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**Grzegorz Maroń**

ORCID ID: 0000-0002-3861-9103

University of Rzeszow

E-mail: [grzegorzmaron@op.pl](mailto:grzegorzmaron@op.pl)

**The Right to Conscientious Objection as a Constitutional Category: Selected Issues. A Comparative Study of Fundamental Laws and Constitutional Courts' Jurisprudence**

**Keywords:** comparative study, constitution, constitutional court, right to conscientious objection

**Słowa kluczowe:** konstytucja, sąd konstytucyjny, prawo do sprzeciwu sumienia, komparatystyka

**Abstract**

The article presents the results of a comparative study focusing on the right to conscientious objection in constitutions of modern states. This right is primarily associated with military service. In approximately a dozen constitutions, it stands as an independent, general right to conscientious objection. The constitutional scope of the given right is typically broad, with lawmakers seldom specifying the sources or conditions for its exercise. The contentious nature of the analysed right causes its explicit challenge in several constitutions. Case law, especially that of constitutional

courts, reveals that the normative presence and the specifics of the right to conscientious objection within a particular legal system may not necessarily originate directly from constitutional provisions. Court decisions rendered in various countries sometimes attribute a constitutional character to this right, even when the fundamental law does not explicitly articulate it. Conversely, there are occasional restrictive interpretations of unequivocal constitutional provisions regarding conscientious objection.

## **Streszczenie**

### **Prawo do sprzeciwu sumienia jako kategoria konstytucyjna w świetle komparatystycznego studium ustaw zasadniczych i orzecznictwa sądów konstytucyjnych: wybrane zagadnienia**

W artykule zaprezentowano rezultaty komparatystycznego studium konstytucji współczesnych państw pod kątem gwarantowanego w nich prawa do sprzeciwu sumienia. Prawo to najczęściej dotyczy służby wojskowej. W pojedynczych przypadkach sprowadza się do innej partykularnej klauzuli sumienia. W kilkunastu konstytucjach przyjmuje postać generalnego prawa do sprzeciwu sumienia. Unormowania konstytucyjne tytułowego prawa są zwykle ogólne. Z rzadka ustrojodawcy określają źródła sprzeciwu sumienia czy warunki skorzystania z prawa do sprzeciwu sumienia, w szczególności odsyłając do ustaw. Kontrowersyjność tytułowej kategorii prawa tłumaczy jego eksplikatywne zakwestionowanie w kilkunastu ustawach zasadniczych. Praktyka orzecznicza, zwłaszcza sądów konstytucyjnych, pokazuje że normatywny byt i zakres treściowy prawa do sprzeciwu sumienia w danym porządku prawnym niekoniecznie jest prostą konsekwencją postanowień konstytucji. W judykaturze poszczególnych państw zdarza się uznawać konstytucyjny charakter prawa do sprzeciwu sumienia pomimo braku jego wyraźnego wyartykułowania w tekście ustawy zasadniczej, jak i czynić wykładnię zawężającą językowo jednoznacznych przepisów konstytucyjnych w tym względzie.

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## **I. Introduction**

The right to conscientious objection and its associated safeguards, often in the form of a conscientious objection clause, have garnered significant atten-

tion in both Polish and international legal scholarship<sup>1</sup>. Typically, scholarly explorations of this topic tend to revolve around legal theory or legal philosophy, focusing on the fundamental essence of the right itself and its rationalization<sup>2</sup>. Alternatively, they involve an analysis of specific conscientious objection clauses within a particular legal system, such as the medical conscientious objection clause<sup>3</sup>. However, within the realm of legal literature, a notable gap exists concerning a comparative examination of the regulation of the issue of conscientious objection at the constitutional level. The aim of this study is to synthesize and evaluate how the right to conscientious objection is legally covered in the constitutions of modern states. To achieve this objective, we employ a textual analysis approach complemented by illustrative references to court decisions, particularly those handed down by constitutional courts. These decisions serve as the most effective means to demonstrate how constitutional provisions are put into practice.

- Within this focused article, we address several research questions, encompassing both qualitative and quantitative dimensions of the research problem, with a notable emphasis on the former:
- What is the extent of legal coverage regarding conscientious objection in constitutions?
- Do constitutions safeguard the general right to conscientious objection, or do they guarantee specific types of conscientious objection clauses?
- Are there instances where lawmakers explicitly deny the right to conscientious objection?
- Which components of the right to conscientious objection find constitutional coverage?
- To what degree does the constitutional coverage of this right influence case law, and to what extent do courts, independently of the consti-

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<sup>1</sup> See, K. O'Halloran, *Conscientious Objection. Dissent and Democracy in a Common Law Context*, Cham 2023; *Religion, Law and the Politics of Ethical Diversity. Conscientious Objection and Contestation of Civil Norms*, eds. C. Proeschel, D. Koussens, F. Piraino, New York 2021; *Freedom of conscience: a comparative law perspective*, ed. G. Blicharz, Warszawa 2019.

<sup>2</sup> M. Saporiti, *For a General Legal Theory of Conscientious Objection*, "Ratio Juris" 2015, vol. 28, no. 3, pp. 416–430.

<sup>3</sup> *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, eds. P. Stanisławski, J. Pawlikowski, M. Ordon, Lublin 2014.

tutional text, define the normative existence and content of the right to conscientious objection?

The findings made in the context of the above questions may make an argumentative contribution to the discussion on the constitutionalization of the general or particular right to conscientious objection.

To implement the anticipated research objectives, the texts of current *constitutions* of all countries in the world were analyzed using the search engine in the *constituteproject* database<sup>4</sup>, and for exemplification purposes, judgments of constitutional courts of several countries were cited.

## II. Military conscientious objection clause

The accommodation of conscientious objection at the constitutional level made its first appearance in 1922 when an amendment to the Netherlands' fundamental law was adopted. This amendment provided an exemption from military service based on conscientious objections, subject to rules outlined in statutory law<sup>5</sup>.

In contemporary times, nearly 60 countries incorporate military conscientious objection clauses in their constitutions. The constitutional coverage of this matter typically takes one of two forms. Most frequently, lawmakers explicitly ensure the option of performing alternative (civilian) service instead of mandatory military service<sup>6</sup>. Alternatively, they stipulate that such service

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<sup>4</sup> <https://www.constituteproject.org> (20.11.2023).

<sup>5</sup> Art. 183 (currently Art. 99) of the Constitution of the Kingdom of the Netherlands of 28 March 1814. See M. Adams, *Artikel 99 – Gewetensbezwaren militaire dienst*, <https://www.nederlandrechtsstaat.nl/grondwet/inleiding-hoofdstuk-5-wetgeving-en-bestuur/artikel-99-gewetensbezwaren-militaire-dienst> (20.11.2023).

<sup>6</sup> Albania (Art. 166 sec. 2), Armenia (Art. 41 sec. 3), Austria (Art. 9a sec. 4), Azerbaijan (Art. 76 sec. 2), Brazil (Art. 143 sec. 1), Croatia (Art. 47), Montenegro (Art. 48), Ecuador (Art. 66 sec. 12), Estonia (Art. 124), Finland (Art. 127), Greece (Art. 4 sec. 6 with an explanatory clause), Spain (Art. 30 sec. 2), Netherlands (Art. 99), Germany (Art. 4 sec. 3 and Art. 12a sec. 2), Paraguay (Art. 129), Poland (Art. 85 sec. 3), Portugal (Art. 276 sec. 4), Czech Republic (Art. 15 sec. 3), Russia (Art. 59 sec. 3), Cape Verde (Art. 271 sec. 3), Russia (Art. 59 sec. 3), Serbia (Art. 45), Slovakia (Art. 25 sec. 2), Slovenia (Art. 123), Suriname (Art. 180 sec. 5), Ukraine (Art. 35), Hungary (Art. XXXI sec. 3), Marshall Islands (Art. 11) [For editorial reasons, footnotes provide the name of the country in whose constitution the right to conscientious

does not constitute forced or slave labour, a practice otherwise prohibited<sup>7</sup>. In some instances, exemption from military service due to conscientious objection is not explicitly conditioned on performing alternative service<sup>8</sup>.

Regulations related to alternative service can be seen as an implicit endorsement of the conscientious objection clause when they directly reference conscientious objection as a legitimate reason for opting out of military service. In several constitutions, the possibility of performing alternative service is affirmed without a direct link to conscientious objection<sup>9</sup>.

Constitutional guarantees pertaining to exemption from military service due to conscientious objection align with the growing assertion that there is an international law right to alternative service. Indeed, the human right to conscientious objection to armed service is perceived as firmly rooted in the freedom of thought, conscience, and religion, as articulated in Art. 18 of the International Covenant on Civil and Political Rights<sup>10</sup> and Art. 9 of the European Convention on Human Rights<sup>11</sup>.

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tious objection is regulated and indicate the relevant provision of the constitution. A detailed list of the cited constitutions with references to their texts in the official language is provided in the appendix at the end of the publication].

<sup>7</sup> Antigua and Barbuda (Art. 6 sec. 3 pt. c), Bahamas (Art. 18 sec. 3 pt. b), Barbados (Art. 14 sec. 3 pt. c), Belize (Art. 8 sec. 3 pt. c), Botswana (Art. 6 sec. 3 pt. c), Cyprus (Art. 10 sec. 3 pt. b), Dominica (Art. 4 sec. 3 pt. c), Estonia (Art. 29), Eswatini (Art. 17 sec. 3 pt. c), Ethiopia (Art. 18 sec. 4 pt. b), Gambia (Art. 20 sec. 3 pt. c), Ghana (Art. 16 sec. 3 pt. b), Grenada (Art. 4 sec. 3 pt. b), Guyana (Art. 140 sec. 3 pt. c), Kiribati (Art. 6 sec. 3 pt. c), Lesotho (Art. 9 sec. 3 pt. c), Malta (Art. 35 sec. 2 pt. c), Mauritius (Art. 6 sec. 3 pt. c), Namibia (Art. 9 sec. 3 pt. c), Nigeria (Art. 34 sec. 2 pt. c), Papua New Guinea (Art. 43 sec. 2 pt. f), Romania (Art. 42 sec. 2 pt. a), Saint Kitts and Nevis (Art. 6 sec. 3 pt. c), Saint Lucia (Art. 4 sec. 3 pt. c), Saint Vincent and the Grenadines (Art. 4 sec. 3 pt. c), Samoa (Art. 8 sec. 2 point b), Sierra Leone (Art. 19 sec. 2 pt. c), Tuvalu (Art. 18 sec. 2 pt. b (c)), Uganda (Art. 25 sec. 3 pt. c), Solomon Islands (Chap. 2, Art. 6 sec. 3 pt. c), Zambia (Art. 14 sec. 3 pt. c).

<sup>8</sup> E.g. Ecuador, Slovakia, Marshall Islands.

<sup>9</sup> E.g. Belarus (Art. 57), Kyrgyzstan (Art. 56 sec. 2), Lithuania (Art. 48), Mozambique (Art. 267 sec. 3), Switzerland (Art. 59).

<sup>10</sup> See resolutions of the Human Rights Council (24/17 and 20/2) and the Human Rights Commission (2004/35, 2002/45, 2000/34, 1998/77, 1995/83, 1993/84, 1991/65, 1989/59, 1987/46). See also Ö. Heval Çınar, *Conscientious Objection to Military Service in International Human Rights Law*, New York 2013.

<sup>11</sup> Strasbourg case law does not establish a right to conscientious objection of general application. W. Brzozowski, *Ponownie o sprzeciwie sumienia*, "Państwo i Prawo" 2018, no. 12,

While relatively rare, some constitutions explicitly specify the nature of conscientious objection, indicating its sources. These sources most commonly include religious beliefs/confession<sup>12</sup>, moral<sup>13</sup>, philosophical<sup>14</sup> or humanitarian convictions<sup>15</sup>, and even political convictions<sup>16</sup>. Occasionally, legislators generally refer to contradictions with shared beliefs or convictions<sup>17</sup> or, more broadly, to “grounds” other than conscience<sup>18</sup>.

Constitutional regulations typically affirm the possibility of alternative service due to conscientious objection, while the specific conditions and principles governing this service are often left to statutory law, either expressly or tacitly. In fewer instances, more precise constitutional provisions exist. For example, the Portuguese constitution stipulates that alternative service should be of the same duration and degree of arduousness as armed military service. Conversely, the constitution of Paraguay specifies that alternative service should benefit population and must not be punitive or more burdensome than military service.

### III. General right to conscientious objection

In the fundamental laws of several countries, the “right to conscientious objection” has been elevated to the status of a constitutional right, treating it as a distinct category of human rights<sup>19</sup>. This elevation is expressed either explicitly<sup>20</sup> or implicitly<sup>21</sup>, considering it an integral component of freedom of

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p. 131. In support of this assertion, see, for example, the ECtHR decision of 11 February 2020, *Grimmark v. Sweden*, app. no. 43726/17.

<sup>12</sup> Armenia, Montenegro, Croatia, Czech Republic, Estonia, Poland, Romania, Serbia, Slovakia, Ukraine.

<sup>13</sup> Croatia, Estonia, Poland.

<sup>14</sup> Brazil, Slovenia.

<sup>15</sup> Slovenia.

<sup>16</sup> Brazil.

<sup>17</sup> Armenia, Azerbaijan, Montenegro, Russia, Serbia.

<sup>18</sup> Spain.

<sup>19</sup> Montenegro (Art. 48), Ecuador (Art. 66 sec. 12), Paraguay (Art. 37), Slovenia (Art. 46).

<sup>20</sup> Angola (Art. 41 sec. 3), Mozambique (Art. 54 sec. 5), Portugal (Art. 41 sec. 6), Cape Verde (Art. 48 sec. 8), East Timor (Art. 45 sec. 3).

<sup>21</sup> Fiji (Art. 22; compare, however, Art. 4 sec. 3 pt. d), Kenya (Art. 32 sec. 4), Colombia (Art. 18), Tuvalu (Art. 23 sec. 7 pt. a).

thought and conscience. This approach aligns with the doctrinal perspective that views the right to conscientious objection as an “integral and indispensable element of freedom of conscience”<sup>22</sup>.

When constitutions establish the right to conscientious objection, they typically clarify that the scope of this right is defined by statutory law<sup>23</sup> or, in some instances, by the constitution itself<sup>24</sup>. This framework is reminiscent of Art. 10 sec. 2 of the Charter of Fundamental Rights of the European Union, which acknowledges “the right to conscientious objection” but specifies that it should be exercised “in accordance with national laws governing the exercise of this right”<sup>25</sup>. This provision raises questions about whether the right to conscientious objection could be effectively exercised in the absence of national laws that govern its exercise.

The first constitution to guarantee the general right to conscientious objection was the Portuguese Constitution, following an amendment in 1982<sup>26</sup>. This Portuguese legal solution was also integrated into the fundamental laws of the former Portuguese colonies, now independent states, including Angola, Mozambique, and Cape Verde.

In three constitutions, explicit conditions for the exercise of the right to conscientious objection are specified. In the Constitution of Ecuador, it is stipulated that this right must not undermine other rights or cause harm to persons or nature. Similarly, the Constitution of Slovenia provides that reliance on conscientious objection should not result in limitation of the rights and freedoms of others. The Constitution of Tuvalu states that a person who proves conscientious objection to avoid traditional, communal, or civic obligations may be required to provide equivalent service to benefit to the community or may be deprived of certain benefits associated with the duties from which they seek exemption.

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<sup>22</sup> M. Olszówka, *Guarantees and the Essence of the Right to Conscientious Objection* [in:] *Freedom of Conscience. A Comparative Law Perspective*, ed. G. Blicharz, Warsaw 2019, pp. 30–31.

<sup>23</sup> Angola, Mozambique, Portugal, Cape Verde, Slovenia.

<sup>24</sup> Paraguay.

<sup>25</sup> The Charter of Fundamental Rights of the European Union of 7 December 2000, Official Journal of the European Union C 326/391.

<sup>26</sup> J. de Sousa e Brito, *Political Minorities and the Right to Tolerance: The Development of a Right to Conscientious Objection in Constitutional Law*, “BYU Law Review” 1999, no. 2, p. 611.

While the constitutions of Montenegro and Ecuador grant a general character to the right to conscientious objection, they explicitly mention only the prohibition against compelling an individual to perform military service.

In a unique approach, the Paraguayan legislator specifies the sources of constitutionally protected general conscientious objection, identifying them as religion and morality.

#### **IV. Monothematic nature of constitutional coverage of conscientious objection**

Constitutional provisions related to conscientious objection tend to centre around two key themes: a specific military conscientious objection clause and, less frequently, the general right to conscientious objection. There are exceptions, however, in the form of constitutional references to other types of conscientious objection clauses. For instance, the Constitution of Ireland stipulates that “[T]he State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State”<sup>27</sup>. Similarly, the Constitution of Eswatini prohibits compelling women to undergo or uphold any custom to which they are in conscience opposed<sup>28</sup>.

In a distinct category, five constitutions introduce what is commonly referred to as a “journalistic conscientious objection clause”. It’s worth noting that the scope of these clauses is not necessarily limited to journalists, and the subject matter may extend beyond traditional journalism. For instance, the constitution of Paraguay directly states that journalists shall not be compelled to act against the dictates of their conscience<sup>29</sup>. Meanwhile, the constitution of Spain specifies that the law shall establish the right to conscientious objection in the exercise of freedom of expression, artistic freedom, academic freedom, freedom of teaching, and the right to information<sup>30</sup>. However, it

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<sup>27</sup> Ireland (Art. 42 sec. 3.1°).

<sup>28</sup> Eswatini (Art. 28 sec. 3).

<sup>29</sup> Paraguay (Art. 29). Similarly, Bolivia (Art. 106 sec. 4), Dominican Republic (Art. 49 sec. 3).

<sup>30</sup> Spain (Art. 20 sec. 1). Compare, Ecuador (Art. 20).



could be argued that the concise nature of these constitutional provisions somewhat diminishes their practical significance<sup>31</sup>.

It is worth noting that fundamental laws typically do not explicitly mention clauses for medical conscientious objection, business conscientious objection<sup>32</sup>, or conscientious objection clauses for civil registry officials<sup>33</sup>. Despite this, in many countries, some of these clauses, particularly *healthcare workers' conscientious clause*, are governed by statutory law, referenced in judicial decisions, and subject to scholarly and social debates.

## V. Denial of the right to conscientious objection

As previously mentioned, while some constitutions explicitly acknowledge the general right to conscientious objection, several others have more or less explicitly challenged this right, each with varying degrees of decisiveness and consequences. The most unambiguous denial of this right is found in the constitution of Cuba<sup>34</sup>. In the context of freedom of thought, conscience, and expression, it explicitly states that one cannot invoke conscientious objection with the intention of evading compliance with the law or impeding another from the exercise of their rights. Similar reservations are evident in the constitutions of Venezuela and Nicaragua<sup>35</sup>. In the constitutions of Denmark, Fiji, Iceland, Greece, and Ukraine<sup>36</sup>, there are provisions stating that, on the basis of religious beliefs, one cannot claim exemption from ful-

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<sup>31</sup> See J. Sánchez Lorenzo, *El derecho a la cláusula de conciencia en la formación de la opinión pública: debate sobre la necesidad o irrelevancia de su regulación legal en la comunicación del siglo XXI*, “Revista de la Facultad de Derecho” 2019, no. 46, pp. 135–183.

<sup>32</sup> See the ruling of the Polish Supreme Court of 14 June 2018, file ref. no. II KK 333/17, and the decision of the Polish Constitutional Tribunal of 16 October 2019, file ref. no. SK 43/19. Teka Komisji Prawniczej PAN Oddział w Lublinie, vol. XVI, 2023, no. 1, pp. 245–257. See also, J. Potrzebszcz, *The Conscience Clause of Service Providers from the Perspective of Legal Security*, “Teka Komisji Prawniczej PAN Oddział w Lublinie” 2023, vol. XVI, no. 1, pp. 245–257.

<sup>33</sup> See Art. 6 of the Civil Union Act 2006 (South Africa).

<sup>34</sup> Cuba (Art. 54).

<sup>35</sup> Nicaragua (Art. 69), Venezuela (Art. 59 and 61).

<sup>36</sup> Denmark (Art. 70), Fiji (Art. 4 sec. 3 pt. d), Greece (Art. 13 sec. 4), Iceland (Art. 64), Ukraine (Art. 35). See also Liechtenstein (Art. 39).

filling civic duties or abiding by the law<sup>37</sup>. However, in the latter two constitutions, there is an exception regarding the obligation of military service. Importantly, these reservations exclusively pertain to religious beliefs, disregarding the fact that non-religious viewpoints can also form the basis for conscientious objection, as recognized in the constitutions of Chad, Estonia, Lithuania, and Vietnam<sup>38</sup>.

In the constitutions of Angola, Mozambique, and Portugal, the provision regarding the right to conscientious objection, subject to conditions specified in the law, is included as a specific provision, distinct from the one outlining a general prohibition on exempting individuals from their legal obligations based on their religious beliefs/practices or, in the case of Angola, philosophical and political views.

## **VI. Judicial implementation of the constitutional right to conscientious objection**

The practice of the judicial decision-making, or the application of the law in general, plays a pivotal role in defining the normative status, content, and scope of the right to conscientious objection. Courts, especially constitutional courts, have the authority to both diminish the significance of constitutional provisions related to conscientious objection and, conversely, recognize the constitutional nature of this right, even when it is not explicitly mentioned in the fundamental law<sup>39</sup>.

In the judgments of constitutional courts, the right to conscientious objection is not treated as an entirely separate category of subjective rights but rather as an integral component of freedom of conscience. This perspective recognizes that freedom of conscience encompasses not only the right to shape

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<sup>37</sup> In Poland, a similar provision can be found in Art. 3 sec. 2 of the Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion. However, it is important to note that this statutory provision should not be interpreted in a manner that negates the right to conscientious objection as an element of constitutional freedom of conscience.

<sup>38</sup> Chad (Art. 59), Estonia (Art. 41), Lithuania (Art. 27), Vietnam (Art. 24).

<sup>39</sup> See: E. Łętowska, *Tylnymi drzwiami ku uniwersalnej klauzuli sumienia? (uwagi na marginesie „sprawy drukarza” przed TK)*, „Państwo i Prawo” 2022, no. 2, pp. 3–19.

one's own conscience but also the right to act in accordance with what one's conscience dictates<sup>40</sup>.

A clear example of this legal dynamic can be seen in the case of Azerbaijan. Despite the wording of Art. 76 sec. 2 of the Constitution of Azerbaijan, the country has not yet enacted an appropriate law concerning alternative service. Consequently, conscripts who refuse to perform military service due to conscientious objection are subject to imprisonment. Azerbaijan's courts downplay the significance of the constitutional provision, often arguing its inapplicability in the absence of relevant statutory provisions<sup>41</sup>. This situation persists despite multiple judgments from the European Court of Human Rights (ECtHR) finding that Azerbaijan violates Article 9 of the European Convention on Human Rights by prosecuting objectors who seek to avoid military service<sup>42</sup>.

In contrast, the German Federal Constitutional Court issued a 1985 ruling that diverged from the unequivocal wording of Art. 12a of the German Constitution. This article states that "The duration of alternative service shall not exceed that of military service". The court ruled that the provisions of the Alternative Service Act, which extended the alternative service period to one-third longer than basic military service (20 months compared to 15 months), did not conflict with the constitution. The court's reasoning was that the longer but less strenuous civilian service provided a legitimate option for conscientious objectors who refused to perform military service. However, this decision did not align with the precise wording of the Constitution<sup>43</sup>.

Sometimes, even a literal interpretation of the law can generate controversy. In the jurisprudence of Polish administrative courts, Art. 85 sec. 3 of the Polish Constitution is not applied to contributions for defence, as they are considered a distinct form of fulfilling the constitutional duty of defend-

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<sup>40</sup> See, for example, the judgment of the Constitutional Tribunal of Poland of 7 October 2015, file ref. no. K 12/14 (pt. 3.3.1).

<sup>41</sup> *The Right to Conscientious Objection in Europe: Azerbaijan*, [https://wri-irg.org/en/programmes/world\\_survey/reports/Azerbaijan](https://wri-irg.org/en/programmes/world_survey/reports/Azerbaijan) (20.11.2023).

<sup>42</sup> Judgment of the ECtHR of 17 October 2019, *Mushfig Mammadov and Others v. Azerbaijan*, app. no. 14604/08, and the ECtHR decision of 7 October 2021, *Mehdiyev and Abilov v. Azerbaijan*, app. nos. 52773/19 and 54768/19.

<sup>43</sup> The judgment of the German Federal Constitutional Court of 24 April 1985, 2 BvF 2, 3, 4/83, and 2/84.

ing the country, separate from military service<sup>44</sup>. While this interpretation aligns with linguistic precision, it is a subject of dispute among some legal scholars who view it as a significant limitation on the scope of conscientious objection accommodation<sup>45</sup>.

Constitutional courts in different countries often arrive at divergent conclusions regarding conscientious objection, even when interpreting similar constitutional provisions. For instance, the Chilean Constitutional Court, in the context of abortion, ruled that not only individuals (such as doctors or midwives) but also medical institutions can invoke conscientious objection. This position supports the concept of “institutional conscientious objection”, deeply rooted in freedom of conscience and religion, as well as the freedom of association<sup>46</sup>. In contrast, the Colombian Constitutional Court adopted a different stance, affirming that the right to conscientious objection cannot be exercised by legal entities like hospitals or the state in general but only by natural persons directly involved in abortion procedures<sup>47</sup>. Moreover, while the Chilean Constitutional Court and the Polish Constitutional Tribunal found the requirement for a doctor who invokes conscientious objection to refer the patient to another willing doctor as unconstitutional, the Colombian Constitutional Court held a different view. It ruled that conscientious objection obliges the doctor to provide a comprehensive written explanation of their religious beliefs hindering their participation in the abortion procedure, which is then subject to review by a competent authority on the grounds of the objection’s merits<sup>48</sup>. Conversely, the Polish Constitutional Tribunal emphasized

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<sup>44</sup> See the judgments of the Supreme Administrative Court of 12 March 2020, file ref. no. II OSK 1259/18; of 1 December 2020, file ref. no. II OSK 1434/18; and of 4 April 2023, file ref. no. III OSK 2062/21.

<sup>45</sup> W. Brzozowski, *Sprzeciw sumienia wobec świadczeń na rzecz obrony*, “Przeгляд Sądowy” 2022, no. 3, pp. 35–52.

<sup>46</sup> The judgments of the Constitutional Tribunal of Chile of 28 August 2017, 3729 (3751)-17 CPT, and of 18 January 2019, 5572–18-CDS/5650–18-CDS. See V. Undurraga, M. Sadler, *The misrepresentation of conscientious objection as a new strategy of resistance to abortion decriminalization*, “Sexual and Reproductive Health Matters” 2019, vol. 27, no. 2, pp. 17–19.

<sup>47</sup> See the judgments of the Constitutional Court of Colombia of 10 May 2006, C-355–06; of 28 February 2008, file ref. no. T-209/08, and of 28 May 2009, T-388/09. Similarly, the judgment of the Supreme Court of Mexico of 21 September 2021, file ref. no. 54/2018.

<sup>48</sup> The judgment of the Constitutional Court of Colombia of 28 February 2008, file ref. no. T-209/08.

that “The reasons for refusing to provide a service should be of a medical nature rather than an explanation of the doctor’s philosophy or moral principles underlying their behaviour”<sup>49</sup>.

Notably, changes in the direction of constitutional court decisions on conscientious objection can occur without amending the constitution itself. For instance, the Constitutional Court of South Korea issued varying rulings over the years. In 2004 and 2011, it held that the inability to perform alternative service did not conflict with the constitution and that the freedom of conscience under Art. 19 of the Constitution did not grant individuals the right to refuse to fulfil the duty of military service or to reject legal duties based on their conscience<sup>50</sup>. However, in 2018, the same court ruled that the absence of provisions regarding alternative service in the National Military Service Act constituted a violation of the constitutional freedom of conscience<sup>51</sup>. Similarly, between 1991–2008, the Colombian Constitutional Court consistently held that conscientious objection did not exempt individuals from military service. In 2009, it reversed its position, ruling that the constitution did, in fact, guarantee the right to conscientious objection in this context<sup>52</sup>.

The question of whether the right to conscientious objection is of a constitutional nature or falls within the domain of statutory law remains a source of hesitation for many courts. An example of this uncertainty can be found in American case law concerning conscientious objection to military service. Despite numerous rulings by the United States Supreme Court affirming accommodation not only for religious conscientious objection but also for objections based on non-religious moral or philosophical beliefs, a definitive

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<sup>49</sup> The judgment of the Constitutional Tribunal of Poland of 7 October 2015, file ref. no. K 12/14 (pts. 8.2.3).

<sup>50</sup> The judgment of the Constitutional Court of South Korea of 26 August 2004, file ref. no. 16–2 (A) KCCR 141, and similarly, the judgment of the Constitutional Court of South Korea of 30 August 2011, file ref. no. 23–2 (A) KCCR 174.

<sup>51</sup> The judgment of the Constitutional Court of South Korea of 28 June 2018, 2011 Hun-Ba 379, 30 KCCR 370. For more details, see S. Smet, *Conscientious Objection through the Contrasting Lenses of Tolerance and Respect*, “Oxford Journal of Law and Religion” 2019, vol. 8, no. 1, pp. 93–120.

<sup>52</sup> The judgment of the Constitutional Court of Colombia of 14 October 2009, file ref. no. C-728/09.

stance on whether the right to conscientious objection is encompassed by the constitutional freedom of conscience and religion (Free Exercise Clause) has not been taken<sup>53</sup>.

Similarly, the decisions of the Spanish Constitutional Court are far from uniform on this matter. In a 1982 ruling related to military service, the Court declared that conscientious objection is a right recognized in the Spanish constitutional system, both directly and indirectly. According to the Court, this right is closely linked to the freedom of conscience, which, in turn, falls under the ideological freedom and freedom of religion mentioned in Art. 16 of the Constitution<sup>54</sup>. In a 1985 ruling concerning abortion, the Court explicitly asserted that the right to conscientious objection could be enforced even without the “*interpositio legislatoris*”, meaning regardless of whether it has been guaranteed and regulated by statutory law, because it is protected by the Constitution<sup>55</sup>. The Polish Constitutional Tribunal shared a similar perspective regarding the medical conscientious objection clause<sup>56</sup>. However, in two subsequent rulings related to the military conscientious objection clause, issued in 1987, the Spanish Constitutional Court questioned its earlier position on the general nature of the right to conscientious objection as a right anchored in the freedom of conscience. The Court argued that accepting the existence of such a right would be tantamount to “denying the very idea of the state”. The Court further stated that conscientious objection could only be recognized as an exception in relation to a specific duty<sup>57</sup>.

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<sup>53</sup> S. Davis, *Constitutional Right or Legislative Grace? The Status of Conscientious Objection Exemptions*, “Florida State University Law Review” 1991, vol. 19, no. 1, pp. 192–193. Also, see *Witmer v. U.S.*, 348 U.S. 375 (1955); *U.S. v. Seeger*, 380 U.S. 163 (1965); *Welsh v. U.S.*, 398 U.S. 333 (1970); *Gillette v. U.S.*, 401 U.S. 437 (1971).

<sup>54</sup> The judgment of the Constitutional Court of Spain of 23 April 1982, file ref. no. STC 15/1982.

<sup>55</sup> The judgment of the Constitutional Court of Spain of 11 April 1985, file ref. no. STC 53/1985.

<sup>56</sup> The judgment of the Polish Constitutional Tribunal of 7 October 2015, file ref. no. K 12/14 (pt. 4.4.5).

<sup>57</sup> The judgment of the Constitutional Court of Spain of 27 October 1987, STC 160/1987 and STC 161/1987. See J. Martínez-Torrón, *Adjusting general legal rules to freedom of conscience: the Spanish approach*, “Revue du droit des religions” 2019, no. 7, pp. 131–151.

## VII. Conclusions

It is rare for the constitutions of contemporary states to expressly provide for a right to conscientious objection. Increasingly, in nearly one-third of all countries, it is guaranteed only in the context of the duty of military service. General right to conscientious objection is explicitly recognized far less frequently. The reluctance of constitution-makers to address this right is not accidental. Codifying a right that is both contentious and subject to diverse interpretations in a constitution poses challenges<sup>58</sup>. Viewing the right to conscientious objection as a distinct fundamental right is not entirely convincing, as it is, in fact, a component of freedom of conscience. Moreover, explicit provisions that restrict the right to conscientious objection to the scope determined by statutory law may be considered ambiguous. On one hand, these provisions address concerns that recognizing the right to conscientious objection could disrupt public order. On the other hand, they may be seen as superfluous and redundant. The absence of such provisions should not be interpreted as affirming the right to conscientious objection as an absolute right. Instead, like many other fundamental rights, it is subject to limitations based on well-defined principles governing legislative interference with individual freedoms and rights. These principles include the requirement for interference by an act of parliament, adherence to the principle of proportionality, not infringing on the essence of the right, and respecting the need to protect other constitutionally safeguarded values, rights, or interests (e.g., as outlined in Art. 31 sec. 3 of the Polish Constitution). Therefore, some constitutional provisions stating that the right to conscientious objection cannot limit the rights and freedoms of others should not be the sole criteria for statutory limitations on this right. As demonstrated in this article, certain court decisions suggest that the normative existence and scope of the constitutional right, both general and specific, to conscientious objection appear to depend more on the stance of constitutional courts than on the wording of the constitution itself. There are instances where constitutional courts have inferred the right

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<sup>58</sup> P. Chiassoni, *Protecting Freedom of Conscience in a Constitutional State*, "Diritto e questioni pubbliche" 2016, vol. 16, no. 2, pp. 23–50; L. Zucca, *Is There a Right to Conscientious Objection?* [in:] *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*, eds. S. Mancini, M. Rosenfeld, Cambridge 2018, pp. 127–148.

to conscientious objection (e.g., in the context of a doctor's refusal to perform an abortion or a draftee's refusal to serve in the military) from the freedom of conscience, even in the absence of a literal mention of this right in the constitutional provisions. Additionally, there are situations in which constitutional courts have imposed restrictive interpretations on unambiguously worded constitutional provisions that guarantee the right to conscientious objection.

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