. This supplementary function of the freedom of conscience could go even further; namely, it could be relevant also in cases, where an individual conscientious decision is not based on a comprehensive or over-arching religious or philosophical system, but rather on a more individualistic pattern of thinking or conviction that is hardly subsumable into a traditional or commonly recognised set of beliefs[16].

When determining the scope of freedom of conscience as a separate human right, one should take into account not only its relation to freedom of religion, but also to other rights and freedoms laid down in the Convention. Especially noteworthy in this context is the distinction between a stand-alone right and a relational right to freedom of conscience made by G Quinn. According to this approach, the freedom of conscience regarded as the stand-alone right protects both the inner sphere of conscientious beliefs and, up to a point, all their manifestations. By contrast, freedom of conscience conceived as a relational right comes into play when it is exercised in connection with some other established right or freedom, such as freedom of expression or freedom of assembly. Since in the latter case the individual conscience provides motivation behind particular uses of the other right, it can be assumed that in some specified areas of human activity, conscience is protected by means of other rights. The areas that are not covered by relational freedom of conscience are still protected through the right to freedom of conscience conceived as a stand-alone right. "Otherwise worthy manifestations would be caught between the ghetto of the *forum internum* and the particularised *forum externum* of specified rights[17]."

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[15] Blum, N., *op. cit.*, p. 155.

[16] GrabenWarter, Ch., Artikel 9, in: Internationaler Kommentar..., *op. cit.*, p. 21; Walter, Ch., *op. cit.*, p. 831.

[17] Quinn, G., Conscientious objection in labour relations (civil service and liberal professions), in: Council of Europe, Freedom of conscience. Seminar organised by the Secretariat General of the Council of Europe in co-operation with the F. M., van Asbeck Centre for Human Rights Studies of the University of Leiden. Leiden (Netherlands), 12-14 November 1992, Council of Europe, Strasbourg, 1993, p. 109.

2.3. The literal interpretation of the freedom of conscience under the Article 9 ECHR

Before embarking on the discussion on the interpretation of the wording of Article 9 with regard to the freedom of conscience it should be borne in mind that when agreeing on international standards relating to the protection of human rights, representatives of states concern themselves first and foremost with achieving a language that would be politically approvable. That is why the wording of many rights and freedoms is intentionally framed in an ambiguous or unclear way, which makes it capable of being understood in different terms. The right to freedom of thought, conscience, religion and belief has proved among the most sensitive rights to agree at the international level, it is therefore not surprising that compromise and deliberate ambiguity is inherent in all its formulations[18], including that of Article 9.

The very ambiguity of this provision makes the determining of the scope of the freedom of conscience enshrined therein considerably difficult. The first part of Article 9 (1) stipulates the 'right to freedom of thought, conscience and religion' without mentioning belief, but it also lays down the right to change "religion or belief". The second part, in turn, guarantees the right to "manifest his religion or belief in worship, teaching, practice and observance", without mentioning "thought and conscience". This has led B. Vermeulen to the conclusion that "thought and conscience" is a concept with a separate meaning and substance that is to be distinguished from the notion "religion and belief"; whereas the former refers to the inner sphere of deep-seated personal convictions, the latter implies the freedom to their manifestation. For that reason the protection of freedom of conscience is limited to the inner sphere of personal convictions, i.e. to the sphere of the *forum internum*[19].

Furthermore, as B. Vermeulen notes, if one assumes that freedom of conscience under Article 9 (1) includes the aspect of the *forum externum*, the issue

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[18] Boyle, K., Freedom of conscience in international law, in: Council of Europe, Freedom of conscience. Seminar organised by the Secretariat General of the Council of Europe in co-operation with the F. M. van Asbeck Centre for Human Rights Studies of the University of Leiden. Leiden (Netherlands), 12-14 November 1992, Council of Europe, Strasbourg, 1993, p. 41.

[19] Vermeulen, B., Scope and limits of conscientious objection, in: Council of Europe, Freedom of conscience. Seminar organised by the Secretariat General of the Council of Europe in co-operation with the F. M. van Asbeck Centre for Human Rights Studies of the University of Leiden. Leiden (Netherlands), 12-14 November 1992, Council of Europe, Strasbourg 1993p. 82. In order to justify this standpoint the quoted Author makes reference to *traveaux préparatoires* wherefrom it can be inferred that when including the freedom of conscience in the text of the Convention, the drafters intended to establish a guarantee against brainwashing and other inquisitorial methods rather than to proclaim a right to act in conformity with one's moral precepts. The relevant passage of the *traveaux préparatoires* says that "it should be added that, in recommending a collective guarantee not only of freedom to express convictions, but also of thought, conscience, religion and opinion, the Committee wished to protect all nationals of any Member State, not only from 'confessions' imposed for reasons of State, but also from those abominable methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and of his conscience". Collected edition of the "Travaux Préparatoires", vol. 1, Den Haag, 1975, p. 222.

of possible limitation on such a right inevitably emerges. The limitation clause of Article 9 (2) only allows restrictions on freedom to manifest one's religion or beliefs, which suggests that the freedom of conscience (as well as the freedom of thought) has not been subjected to any limitations. If the drafters of the Convention had wanted the freedom of conscience to comprise the right to act in accordance with one's imperative moral precepts, this freedom would be unlimited in the sense that every legal obligation would have to yield to an appeal to conscientious objection. Such an outcome would obviously be impractical and socially unacceptable. What is more, the creation of a workable limitation clause with regard to freedom of conscience embracing the sphere of the *forum externum* would not be feasible at all[20]. The phenomenon of conscience is not perceived any more as "*conscientia*' i. e. as a source of common and objective knowledge about the right and wrong shared by the whole society. It is rather described as a pure individualistic and subjective phenomenon that constitutes a reservoir of the internalised values and patterns of behaviour held and practised in a social milieu one is born into. These values and norms are instilled in the individual in the process of education and socialisation. The consequence of this subjectivisation and individualisation of conscience is that the behavior mandated by it cannot be localised in a precisely identifiable or clearly determinable realm of human action. The fact that theoretically every type of action can amount to a manifestation of one's conscience means that conscientious objection can potentially be directed to every and each legal obligation. In this sense freedom of conscience would be boundless and amorphous. Other fundamental rights and freedoms, such as freedom of expression or freedom of assembly, have a well-determined object and scope of protection. They concern with certain specifiable areas of action, are connected to social institutions or refer to foreseeable patterns of behaviour, which makes possible to frame a general clause limiting their enjoyment for the protection of other legitimate rights and interests. Freedom of conscience, in turn, lacks such a clearly determinable object or area of protection, the formulation of a workable provision containing necessary restrictions on its manifestations would therefore not be viable[21].

Nonetheless, this line of argumentation is not to be agreed with; if the scope of the freedom of conscience were to be interpreted restrictively, i.e., if it were to be understood as covering only the sphere of the *forum internum*, then the freedom of conscience would conflate into the freedom of thought. As a result, the term "conscience" would be devoid of its proper and separate meaning and would have to be regarded as superfluous[22]. What is more important, the sharp distinction

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[20] Vermeulen, B., Article 9: Freedom of thought, conscience and religion, in: Van Dijk, P., Van Hoof, F., Theory and practice of the European Convention on Human Rights, Kluwer Law International, The Hague, 1998, p. 543.

[21] Vermeulen, B., Conscientious objection in Dutch law, in: European Consortium for Church-State Research, Conscientious objection in the EC Countries. Proceedings of the Meeting Brussels-Leuven, December 7-8, 1990, Giuffrè, Milano, 1992, p. 262.

[22] Von Ungern-Sternberg, A., *op. cit.*, p. 254.

between the sphere of the *forum internum* and *forum externum* seems artificial from the perspective of practical human experience; people come to crystallise their beliefs by means of thought, religious or not. Beliefs, in turn, inform the conscience of an individual and prompt them to external action. Moreover, the exclusion of the term 'belief' in the first part and its mentioning in the second part of Article 9 seems to suggest a strange outcome that an atheist or an agnostic has the right to manifest their beliefs, but the right to hold them is not protected. To avoid such an outcome it is to be assumed that beliefs are a subset of the broader category of thought and conscience[23], which means that the second part of Article 9 (1) contains the right to manifest all freedoms enumerated in its first part[24].

This approach is confirmed by the words 'this rights include', or '*ce droit implique'* which seem to indicate that the function of the second part of Article 9 (1) is to single out and precise the meaning of some but not all rights mentioned in the first clause. The second part of Article 9 (1) plays therefore only the explanatory role with regard to its first part. The complete guarantee of freedom of thought, conscience, religion and belief, including their exercise in the outer sphere, is already contained in the first part of Article 9(1)[25]. In other words, the phrase 'freedom of thought, conscience, religion and belief' from Article 9 is to be regarded as a succinct summation of the content of all freedoms guaranteed herein. One should therefore subscribe to the broad interpretation of Article 9 according to which the scope of this provision encompasses all personal, political, philosophical, moral and religious beliefs and convictions and safeguards "ideas and conceptions of all kinds, with specific reference to an individual's religious conceptions and his own way of perceiving his social and private life"[26]. Within such an interpretation the "freedom of conscience would appear to lie halfway between freedom of opinion and freedom of worship or rather at the point where they intersect"[27]. Furthermore, It should be noted that the term 'belief' is listed together and on an equal footing with the freedom of religion. It is therefore broad enough to encompass *inter alia* conscientious convictions[28]. This broad interpretation of the notion 'belief' is in line with the jurisdiction of the Strasbourg bodies according to which a manifestation of a belief requires some coherent view of fundamental problems and must relate to "a weighty and substantial aspect of human life and behavior". Moreover, in order to be qualified as a 'belief' within the meaning of the Convention, the views in question have "to attain a certain level of

[23] Evans, C., Freedom of Religion under the European Convention on Human Rights, Oxford University Press, Oxford, 2001, pp. 52 ff.

[24] Frowein, A. J., *op. cit.*, Artikel. 9, marginal number (Rn.) 10.

[25] Blum, N., *op. cit.*, p. 159; approvingly: Grabenwarter, Ch., Artikel 9, in: Internationaler Kommentar..., *op. cit.*, p. 23.

[26] Renucci, J. F., Article 9 of the European Convention on Human Rights, Freedom of Thought, Conscience and Religion, Council of Europe, Strasbourg, 2005, p. 12.

[27] Ibidem, p. 14.

[28] Grabenwarter, Ch., European Convention on Human Rights-Commentary, München, 2014. pp. 236 and 240.

cogency, seriousness, cohesion and importance"[29]. Such a broad interpretation of the term 'belief' underlies the jurisdiction of the Strasbourg bodies; for instance, in the case *Arrowsmitth v. the UK*[30] the Commission has held "that pacifism is a philosophy and, in particular, as defined above, falls within the ambit of the right to freedom of thought and conscience. The attitude of pacifism may therefore be seen as a belief (conviction) protected by Article 9.1". This decision shows that the Commission has equalised the freedom of conscience with freedom of belief, however, the issue of distinction between the two freedoms has not been discussed[31].

If one accepts that the expression 'freedom to manifest his religion or belief' is to be interpreted broadly so that it covers all sorts of serious and coherent sets of convictions stemming from one's thought and conscience, the problem of the lack of an explicit limitation clause referring to freedom of conscience indicated by B. Vermeulen ceases to exist. This is because Article 9 (2) becomes applicable not only to manifestations of a religion or philosophy, but also to issues related to conscientious objection. The described interpretation does not render the difference between the *forum internum* and the *forum externum* irrelevant, since, as Article 9 prescribes, no interference is permissible to control over the internal exercise of conscience[32]; the restriction imposed by the authorities apply exclusively to the ambit of the manifestation of a conscientious belief[33]. It is noteworthy that such an approach to the limitation clause was adopted by the Commission in the case *X. v. the United Kingdom* concerning the sentencing of the applicant for attempting to distribute among British soldiers a pamphlet that incited them to desert the army and to defect to IRA: "(...) the Commission finds that the restriction of the applicant's freedom to thought or conscience ensured by Article 9 (1) was justifiable for the same reasons expressed above in relation to Article 10 and, in terms of Article 9 (2), it was justifiable in the interests of public safety, for the protection of public order and the rights of others."[34] This assertion is consistent with the wording of Article 9 (2) provided that one accepts that the term 'belief' is to be interpreted as broadly as to include not only philosophical but also moral or "conscientious" convictions.

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[29] Murdoch, J., Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights, Council of Europe, Strasbourg, 2012, p. 16.

[30] Appl. N.º 7050/75, Comm. Rep 1978, 19 DR 5.

[31] Walter, Ch., *op. cit.*, p. 829.

[32] Similarly to the freedom of religion the right to freedom of conscience protects first and foremost the inner sphere of beliefs related to the morally good and wrong, including the right to negative freedom, i.e. the right not to reveal the content of one's conscientious beliefs. (See: Grabenwarter, Ch., Artikel 9, in: Internationaler Kommentar..., *op. cit.*, p. 21.) This entails the prohibition of indoctrination on the part of state authorities, which is relevant especially with respect to vulnerable groups such as pupils or prisoners or soldiers.

[33] Intervention by Sir Basil Hall relating to the theme: Scope and Limits of Conscientious Objection, in: Council of Europe, Freedom of conscience. Seminar organised by the Secretariat General of the Council of Europe in co-operation with the F.M. van Asbeck Centre for Human Rights Studies of the University of Leiden. Leiden (Netherlands), 12-14 November 1992, Council of Europe, Strasbourg, 1993, p. 129.

[34] xv the United Kingdom, Appl. N.º 6084/73, DR 3, p. 65.

This inclusive interpretation of the term "belief" has been criticised by N. Blum who has claimed that its adoption would result in blurring the boundaries between rights protected under Article 9. In particular, it would not be possible any more to differentiate between freedom of conscience on the one hand, and freedom of religion and of non-religious belief on the other. The freedom of conscience would again merge into one indivisible right with freedom of religion, which should be regarded as retrogression in its development. Instead of the inclusive interpretation of the term "belief" N. Blum suggests the analogous application of the limitation clause under Article 9 (2) to all rights set out in Article 9 (1). This approach seems acceptable when taking into consideration the structure and methodology of Articles 8-11 of the Convention. The limitation clauses enshrined in paragraph 2 of each of these Articles are designed to cover each and every right stipulated in their first paragraphs. The drafters of the Convention could not recognise freedom of conscience as a separate human right having its own scope of protection distinguishable from the scope of freedom of religion and belief. In order to uphold this distinction there is a need for a "supplementary and corrective interpretation" of the restriction clause by extending its applicability on the right to freedom of conscience. Nevertheless, N. Blum acknowledges that his approach is not free from methodological doubts arising above all from the wording of Article 9 (2). At the same time he defends his position by claiming that the very wording of the restriction clause hinders the adoption of any solution that would be "dogmatically pure"[35].

2.4. Teleological interpretation of freedom of conscience under Article 9

The broad interpretation of the freedom of conscience under Article 9 that includes the right to conscientious objection, subject to the limitation clause of Article 9 (2), can be corroborated by teleological considerations. Namely, it should be noted that the essential core of the freedoms enshrined in Article 9 is the recognition of the moral autonomy of the individual human being. Freedom of conscience, religion and belief is an indispensable component of treating human beings as autonomous persons deserving of dignity and respect[36]. This idea underlies the legal instruments aiming at protection of human rights, in particular of the freedom of conscience, adopted in international law. In this respect it is important to emphasise that "international law as it has developed defends the right of the individual to think for him or herself, to hold principles which concern fundamental convictions or moral principles and to live out those convictions or principles, subject only to the rights of others, including the right of others to enjoy freedom of conscience"[37]. Since issues concerning religion and beliefs, including moral beliefs, are an essential element of self-identity and any improper interference with them

[35] Blum, N., *op. cit.*, pp. 160 et. seq.
[36] Evans, C., *op. cit.*, p. 29.
[37] Boyle, K., *op. cit.*, p. 42.

is tantamount to an attack on the autonomy of the individual, freedoms set out in Article 9 should be given the possibly broadest scope of protection. This means that limitation on them should require especially serious justification.

The teleological argument from autonomy seems to be the most appropriate approach for the Court to adopt when applying Article 9. It is consistent with the ideas of pluralism, tolerance and the importance of religion to believers that the Court has already emphasised[38], as well as with the general assumption of the Strasburg bodies that the Convention should be applied in a way as to ensure that the rights guaranteed by it are "practical and effective" and not merely "theoretical and illusory". It is noteworthy that the importance of fulfilling the objects and purposes of the Convention has been viewed indispensable, even if that at times requires a very broad approach to the meaning of the words themselves. Above all, the Court has held that it should seek an interpretation of the rights and freedoms set out in the Convention that "is most appropriate in order to realise the aim and achieve the object of the treaty, and not that which would restrict to the greatest possible degree the obligations undertaken by the parties"[39]. As far as the freedom of conscience is concerned, its all-embracing protection is possible only in case it extends to the practical realisation of one's conscientious belief[40]. The freedom of conscience within the meaning of Article 9 comprises therefore "the right to development and exercise of the conscience. The guarantee aims at protecting the inner core of the human self-determination and thereby the respect of the individual personality".[41] As it has been shown, such a broad interpretation of the right to freedom of conscience is relatively widespread in the legal theory. However, as it will be discussed below, these doctrinal developments have exerted relatively little influence on the jurisprudence of the Strasbourg bodies.

3. THE SCOPE OF FREEDOM OF CONSCIENCE IN THE JURISDICTION OF EUROPEAN COMISSION AND COURT OF HUMAN RIGHTS

3.1. The Arrowsmith test as a tool to a restrictive interpretation of the freedom of conscience

Above all, it should be noted that the Strasbourg bodies have not offered a thorough explanation of the 'substance' of the right to freedom of conscience[42]. Although the notions: thought, conscience, religion and belief at first glance seem to be broad, in

[38] Evans, C., *op. cit.*, p. 32.
[39] Wemhoff V. Germany, 7 Eur. Cr. H.R. (ser.A), p. 23 (1968).
[40] Grabenwarter, Ch., Artikel 9, in: Internationaler Kommentar..., *op. cit.*, p. 23.
[41] Grabenwarter, Ch., European Convention..., *op. cit.*, p. 237.
[42] Kühler, A., Das Grundrecht der Gewissensfreiheit. Ein Beitrag zum Verständnis von Art. 15 der Bundesverfassung unter Berücksichtigung der Praxis des Schweizerischen Bundesgerichts, der EMRK Organe, des UNO-Menschenrechtsausschusses und im Rechtsvergleich, Stämpfli, Bern, 2012, p. 99.

the Strasbourg jurisdiction they have been linked to a rather restrictive understanding of their manifestation. The leading statement on the scope of the freedoms under Article 9, that has permeated the whole jurisdiction of the Strasbourg bodies on freedom of religion and belief, has been formulated in the case *Arrowsmith v. the U.K* where the Commission has held that "[A]rticle 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*. In addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form." However, it should be noted that the manifestation of religion or belief is not limited to such acts. The existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, the applicant is not required to establish that he or she acted in fulfillment of a duty mandated by the religion in question[43]. According to B. Vermeulen, the words: "the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*" refer to the passages 'the freedom of thought, conscience and religion' and 'the freedom to change his religion or belief' in Article 9. In turn, the words: "acts which are aspects of the practice of a religion or belief in a generally recognised form" refer only to the last part of the discussed provision that contains the freedom to manifest one's religion and belief. The Commission advocates therefore the narrow interpretation of Article 9 according to which it covers only the inner sphere of freedom of conscience, whereas the right to live in conformity with mandates of one's conscience remains beyond its scope[44].

Moreover, the view of the Strasbourg bodies that manifestation of religion and belief within the meaning of Article 9 is restricted to "aspects of the practice of a religion or belief in a generally recognised form" suggests that not personal motivation but objective characteristics of the relevant act determine whether it falls within its scope 9[45]. Indeed, a mere subjective statement of an applicant that a given conduct is imperatively prescribed by their religion or belief is not sufficient to be recognised as a manifestation of that religion or belief in 'practice'[46]. In the jurisdiction of the Stras-

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[43] See for example: Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France [GC], Appl. N.º 27417/95, ECHR 2000 VII, para. 73-74; Skugar and Others v. Russia (dec.), N.º 40010/04, 3 December 2009; *Leyla Şahin v. Turkey* [GC], N.º 44774/98, ECHR 2005 XI, para. 78 and 105; Bayatyan V. Armenia (GC), Appl. N.º 23459/03, ECHR 2011, para. 111.

[44] Vermeulen, B., Freedom of religion in western Europe, in: Jonneke, M., Naber, M., Freedom of religion: a precious human right; a survey of advantages and drawbacks, Assen, Van Gorcum, 2000, pp. 20 ff.

[45] Kühler, A., *op. cit.*, p. 103. The Strasbourg organs have occasionally resorted to expert evidence from religious authorities. Another approach would be a reference to religious set of rules. However, as C. Evans notes, in many cases decisions are not at all substantiated by referring to objective criteria, but instead involve a substitution of the Court or Commission's judgment for that of the applicant. See: Evans, C., *op. cit.*, p. 122.

[46] It should be noted that on the one hand, the term 'practice' is potentially open-ended and amenable to a broad interpretation including the right to put into action all of the dictates and teachings of one's religion or belief. On the other hand, it could be interpreted narrowly by referring only to directly religious practices. The restrictive interpretation is suggested by its French counterpart 'les pratiques'. The French word 'pratique', used in singular, means above all the application of

bourg bodies, from the decision in the case *Arrowsmith* onwards, the term "practice" has been interpreted in a narrow manner. It does not cover each act which is motivated or influenced by a religion or belief nor does it encompass the observance of religious rules in practical life. It merely refers to actions which in themselves give direct expression to a religion or belief. This approach is obviously counterproductive as far as the development of the right to conscientious objection under Article 9 is concerned. Furthermore, it privileges committed and obedient members of well-known religious organisations over some minority groups or individuals. In consequence, applicants invoking individualistic (conscientious) beliefs have to face practically insurmountable evidentiary problems, since there may be no higher authority or set of rules that could be consulted to determine what behaviour is required by their belief[47]. For these reasons the interpretation of Article 9 ECHR adopted in the constant jurisdiction of the Strasbourg bodies "at the least may be termed cautious"[48].

A problem connected with the application of the *Arrowsmith* formula is the need to determine whether a particular conduct constitutes a direct manifestation of a religion or belief or it has merely been motivated or inspired by it. In order to answer this question a potentially intrusive scrutiny of the sphere of individual belief and thus an interference with *forum internum* may result inevitable[49]. Moreover, the emphasis given in the case-law to the primacy of internal beliefs is not consonant with the way in which many religious and philosophical systems define themselves. Not only do they demand a passive acceptance of a set of beliefs or ideas, but also dictate to their adherents ethical norms and standards of behaviour to be lived by in everyday life[50]. The idea of the strict separation of the inner and outer sphere of freedom of conscience, religion and belief is therefore of little assistance for theoretical conceptualising of this right as well as for resolving knotty problems related to its application in practice.

An alternative approach to the *Arrowsmith* test has been propounded in the dissenting opinions in the cases *Efstratiou v. Greece* and *Valsamis v. Greece*. According to this view, the Court should abstain from making its own assessments of the validity of beliefs or the importance of an action to applicants. The ascertainment of whether being forced into a particular action or omission affects their religious or philosophical convictions should be left to the involved. The Court should accept their perception "unless it is obviously unfounded and unreasonable"[51]. This approach, if accepted by the majority of the Court, could serve as a solid starting point to the development of

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a theory. When it takes the plural, as it is the case in Article 9 (1), then it strongly collocates with the word 'religieuses'. Despite the religious flavour of the term 'pratiques' it is not much clearer than its English counterpart. Unfortunately, the Strasbourg organs have not directly addressed the issue of the possible inconsistency between two language versions (both of them are authoritative), but they have been wary of interpreting the notion 'practice' too expansively. See: EVANS, C., *op. cit.*, p.111.

47 Evans, C., *op. cit.*, p. 122.

48 Boyle, K., *op. cit.*, p. 43.

49 Murdoch, J., *op. cit.*, p. 23.

50 Grabenwarter, Ch., European Convention..., *op. cit.*, p. 237.

51 Valsamis V. Greece, Appl. N.º 21787/93; Efstratious V. Greece, Appl. N.º 24095/94, Joint dissenting opinions of judges Thór Vilhjalmsson and Jambrek.

the right to conscientious objection under Article 9. The potential for abuse could be limited by the use of the limitation clause of Article 9(2) as well as by the exclusion of clearly fraudulent claims. Although this subjective approach holds some danger of fraud, it is preferable to a test that requires judges to make a determination, often with little evidence, as to requirements of a religion or belief, especially when one takes into consideration that the Strasbourg organs have been criticised for being unsympathetic to the claims of applicants from less known religions or traditions[52].

3.2. The doctrine of generally applicable and neutral laws as an obstacle to recognition of the right to conscientious objection

The restrictive approach to the freedom of conscience resulting from the application of the *Arrowsmith* test has been strengthened by the argument adduced by Strasbourg organs that the obligation to obey laws of general character that apply to all individuals regardless of their religion or belief is not capable of interfering with the freedoms laid down in Article 9. In consequence, the Convention does not confer a right to evade legal obligations by alleging their incompatibility with one's religious beliefs or conscientious convictions[53]. There have been a number of cases, where the applicants objected to abide by generally applicable and neutral laws (such as laws on obligatory selling of contraceptives when a patient produces the valid prescription[54], laws on taxation[55], compulsory vaccination[56], or pension schemes[57], the compulsory membership of a hunting association and the duty to tolerate hunting on one's own land that runs counter to the principles of one's conscientious objection against hunting[58]) claiming that they interfere with their religion or belief. Similarly, some applicants challenged neutral and non-discriminatory contractual obligations resulting from employment relations (conscientious objection to carry out registration of same-sex marriages on the part of a civil registrar employed by a

[52] As C. Evans rightly notes: "[t]he role of the Court in determining what is and is not necessary to the religion or belief of an applicant increases the potential that it will single out for protection religious rites and practices with which the members of the Court are familiar and feel comfortable. This can have serious implications for minorities." See: Evans, C., *op. cit.*, p. 125.

[53] Bartole, S., de Sena, P., Zagrebelsky, V., Commentario breve alla Convenzione Europea per la salvaguardia dei diritti dell' uomo e delle libertà fondamentali, CEDAM, Padova, 2012, p. 377.

[54] Pichon and Sajous V. France, Appl. No 49853/99, Reports-x (decision on admissibility).

[55] Appl. N.º 10358/83, C. V., the United Kingdom , D&R 37, 142.

[56] Appl. N.º 1068/61, X V. the Netherlands, Yearbook V (1962), p. 278 (284).

[57] Appl. N.º 1497/62, Reformed Church *ofX* V. the Netherlands, Yearbook V. (1962), p. 286 (297).

[58] Chassagnou and Others V. France [GC], Appls. Nos. 25088/94, 28331/95 and 28443/95, judgment of 29 April 1999, especially paras. 103 and 117; Schneider v. Luxemburg, Appl. N.º 2113/04, judgment of 10 July 2007, para. 69 et., seq.; Hermann v. Germany [GC], Appl. N.º 9300/07, judgment of 26 June 2012, para. 63 et., seq.

municipality[59] or to give psycho-sexual counseling to homosexual couples by a therapist employed with a private company[60]). These cases show clearly that according to the Strasbourg organs a general right to refuse to obey certain legal obligations relying on religious or ideological precepts cannot be derived from Article 9[61]. While it is true, that "neither the Court nor the Commission has ever explicitly held that general and neutral laws cannot breach Article 9 ECHR, the pattern of case law suggests that this is their *de facto* position"[62]. In most cases involving conscientious objection to neutral and general laws the Strasbourg bodies paid almost no attention to the specific facts of the case or the claims of the applicant that the obligation to comply such a law has amounted to the interference with their freedom of conscience[63]. Instead, they would reiterate the passage from *Arrowsmith* decision that Article 9 does not give individuals the right to behave in the public sphere in compliance with all the demands of their religion or belief[64]. "The summary way in which the Strasbourg organs have dealt with such cases suggests that the fact that a law is general and neutral is at least a powerful indication that it cannot interfere with freedom of religion or belief under the *Arrowsmith* test."[65]

Nevertheless, it an undeniable fact that in some circumstances apparently general and neutral laws require people to behave in a manner which is contrary to their deep-seated beliefs and thus constitute an interference with their right to practise their religion or belief. Claiming that it is not the case, as the Strasbourg organs do, can contribute to exasperations of conflicts rather than to their solution. On the other hand, granting exceptions from generally binding legal duties in increasingly pluralistic European societies has the potential to become highly divisive since they are often perceived as irreconcilable

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[59] Eweida and Others V. the United Kingdom, Appls. nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013, para 102-106.

[60] Ibidem, para. 107-112.

[61] Grabenwarter, Ch., European Convention..., *op. cit.*, p. 239.

[62] Evans, C., *op. cit.*, p. 180.

[63] An illustrative example of this approach are judgments concerning the conscientious objection to the obligation to join a hunters' association and to transfer to it the hunting rights over their land cited above in the footnote 58. The Court examined the applications in the light of the (negative) freedom of association and the protection of property. In the Court's view the freedom of conscience has a spillover effect on the mentioned rights, separate examination of the alleged breach of Article 9 was therefore not necessary.

[64] The routine application of sections of earlier decisions without real consideration of subtle differences in facts or review of whether the original decision was appropriate or remains appropriate in the current circumstances is to a considerable extent due to the big workload of the Strasbourg bodies. In considering the merits of cases the Court has to come to a consensual majority decision within a reasonable period of time. This can lead to decisions based on the lowest common denominator and, again, to repeating large sections of previous judgments. These problems are systemic and refer to other rights too, but given the highly controversial nature of the freedom of religion, it may be harder to achieve a consensus among the judges in this area than in cases addressing the breach of other rights. See: Evans, C., *op. cit.*, p. 16.

[65] Evans, C., *op. cit.*, p. 181.

with the principles of equality and democracy. Indeed, some people are of the opinion that such exemptions are both unfair to those who have to comply with the challenged law and potentially dangerous to social cohesion[66]. It is therefore conceivable that states are concerned to protect their competence to make laws for the general welfare, to subject all members of society equally to all laws, and to ensure that any exemptions are narrowly construed to avoid undermining the law or encouraging fraud. This reasoning is reflected in the decision *N. v. Sweden*[67], where the Commission dealt with a claim by a pacifist who challenged the law that allowed conscientious objector status only to a person who could not perform military service in view of his affiliation to a religious community as discriminatory against people who could not prove the membership to any recognised religion. Since the applicant refused to carry out military service on the basis of his philosophical beliefs, he was not eligible to an exemption. The arguments of the Commission advanced to support its assertion that discriminatory treatment of the applicant was reasonably justified and objective under Article 14 ECHR merit to be quoted at length:

"Members of Jehovah's Witnesses adhere to a comprehensive set of rules of behaviour which cover many aspects of everyday life. Compliance with these rules is the object of strict social control amongst the members of the community. One of these rules requires the rejection of military and substitute service. It follows that membership of Jehovah's Witnesses constitutes strong evidence that the objections to compulsory service are based on genuine religious convictions. No comparable evidence exists in regard to individuals who object to compulsory service without being members of a community with similar characteristics. The Commission therefore finds that membership of such a religious sect as Jehovah's Witnesses is an objective fact which creates a high probability that exemption is not granted to persons who simply wish to escape service, since it is unlikely that a person would join such a sect only for the purpose of not having to perform military or substitute service. The same high probability would not exist if exemption was also granted to individuals claiming to have objections of conscience to such service or to members of various pacifist groups or organisations. For these reasons the Commission considers that there are reasonable grounds for the distinction made"[68].

The discussed decision has found broad approval in the legal doctrine; for instance, B. Vermeulen has regarded the reasoning of the Commission as "satisfactory", even though he has expressed some doubts as to the justifiability of the privileged treatment of members of a religious community in comparison with other objectors to military and substitute service against the principle of equality[69].

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[66] Ibidem. p. 169.

[67] Appl. N.º 10410/83, D&R 40 203 (208).

[68] Ibidem, pp. 207 ff.

[69] Vermeulen, B., Scope and limits of conscientious objection, in: Council of Europe, Freedom of conscience. Seminar organised by the Secretariat General of the Council of Europe

R. Navarro Valls argues, in turn, that "even if the more advantageous treatment of the objectors motivated by religious grounds does not meet the requirement of strict justice, it certainly meets the requirement of equity"[70] (sic!).

The application of the *Arrosmith* test in combination with the doctrine of general and neutral laws results in a rather restrictive interpretation of Article 9, which is difficult to reconcile with general guidelines of interpretation to be applied in the area of human rights, in particular with the principle that orders to adopt a possibly broad interpretation of their substance and scope of protection[71]. The adoption of a more extensive interpretation of this provision does not necessarily mean that the freedom of conscience should be defined as a general right to behave in accordance with one's innermost moral precepts. Otherwise, the objectively binding law would be amenable to the subjective acceptance of the individual. In order to avert this danger, the scope of the freedom of conscience has to be determined with more precision. When doing this, it should be borne in mind that the core function of this freedom is to protect the individual form coercion on the part of state authorities to actions or omissions that would be in contravention with individual moral beliefs. Taking into consideration that protective function of the freedom of conscience, it is to be assumed that it does not cover each act that is perceived by the individual in question as merely permitted or optional. The freedom of conscience can be invoked only in situations of unavoidable coercion, i.e. in cases where a conflict between a legal norm and a mandate of conscience is insolvable in other way. As long as an alternative action is possible and at the same time can be reasonably expected of the individual, no issue under the right to freedom of conscience arises. Similar reasoning has been adopted by the Commission in cases concerning compulsory participation in elections[72]. The applicant alleged that the obligation to go to the polls breaches his right to freedom of conscience, especially when he did not want to vote for either candidate. The Commission rejected the claim on the basis that the duty to participate in voting was not tantamount to the duty to vote for a candidate the applicant did not support. It could be expected of the applicant to cast an invalid vote, which would not have burdened his conscience.

Even if one assumes that Article 9 does not guarantee a directly applicable right to be exempted from general and neutral legal duties, it still contains a

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in co-operation with the F. M. van Asbeck Centre for Human Rights Studies of the University of Leiden. Leiden (Netherlands), 12-14 November 1992, Council of Europe, Strasbourg, 1993 p. 90.

[70] Navarro-Valls, R., Objeción de conciencia, in: Navarro-Valls, R. (ed.), Derecho eclesiástico del estado español, EUNSA Ed. Univ. de Navarra, Pamplona, 1993, p. 488.

[71] Martínez Torrón, J., Las objeciones de conciencia en el derecho internacional y comparado, in: Sancho Gargallo, I., Objeción de conciencia y función pública, Consejo General del Poder Judicial. Centro de Documentación Judicial, Madrid, 2007, p. 126.

[72] Appl. 1718/62, *X Austria*, Yearbook VIII (1965), p. 168 (172); Appl. 4982/71, XV *Austria,* Yearbook XV (1972), p. 468 (472-474).

positive obligation of the national legislator to shape the domestic law in such a way that serious conflicts of conscience be avoided or at least mitigated. The coercion on the individual conscience exerted by state authorities is permitted only as far as it is justifiable under the limitation clause of Article 9 (2)[73]. Not only are state authorities free to bypass the issue of freedom of conscience by creating alternative obligations that would not affect the individual conscience, but they are recommended to take such measures by virtue of political prudence. An exemption from a legal obligation of a general and neutral character is to be regarded as the measure of last resort that should be granted only in case when an alternative (substitutive) duty is not available or the individual invoking the freedom of conscience cannot be expected to comply with it. For instance, this would be the case when such an alternative obligation was disproportionately burdensome in comparison with the objected one and thus irreconcilable with the principle of equality. Illustrative in this regard are decisions of the Commission on conscientious objection both to military and substitute civilian service. The Commission has held that it falls within the margin of appreciation of competent domestic authorities to make the length of civilian service greater than the length of military service as a form of disincentive to ensure that only those with a genuine conviction seek the purportedly less onerous option of alternative service[74]. Nonetheless, such extension of time is subject to the test of proportionality, which means that state authorities must not use this measure in a manner that is unduly oppressive or punitive[75].

3.3. Conscientious objection to military service – a problematic though desirable breakthrough in the jurisprudence of the Strasbourg bodies on the freedom of conscience

With respect to the exercise of the freedom of conscience, the most important place in Strasbourg case-law takes the issue of conscientious objections of a religious or other nature against military and substitute service. In the earlier decisions on that issue the Commission has held that although conscientious objections to military service fall into the realm of Article 9[76], this does not imply that the Convention contains an obligation for the Contracting States to exempt conscientious objectors from compulsory military service. For its position the Commission referred to the words in Article 4(3)(b): 'conscientious objectors *in countries where they are recog-*

[73] Grabenwarter, Ch., Artikel 9, in: Internationaler Kommentar..., *op. cit.*, p. 23.

[74] Conscientious objectors V. Denmark, Appl. N.º 7565/76, 9 ECHR Dec. & R 1985, pp. 155, 165; Autio V. Finland, App. N.º 17086/90, 72 ECHR Dec.& R 1990, p. 245, 249.

[75] Autio V. Finland, op. cit., pp. 245, 250.

[76] Appl. 10410/83, *Nv. Sweden*, D&R 40 (1985), p. 203 (207); Appl. 17086/90, *Autio* V. *Finland,* D&R 72.
(1992), p. 245 (249); Appl. 20972/92, *Raninen* V. *Finland*, D&R 84-A (1996), p. 17.

nized' placed in the context of the prohibition of slavery and forced labour[77]. The argument is evidently that, since the drafters of the Convention meant to leave the States free to recognise or not to recognize the right to conscientious objection to military service, they cannot have intended to deprive them of this same freedom in another provision. of the same Convention.

This position has been changed in the case Bayatyan v. Armenia, where the Court held that the law that did not provide an exemption from obligatory military service for conscientious objectors failed to strike a fair balance between the interests of society as a whole and those of the applicant, a member of Jehovah's Witnesses who had been sentenced to imprisonment for draft evasion. The Court deemed that the imposition of a penalty on the applicant in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society. The Court thus abandoned the textual interpretation of the Convention in favour of the dynamic one by emphasising that due to the evolution of the law and practice of European states whose overwhelming majority have already introduced the alternative civilian service. it was now not appropriate to read Article 9 in conjunction with Article 4(3)(b). Since the Convention is a living instrument, it had to reflect such developments. "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society"[78]. However, it must be borne in mind that in opinion of the Court this approach is not extensible to obligations which have no specific conscientious implications in itself, such as a general tax obligation[79].

The quoted statement is promising to the further development of the emergent freedom of conscience under Article 9. Especially noteworthy is the assertion that the recognition of conscientious objection does not entail any danger to the democratic system, but rather serves as a means of its strengthening. Nonetheless, the outcome of the case, even if *per se* desirable, is difficult to be accepted in the light of the wording of the Convention and the directives of its

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[77] [71] See the report of 29 June 1967, *Grandrath*, Yearbook x (1967), p. 626 (672-674). See also Appl. 5591/72, xv *Austria,* Coli. 43 (1973), p. 161; Appl. 7565/76, *Conscientious objectors* v. *Denmark*, D&R 9 (1978), p. 117 (118); Appl. 7705/76, xv. *Federal Republic of Germany*, D&R 9 (1978), p. 196 (203); Appl. 10640/83, *A.* V. *Switzerland*, D&R 38 (1984), p. 219 (223); Appl. 10410/83, *N* v. *Sweden*, D&R 40 (1985), p. 203 (206); Appl. 11850/85, *G.* V., *the Netherlands.*

[78] Bayatyan V. Armenia, Appl. N.º 23459/03, par. 126.

[79] Ibidem, par. 111.

interpretation. In particular, it should be noted that starting point and limits to any dynamic or extensive interpretation of any legal instrument are to be sought in its very wording. This means first and foremost that the interpretation must not go beyond the text and systematic context of the provisions to be elucidated and thus surreptitiously create new rights that are not enshrined therein. In the discussed case the limits of the interpretation seem to be overstepped. The right to conscientious objection to military service should rather be guaranteed by an appropriate change to the Convention.

4. CONCLUSION

Given the processes of secularisation and individualisation of modern societies, there is a need that freedom of conscience be interpreted as a separate human right that would be endowed with its own scope of protection and thus detached from freedom of religion and belief. Human conscience, by its very nature, urges the individual to act in conformity with its mandates. This implies that freedom of conscience should be perceived as a right to moral sefl-determination and self-realisation whose extensive guarantee is indispensable for the protection and development of the identity, integrity and dignity of the individual. In order to properly fulfill this function, the right to freedom of conscience has to cover the sphere of the *forum externum*, otherwise its legal guarantee would be illusory and ineffective.

Defined in such a way, the right to freedom of conscience may seem amorphous, since theoretically each legal obligation can be challenged by an individual as inconsistent with one´s imperative moral standards. Nevertheless, it should be borne in mind that due to imperative character and considerable gravity of moral precepts, the situation of the incompatibility of legal and moral norms is supposed to occur rather seldom and in relatively predictable circumstances whose regulation is legally manageable. Furthermore, the individual invoking the freedom of conscience is prone to fulfill an alternative legal duty, which serves as a compensation for the received privileged treatment. Last, but not least, like all freedoms laid down in paragraph 1 of Article 8-11, the freedom of conscience is not unlimited, but it is subject to limitation clause of Article 9 (2). The applicability of the limitation clause to the freedom of conscience is a consequence of the broad interpretation of the right to manifest one's 'belief' that includes the right to live by one's moral precepts. However, given the general need for ensuring the compliance with the law and the concomitant mistrust towards establishing exemptions from generally binding legal obligations, one should bear in mind that the limitation clause of Article 9 (2) is to be applied in a possibly restrictive manner. Admittedly, this directive applies to all rights and freedoms under the European Convention on Human Rights, but it is of special significance to freedom of conscience so that the broad interpretation of the scope of this freedom is not frustrated by means of too hasty or excessive use of the limitation clause.