FREEDOM OF CONSCIENCE IN THE INSTITUTIONAL ASPECT

Freedom of Conscience in the Institutional Aspect

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edited by Lóránt Csink

Wydawnictwo Instytutu Wymiaru Sprawiedliwości **Warszawa 2024**

The publication was written within the framework of the international scientific project "Polish-Hungarian Research Platform" conducted by the Institute of Justice in Warsaw in 2023

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ISBN 978-83-67149-73-0

WYDAWNICTWO INSTYTUTU WYMIARU SPRAWIEDLIWOŚCI
ul. Krakowskie Przedmieście 25, 00-071 Warszawa
SEKRETARIAT tel.: (22) 630 94 53, e-mail: wydawnictwo@iws.gov.pl

BOUND AND PRINTED BY *"Elpil", ul. Artyleryjska 11, 08-110 Siedlce*

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Preface

Moral sense is a distinguishing characteristic of the human race. As long as there have been people, they have had a conscience. However, individual conscience is different. As a result of our conscience, our world view convictions and ideas about the role of the state, society and the individual may differ. "Diversity of conscience" results in a colourful society.

According to the general perception of the state, it is created to provide a regulated framework for social coexistence. The essential characteristic of the state is regulation: the establishment and enforcement of behavioural standards that can be used to avoid anarchy and promote common values. In many cases, the general rule conflicts with the command of conscience, which is why the diversity of consciences is necessarily an unpleasant phenomenon for the state. One of the main topics of the research was the state's obligations and possibilities for regulation based on the European Convention on Human Rights and national regulations.

Another topic of the research is the issue of collective and institutional conscience. In what cases can we talk about the common conscience of persons, as well as the conscience of an institution (for example, a hospital or school)? What is their practical effect?

The participants of the research worked on the question of institutional conscience in the fields of health care, compulsory military

service, the civil sector, education and various professional orders in different topics, but as far as possible in response to each other's results. The primary purpose of the volume is to raise problems, explore decision-making options and develop proposals. We hope that this will be of help both to researchers of the theoretical questions of the topic and to those who come into contact with these questions in the field of legislation or law enforcement.

We thank the Polish Hungarian Research Platform for the support of the research and the presentation of the volume, as well as all those who contributed to the organization of the research.

Laus viventi Deo

Lóránt Csink

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Pázmány Péter Catholic University | DOI: 10.32041/9788367149730/1

Chapter 1. The Role of the State in Protecting the Institutional Aspect of Conscience. The 'Pharmacy Case' from a Theoretical Perspective

1.1. Introduction

One of the current questions in Polish jurisprudence is whether the dispensing of certain pharmacy products can be refused on grounds of conscience. The answer to this question in many respects belongs to the field of national law – which is outside the scope of the author's investigation. However, the question also arose in Hungary almost 15 years ago,[1] thus, the experiences gained there can be used. On the other hand, this study contains a constitutional theoretical approach, regardless of national regulations. First, it reviews the foundations of freedom and conscience, then analyses how the social perspective influences what we think about conscience, and finally draws conclusions based on these and the Hungarian case law.

[1] https://www.magyarkurir.hu/hirek/schanda-balazst-gyogyszereszek-lelkiismereti-szabadsagarol (accessed on: 09.04.2024).

1.2. Freedom and Conscience

Freedom is a basic human need. It is based on freedom of thought, which is closely related to conscience. The fulfilment of human existence is ensured by being able to adjust one's behaviour to their conscience, or at least not doing something that is contrary to it.

Freedom is one of the basic concepts of both law and theology, and it is also a concept that has an everyday meaning: everyone thinks they know what freedom is. After a brief reflection, however, the complexity of the issue becomes apparent: not only does freedom mean something different to law and theology but that there is no uniform interpretation of freedom even within the scope of law itself. Freedom is typically the concept that constitutional law uses in everyday operation, but does not define.

According to Hobbes, by freedom in the original sense of the word we mean the absence of external obstacles. These obstacles often divert a part of a man's strength from what he wishes to do, but they cannot prevent him from using the remaining part of his strength according to the dictates of his judgment and reason.[2]

In Hobbes's approach, freedom depends on external factors. If the external obstacles are absent, then there is freedom, while if the external obstacles are close, there is none. And the content of freedom is that one can do what one wants to do, even if he cannot fully realise it due to external obstacles. In essence, Kant takes a similar position: "Interference with another's freedom is understood as coercing the other to be happy as the former sees fit."[3] In this approach, too, freedom depends on external factors: people are free if they can free themselves from the arbitrary coercion of others, more simply: they cannot be forced to do something they do not want.

According to Locke, liberty and equality are the natural state of man.[4] However, freedom is not absolute, because its enforcement depends on external factors; freedom must be sacrificed in order

[2] T. Hobbes, *Leviathan*, Oxford 1998. p. 86.

[3] I. Kant, *Theory and Practice,* 8:290, https://hesperusisbosphorus.files.wordpress.com/2015/02/theory-and-practice.pdf (accessed on: 09.04.2024).

[4] J. Locke, *Two Treatises of Government*, para. 26.

to assert additional values. Such an additional value is security for Hobbes, equality for Dworkin.

Regarding the relationship between freedom and security, Hobbes's opinion is that in the state of *bellum omnium contra omnes*, the individual's unlimited freedom ultimately leads to his vulnerability; due to the unrestricted freedom of others, the retention of one's own property and personal integrity is endangered.[5] It was therefore a fundamental need for power to create order and predictability, to protect people's property and persons, i.e., to provide security. In this approach, security is a very complex and multifaceted concept, it includes, on the one hand, all the protection that serves to prevent an attack on the person or property, and on the other hand, the feeling of comfort that the individual does not even have to expect a reason for such an attack.[6] In practice, it can be seen that the more people see their security threatened, the more they are willing to sacrifice their freedom, and vice versa: the more they lack their freedom, the more they risk, i.e., sacrifice their security. In Hobbes's chain of thought, there is no freedom without security, and to this it can be added that security can exist without freedom, but it is meaningless: it does not realise the natural state of the individual.[7]

In addition to the conflict between freedom and security, it also became clear that the first two of the slogans of the French Revolution "Liberty, Equality, Fraternity" cannot live side by side absolutely: the two principles compete with each other. As Dworkin says: 'Unfortunately, liberty and equality often collide: sometimes the only effective means of promoting equality requires some limitation of liberty, and sometimes the consequences of promoting liberty are detrimental to equality.'[8] So it can be seen that the source (result) of freedom is man's natural state, i.e., man is inherently free.

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[5] T. Hobbes, *op. cit.*, pp. 160–162.

[6] It cannot be deemed as 'security' if people live in constant fear that their properties and physical integrities are in danger, even if the attack against them does not occur in the end.

[7] It is worth to recall Benjamin Franklin saying, "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."

[8] R. Dworkin, *A Matter of Principle*, Cambridge 1985, p. 181.

However, they can only exercise their freedom if suitable external conditions exist.

From all of this, it can be concluded that the basis of conscience is freedom, but no free state can ensure the unrestricted enforcement of conscience, free from external limitations. The regulatory role of the state is necessary so that freedom of conscience prevails in practice.

Overall, it can be concluded that the conviction of conscience is a condition for the enforcement of the right to the free development of the personality. It follows from human dignity that the human personality itself is inviolable for the law, and the law can help autonomy by ensuring external conditions. As the Hungarian Constitutional Court pointed out, from the right to freedom of conscience, the duty of the state in itself follows that the state cannot judge the truth of religious belief or conviction of conscience.[9]

On the other hand, in an institutional perspective of conscience, human rights function as a state protected means of human salvation.[10] In such an approach, human rights are state guarantees for the peaceful coexistence of the society.

1.3. Different Roles of the State and Their Relation to Conscience

The individual philosophical trends are not uniform in what the role of the state is. From the point of view of the enforcement of freedom of conscience, I highlight two of the many trends: the individualist and the collectivist social approach. Needless to say, it is not possible to talk about a "correct" or "incorrect" perception on a purely social scientific basis. It is a matter of individual judgement, which position we consider more sympathetic, just as individual societies also take different positions. Since my goal is to reveal and present

[9] Decision of the Constitutional Court, 27/2014. (VII. 23.).

[10] G. Deli, *The Constitutionality of Conscience*, [in:] A. Koltay (ed.), *Christianity and Human Rights*, Budapest 2021, p. 112.

the differences, I am deliberately presenting the polarised, extreme version of both positions.

1.3.1. INDIVIDUALIST APPROACH

The individualist view is that the essence of the role of the state is the achievement of individual freedom and individual fulfilment. As the American Declaration of Independence put it:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

Governments (in this context: public powers) are created so that individuals can be free: they can live freely and pursue happiness. Constitutional liberalism means the defence of individual autonomy and dignity against arbitrary coercion.[11] In short, in the individualistic social approach, the individual expects the state to "let me live". The role of the state is to ensure that individuals can freely enjoy their basic rights.

Even the most committed individualist recognises the need for regulation, along with the restriction of human rights. On the other hand, they believe that the purpose of the restriction can only be to assert – indirectly or directly – the rights of others.

Individualists also find the diversity of individuals as natural and obvious. Consequently, they do not wish to generalise too much; they accept that individual freedom and conscience are different.

[11] W. Włoch, *The Democratic Paradoy Revisited – how liberal constitutionalism supports democratic equality*, [in:] A. Bień-Kacała, L. Csink, T. Milej, M. Serowaniec (eds.), *Liberal Constitutionalism – between individual and collective interests*, Toruń 2017, p. 14.

Individualists defend freedom of conscience because conscience is the motive of action. Individuals are free if they can behave in accordance with their freedom of conscience. They consider the diversity of consciences to be natural, and does not wish to establish an order of importance among them. Since its roots are in individual freedom, in the event of a collision between state regulation and individual conscience, it will provide more space for the latter and is more likely to allow exceptions to the rule.

In this concept, the constitution has a negative approach, in which the central element of its function is the minimisation of the role of state intervention. This kind of minimalist role of the state also speaks for the citizen's place in the state. In addition to the basic operation of the state, its main task is "residence", which may result in the individual's direct right of complaint if the boundaries defined in the constitution are crossed. The concept, which relieves the state in this way and focuses on the subjective-defensive function, was identified as a classical theory of constitutional law.[12] Opposite the minimalist state, however, stands the image of the active citizen, who lives freely within the framework constituted by the constitution, filling the framework with the rights provided.

1.3.2. COLLECTIVIST APPROACH

Unlike the individualist view, the starting point for the collectivist view is the community. The role of the state is to formulate – on the authority of the community – how the community wants to live. The community is not a multitude of individuals randomly living next to each other, but individuals who are connected by culture, history, identity, or possibly religion. They claim that individual liberty can only be complete in cooperation with others and the emphasis is diverted from individualism to the role of communities.[13]

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[12] H. Dreier, *Grundgesetz Kommentar,* Mohr Siebeck, Tübingen 1996, p. 60.

[13] L. Trócsányi, M. Sulyok, *The Birth and Early Life of the Basic Law of Hungary*, [in:] A.Zs. Varga, A. Patyi, B. Schanda, *The Basic (Fundamental) Law of Hungary*, Dublin 2015, p. 12.

The collectivist expects the state to protect and promote values and principles important to the community. The collectivist state is not value neutral. It protects the values which it finds more important than others. As a consequence, state regulation is also value based. The state creates rules that correspond to the ideology and values of the community.

The collectivist state also recognises basic rights and protects them, but for a different reason: because individuals want to live in a free society, so freedom is also a value to be protected. However, freedom is meant to be protected in the interests of the community and not of the individual. It is similar to freedom of conscience; value, so that individuals can live conscientiously (i.e., according to their conscience).

In the collectivist conception of the state, conscience is not value-neutral, i.e., the freedom of consciences with different content is different. The conscience is more protected, which is more in line with the community's idea and image of man.

Since the essence of the collectivist social approach is the preservation of community values, it is only in very exceptional cases that it is possible to make an exception to the observance of the rule that serves the community interest and reflects community values, citing individual considerations and reasons of conscience.

In this concept, the constitution is also meant to ensure the normative principles of the legal order. The functioning of the legislative, executive and judicial powers is bound to the constitution, which is manifested not only in the negative responsibility of the state in refraining from intervention, but also in positive responsibility. According to this, the state must do everything in order to comply with the provisions of the constitution, even if the individual does not specifically request this.[14]

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[14] K. Hesse, *Bestand und Bedeutung*, [in:] E. Benda, W. Maihofer, H.J. Vogel (eds.), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*, Berlin, New York 1983, p. 95.

1.3.3. COMPARING INDIVIDUAL AND COLLECTIVIST APPROACHES IN PRACTICE

One of the most divisive issues regarding freedom of conscience is abortion: some consider it a basic human right and defend the pro-choice position with the utmost naturalness. They believe that a pregnant woman has a subjective right to decide whether to keep her foetus or not. Others just as naturally think that there is no constitutionally appreciable difference between born and unborn life, the pro-life position considers abortion to be equivalent to murder. They also consider it natural that the state (legal regulation) should also protect the unborn, foetal life.

Let us presume that a collectivist society starts from the value of human life (as a value assigned to be protected by the community), and an individualist society looks at this issue in such a way that everyone is free to decide whether they are on the pro-life or pro-choice side.

Let us also assume that in a collectivist society abortion is tolerated, but – due to the state's choice of values – an institution that is not supported. How does freedom of conscience prevail in such a case?

An individualist society does not distinguish between pro-life and pro-decision positions. It accepts if the pregnant woman decides to abort her foetus, but respects the freedom of conscience of the doctor appointed to perform the abortion. Thus, if the doctor happens to take a pro-life position, they can refuse the intervention. At the same time, the individualist approach protects the pro-decision approach in the same way: if the doctor believes, due to their conscience, that it is not possible to force a pregnant woman to give birth, and performs the intervention at her request (perhaps despite state regulations or the internal rules of the medical institution), then this behaviour is protected in the same way as pro-life refusal of intervention. In this approach, the only thing that matters is how the collision of conscience and legislation can be resolved, but there is no difference in terms of the content of conscience.

In contrast, the collectivist social approach is based on the prior choice of values, the value of human life. For this view, it is evident

that the pro-life conscience is more valuable than the pro-choice conscience, so it provides a conscientious objection to the doctor who refuses an abortion, but does not allow the intervention to be performed simply because, according to the doctor's conscience, pregnant women have the freedom to decide the issue for themselves. The collectivist view is value-oriented in the sense that it does not use the conflict between conscience and legislation, but rather the content of conscience to decide the issue.

1.4. Conscientious Refusal to Serve Health Products

In Polish jurisprudence, there arose the question whether it is possible to refuse to provide certain birth control products for reasons of conscience. Assessing this requires an overview of the jurisprudence and detailed regulations at a level that is not possible in this paper. I am endeavouring only to use the case decisions of the Hungarian Constitutional Court in a principled constitutional approach to define the aspects that help to decide the question, and to examine how the image of society influences the perception of the problem.[15]

1.4.1. Decisions of the Hungarian Constitutional Court on Freedom of Conscience

It follows from the freedom of conscience that the state cannot force anyone into a situation that would bring them into conflict with themselves, i.e., with that which is incompatible with some essential belief that defines their personality. The state has the duty not only to refrain from such coercion, but also to enable alternative behaviour within reasonable limits.[16]

[15] Of course, the collectivist social view can also hold a pro-choice view, even then the previous statements are true, just in the opposite way.
[16] Decision of the Constitutional Court, 64/1991. (XII. 17.).

Full freedom of conscience lasts as long as it does not affect others. If the conviction also affects a third party, the right limitation test must be used to decide whether the practice or limitation of the conduct should be allowed.

The recurring question in constitutional democracies is whether citizens can be exempted from laws that set out general obligations, citing their conscience or religious views. (Can they use intoxicating substances for religious ceremonies; when they are in the army, can they wear clothing required by religion; can they deviate from the rules on marriage and family relationships, such as monogamy? etc.) The "comparative burden test" differs in the case of those whose freedom of conscience and religion are also restricted by the provisions. On the one hand, the principle of the rule of law must be taken into account, that everyone is entitled to and bound by the same legal system, that is, the laws apply equally to everyone, and, due to equal dignity, they must not differentiate between individuals (a person of equal dignity). On the other hand, it should be kept in mind that one of the values of constitutional democracy is the diversity within the political community, the freedom and autonomy of individuals and their communities. Therefore, in general, it cannot be said that exceptions to general laws must always be made due to freedom of conscience or cult, nor that the rule of laws completely extends to the inner life of the religious community.[17]

The essence of the comparative burden test is that, on the one hand, it is necessary to examine how close the relationship is between the conviction of conscience and the behaviour in question: the closer the relationship, the more justified it is to make an exception to the general rule. The other aspect is how much the behaviour affects outsiders: the stronger the effect, the more it is justified to stick to the generally binding regulation.

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[17] Decision of the Constitutional Court, 39/2007. (VI. 20.).

1.4.2. APPLYING THE COMPARATIVE BURDEN TEST TO PHARMACIES

From the point of view of applying the test, the first question that arises is how closely the behaviour in question is linked to freedom of conscience. In connection with products related to birth control (contraception, post-event pills), the phrase "You shall not kill!" is often used. They claim that the use of the products is directly or indirectly an act against life. In this respect, of course, there is no consensus even among Christian communities, but it is necessary to point out: here, it is not the use of the products, but the distribution of the products, that is the behaviour that conscience objects to.

In general, it can be stated that the use of the product and participation in the use (distribution) do not have the same weight, but it cannot be disputed that the latter behaviour can also be linked to freedom of conscience.

As a second question, the extent to which the behaviour (refusal to distribute) affects outsiders arises. In this regard, it must also be taken into account that the conscience of individuals is different, and an individual can only exceptionally impose his conscience on others. What criteria can be used to decide to what extent the conduct affects third parties?

a) Nature of the market. At the case of pharmacies, the state needs to take an active position: they need to ensure that medical products will be accessible for those who need them. In such a market the service provider (the pharmacist) is less in a position to make free decisions. Unlike open markets, the pharmacist has an obligation to serve the product.
b) Nature of the preparation. One of the primary aspects is what kind of product it is, and in this regard, birth control pills and after-pills are not considered the same. In the former case, the preparation can be replaced, but in the latter case, failure to use the product leads to implantation of the foetus, thus leading to pregnancy. The latter therefore has a greater impact on third parties.
c) The supply market. The consumer has no subjective right to buy a product in a particular pharmacy. If there are several

pharmacies available to the consumer within easy reach (i.e., it does not cause a serious burden to switch to another), then this rather justifies the reservation of conscience.

d) Advance warning. The conduct affects third parties to a lesser extent if the pharmacy has indicated in advance which products it does not wish to sell, than if the refusal to distribute is the result of a case-by-case decision. If the pharmacy provides information, especially if it already does so when the operating license is granted, then the consumer cannot reasonably claim that he trusted the delivery of the product.

1.5. *De Lege Ferenda* Suggestion

There are several approaches to a society. Even in a European context, there are great varieties of societies; they differ according to their history, culture, population, etc. All these differences affect human rights. As a consequence, there are no general answers for human rights issues, given that the answer might be different in different times for different societies. It is also context related if the law should support the individual conscience in particular cases. Scientific papers can only add an "educated guess" to the evaluation. In item 1.4, the paper strove to provide an educated guess.

In general, considering all the above, I find it less likely that pharmacists claiming solely their freedom of conscience can refuse to provide the product the costumer wishes to buy. However, it is worth stipulating a piece of legislation that balances between pharmacists' conscience and the consumers' need for the product. The regulation may provide conscientious objection for several products, yet the pharmacist may warn the customer in advance for not selling certain products and advise them where they can buy the products they themselves do not wish to sell.

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Chapter 2. The Pharmaceutical Conscience Clause Under Polish Legislation

2.1. Introduction

The topic of the pharmacist's conscience clause has recently been frequently present in public space in Poland. The public debate was caused by a renewed discussion about the conscience clause in medical professions, especially in the context of possible changes regarding the decriminalisation of abortion. The pharmaceutical conscience clause is also indirectly related to this issue. Among the many examples of its possible use, the most frequently cited were issues related to contraceptives and early abortion. Even though many circles consider these topics to be similar and undertaken together, the law requires a clear distinction between the medical and pharmaceutical areas.[1]

The profession of a pharmacist is based on exercising control and advising on aspects related to medicinal products, individual selection of preparations, dosages as well as interactions with food

[1] In Poland, the discussion on conscientious objection for pharmacists is mainly reduced to the dispensing by pharmacists of contraceptive preparations in the broadest sense, including postcoital contraception, which prevents the blastocyst from implanting in the uterine wall. Products, preparations made from cell lines derived from aborted human foetuses and preparations used for euthanasia are also mentioned outside Poland.

ingredients and other drugs. The primary duty of a pharmacist is to protect health and life. There are no doubts here about drugs that restore the physiologically normal state, such as anti-inflammatory drugs, antihypertensive drugs, antibacterial drugs, etc. The situation is different in the case of hormonal contraception, especially post-coital contraception, the mechanism of which is to prevent the embryo from implanting in the uterus. Some actions of hormonal contraception are ethically controversial. Most often, it is associated with inducing a miscarriage and inhibiting the development of a potentially viable embryo. Often, patients are not even informed by doctors about this effect, and the information contained in the leaflets attached to the preparations is general, unclear and unreliably formulated, or even omits this phenomenon.[2]

The Pharmaceutical Law Act[3] does not include the concept of "conscience clause", which would make it possible to refuse to sell a medicinal product on grounds of conscience. At the same time, however, the Constitution of the Republic of Poland provides for freedom of expression, thought and conscience as one of the most important and basic freedoms guaranteed by the Constitution. It should be emphasised that freedom of speech, freedom of thought and freedom of conscience are necessary freedoms, without which human rights and freedoms would be severely limited. Taking into account the respect for individual rights in the light of the Constitution, it seems appropriate to allow the possibility of a pharmacist refusing to sell contraceptive drugs invoking the "conscience clause", while the entrepreneur running a pharmacy in which such a situation occurs must ensure the sale of contraceptive medicinal products by another pharmacist.[4]

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[2] A. Magowska, *Prawo farmaceutów do sprzeciwu sumienia*, "Czasopismo Aptekarskie" 2011, t. 18, nr 4, pp. 14–17; A. Magowska, *Prawo farmaceutów do sprzeciwu sumienia*, "Czasopismo Aptekarskie" 2008, t. 15, nr 1, pp. 15–18.

[3] Act of 6 September 2001. Pharmaceutical Law (Dz. U. Nr 126, poz. 1381 z późn. zm.; 2002 r. Nr 113, poz. 984; Nr 141, poz. 1181; Nr 152, poz. 1265).

[4] M. Prusak, *Konflikt sumienia katolickiego farmaceuty w praktyce aptecznej*, "Teologia i Moralność" 2013, nr 2(14), pp. 35–49.

There is no regulation in pharmaceutical law similar to that contained in the Act on the professions of physicians and dentists,[5] which allows for refusal to sell a medicinal product on grounds of conscience. Also, the ethical standards codified in the Code of Ethics for Pharmacists of the Republic of Poland do not provide for such a possibility.[6] Taking into account the purpose of the institution, which is the "conscience clause", i.e., protection of moral integrity, it is also argued that it is difficult to indicate a moral norm that would be violated as a result of the sale of medicinal products.

2.2. The Legal Basis of the Pharmaceutical Conscience Clause

The conscience clause is a norm that allows certain people to exercise conscientious objection in accordance with the established rules. Conscientious objection is the right to refuse to perform an obligation arising from the provisions of state law. There is no provision in the current pharmaceutical law that would enable a pharmacy employee to invoke the conscience clause. Only doctors and nurses can use this option.[7] The justification for invoking conscientious objection in professional practice may be freedom of conscience, which is a fundamental right of a human being resulting from his or her dignity.[8]

The European Convention on Human Rights (Art. 9), the International Covenant on Civil and Political Rights (Art. 18) and the Universal Declaration of Human Rights (Art. 18) are acts

[5] Act on the profession of doctor and dentist of 5 December 1996 (Dz. U. 1997 Nr 28, poz. 152).

[6] Resolution No. VI/25/2012 of the 6th National Congress of Pharmacists of 22 January 2012 on the adoption of the Code of Ethics of Pharmacists of the Republic of Poland.

[7] Article 39 of the Act of 5 December 1996 on the medical profession (Dz. U. 1997 Nr 28, poz. 152), Article 12 of the Act of 15 July 2011 on the nursing and midwifery profession (Dz. U. 2011 Nr 174, poz. 1039).

[8] M. Drozd, *Prawo farmaceuty do sprzeciwu sumienia w świetle obowiązujących regulacji prawnych*, "Studia z Prawa Wyznaniowego" 2013, t. 16, pp. 267–280.

of international law guaranteeing freedom of conscience. In Poland, this right is ensured by the Constitution of the Republic of Poland (Art. 53 sec. 1), the Act on Pharmacists (Art. 21), and the Code of Ethics for Pharmacists of the Republic of Poland (Art. 3).

On the other hand, it should be noted that the terms "pro-life pharmacy" or "pharmacist's conscience clause" do not exist in Polish law.[9] Actions taken in practice by some pharmacies or pharmacists, which would seem logical and the simplest, i.e., referring to the lack of specific medications, are contrary to generally existing law. The Regulation of the Minister of Health of 2002, in force until 2018, on dispensing medicinal products and medical devices from pharmacies indicates situations in which the sale of a medicine may be refused, including: due to reasonable suspicion as to the authenticity of the prescription, the expiry of its validity period or the fact that the person who presented the prescription for dispensing is under 13 years of age. These grounds partially coincide with the grounds for refusal to dispense a medicinal product by a pharmacist, as referred to in pharmaceutical law. Additionally, it indicates a situation in which the release of the product may pose a threat to the patient's life or health and there is a justified suspicion that the medicinal product may be used for non-medicinal purposes. Therefore, a pharmacist may refuse to sell the product in circumstances strictly defined by law, which cannot be interpreted broadly, citing issues of conscience, faith or worldview.[10]

Referring to the provisions of pharmaceutical law, a person harmed by the operation of a pharmacy may also submit a complaint to the appropriate provincial inspectorate in connection with the limitation of the ability to use the health services to which he

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[9] According to the Pharmaceutical Law, there are three types of pharmacies: general pharmacies, hospital pharmacies and company pharmacies supplying treatment facilities. Its Article 95 obliges pharmacies open to the public to have medicinal products and medical devices in the quantity and assortment necessary to meet the health needs of the local population: "1. Pharmacies open to the public shall be obliged to have medicinal products and medical devices in the quantity and assortment necessary to meet the health needs of the local population."

[10] Article 96(5) of the Pharmaceutical Law.

is entitled by refusing to fill the prescription and import the medicine. The result of the proceedings may be the withdrawal of the license to operate a pharmacy.[11]

Each pharmacy acts as a service provider, so it is liable for refusing to provide services under the Code of Petty Offenses, which provides for a fine for an entity that, professionally engaged in the provision of services, intentionally and without justified reasons refuses to provide the services to which it is obliged.[12] Even though prohibited practices concern the sale not only of hormonal contraceptive drugs, but also of condoms, only the former situation should be classified as discrimination on grounds of gender. This is an additional qualification subject to penalty, because hormonal pills are, in principle, contraception for women, which in Poland is only available by prescription. A condom is a product available without a prescription, easily available also outside pharmacies, so blocking sales by a pharmacy, although it may constitute an offense, is difficult to analyse in terms of exclusion. Moreover, other provisions related to gender discrimination should also be considered in this context. It is worth noting, for example, the Act of 2010 on the implementation of certain provisions of the European Union in the field of equal treatment, which introduces a prohibition of discrimination on the basis of gender with regard to access to and conditions of use of services if they are offered to the public.[13] Therefore, a person to whom a pharmacist refuses to sell medicinal products intended to prevent pregnancy, regardless of whether they are pills, contraceptive patches, the so-called morning-after pill or hormonal intrauterine device, has the right to file a claim for compensation against the pharmacy in a civil court. Importantly, in this type

[11] Article 108(1) para. 2 in connection with Articles 112(3) and 96(5) of the Act of 6 September 2001 and Article 95(3) of the Pharmaceutical Law.

[12] Article 138 of the Code of Offences. states: 'Whoever, when professionally engaged in the provision of services, demands and collects for the provision of services a payment higher than the one in force, or intentionally refuses, without justifiable reason, to provide a service to which he is obliged, shall be subject to a fine.'

[13] Act of 3 December 2010 on the implementation of certain provisions of the European Union on equal treatment (Dz. U. z 2010 r. Nr 254, poz. 1700).

of proceedings, a shifted burden of proof applies. This means that the pharmacist will be able to exempt himself from liability only if he proves that no discrimination took place. The patient's obligation comes down to substantiating the accusation.[14]

The legal act that should be taken into account when assessing the possibility of exercising a pharmacist's freedom of conscience is the Act on family planning, protection of the human foetus and conditions for allowing termination of pregnancy, according to which every citizen has the right to responsibly decide about having children and the right to access the information, education, guidance and resources to exercise this right. Therefore, the claim that the pharmacist's freedom of conscience is in any case more important than civil rights and the patient's rights to access medicinal products, in accordance with the provisions contained in this document, is erroneous.[15]

The Pharmacists' Code of Ethics guarantees pharmacists personal responsibility for their work and freedom to make their decisions in accordance with their conscience. However, please remember that this does not constitute generally applicable law. It is a deontological document whose sole purpose is to clarify the rules and moral principles that pharmacists should follow in their daily work. Attention should be paid to all regulations in the Code of Ethics, according to which when dispensing a medicinal product from a pharmacy, as well as during consultations, a pharmacist should consciously respect the patient's rights, such as the right to confidentiality or the right to respect for privacy. Taking into account the example of dispensing hormonal contraception, it is difficult in pharmacy practice, without violating these rights and without access to medical records, to prove that the drug will be used by the patient as a conscious form of contraception. Therefore, limiting

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[14] C. Strong, *Conscientious objection the morning after*, "The American Journal of Bioethics" 2007, No. 7, pp. 32–34; D.P. Flynn, *Pharmacist conscience clauses and access to oral contraceptives*, "Journal of Medical Ethics" 2008, No. 34, pp. 517–520.

[15] Act of 7 January 1993 on family planning, protection of the human foetus and conditions of permissibility of termination of pregnancy (Dz. U. 1993 Nr 17, poz. 78).

access to medicines without knowing the real health problem may stigmatise the patient. It should also not be forgotten that a pharmacist cannot express opinions to a patient that discredit the doctor's therapeutic behaviour, or make critical comments about medicinal products.[16]

2.3. Conscience Clause Project for Pharmacists

In May 2017, a draft conscience clause for pharmacists, pharmaceutical technicians and pharmacy owners by the Association of Catholic Pharmacists of Poland was submitted to the Polish Parliament. The authors asked for legislative action to regulate how pharmacists exercise the right to freedom of conscience guaranteed by the Constitution of the Republic of Poland. The change in regulations was supposed to result in a legal situation enabling pharmacists to exercise freedom of conscience while performing their work. The applicants emphasised that the right to conscientious objection is guaranteed to doctors, nurses and midwives, but it is not available to pharmacists, who play a special role in drug management. Members of the Association have also previously attempted to change legislation and interest parliamentarians in the ethical problems of pharmacists. As a result, two opinions of the Sejm Research Office were issued, which stated the need to introduce clear regulations enabling pharmacists to invoke conscientious objection. According to the authors of the petition, the lack of a normative statement introducing the construction of a conscience clause for pharmacists, pharmaceutical technicians and pharmacy owners is an omission contrary to the Constitution of the Republic of Poland.[17]

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[16] Article 4: 'Respect for the patient should be expressed in the equal performance of the Pharmacist's professional activities towards everyone who benefits from the Pharmacist's skills – regardless of age, sex, race, genetic equipment, nationality, religion, social affiliation, material situation political views or other circumstances.'

[17] https://orka.sejm.gov.pl/petycje.nsf/nazwa/145-232-17/$file/145-232-17.pdf (accessed on: 11.07.2024).

According to the content of the project, a pharmacist and a pharmaceutical technician could refuse to provide any pharmaceutical service referred to in Art. 4 sec. 3 of the Act of October 28, 2020 on the profession of pharmacist, if its implementation could threaten the life or health of the patient or other persons; dispensing a medicinal product, medical device or food for particular nutritional uses, if: he has a reasonable suspicion that: the medicinal product, medical device or food for particular nutritional purposes to be dispenses as part of a pharmaceutical service may be used for non-medical purposes, prescription, or demand that is to be the basis for issuing a medicinal product, medical device or food for particular nutritional uses is not authentic; there is a need to make changes to the composition of the prescription drug in the prescription, for which the pharmacist or pharmaceutical technician is not authorised, and it is not possible to communicate with the person authorised to issue prescriptions; at least 6 days have passed since the date of preparation of the medicinal product in the case of a prescription drug prepared on the basis of a prescription or pharmacy label; the person who presented the prescription for dispensing is under 13 years of age; there is reasonable suspicion as to the age of the person for whom the prescription was issued.[18]

[18] The draft amendment sent to the Speaker includes 5 amendments to the Pharmaceutical Law: (1) in Article 95 paragraph 1 is replaced by the following: "(1) Public pharmacies shall be obliged to have medicinal products and medical devices in the quantity and assortment necessary to meet the health needs of the local population, subject to paragraph (3a)." (2) In Article 95, paragraph 1a is replaced by the following: "1a. Pharmacies which are bound by the contract referred to in Article 41 of the Act of 12 May 2011 on reimbursement of medicines, foodstuffs for special nutritional purposes and medical devices shall also be obliged to ensure the availability of medicines and foodstuffs for special nutritional purposes for which a funding limit has been set subject to paragraph 3a." (3) In Article 95, the following paragraph 3a shall be inserted after paragraph 3: "(3a) The obligation indicated in paragraph 3 may be waived if the dispensing of the medicinal product sought is incompatible with the conscience of the pharmacist referred to in Article 88(1), or of a sole trader in the context of which he runs a pharmacy or of partners in a partnership running a pharmacy." (4) Article 96(5) is replaced by the following: "5. A pharmacist and a pharmacy technician may refuse to dispense a medicinal product if: (1) its dispensing may endanger the life or health of a patient; (2) in the case of a justified suspicion that a medicinal product

Both the above legal solutions of the proposed provision and the content of the justification for the Act do not indicate the possibility of extending the treatment of the above standard, so that a pharmacist or pharmaceutical technician may refuse to sell a medicinal product, medicinal device or food for special nutritional purposes when their use is inconsistent with his/her worldview. The above catalogue, which constitutes the basis for refusal to sell, is a measure to protect the safety of the patient/buyer against taking a substance that could pose a health hazard.[19]

At the end of November 2017, the Sejm Analyses Office issued a positive assessment of the project, emphasising that the right of pharmacists and pharmaceutical technicians to use the conscience clause should be absolutely guaranteed in the light of the Constitution and applicable provisions of international law.[20] The Supreme

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may be used for a non-medical purpose; (3) in the case of a justified suspicion as to the authenticity of a prescription or the demand 4) there is a need to make changes to the composition of the prescription drug, in the prescription, for which the pharmacist or pharmacy technician is not authorised, and it is not possible to communicate with the person authorised to issue prescriptions; 5) at least 6 days have elapsed since the date of preparation of the medicinal product – in the case of a prescription drug prepared on the basis of a prescription or a pharmacy label; 6) the person who presented the prescription for execution is under 13 years of age; 7) there is a justified suspicion as to the age of the person for whom the prescription was issued; 8) the dispensing of a medicinal product is inconsistent with the conscience of a pharmacist, a pharmaceutical technician or an entrepreneur running a sole proprietorship in which he or she runs a pharmacy or partners of a company running a pharmacy, subject to paragraph 3 and paragraph 4." The Speaker of the Sejm has already referred the petition to the Committee on Petitions for consideration (Article 126b(1) of the Rules of Procedure of the Sejm), https://www.sejm.gov.pl/Sejm8.nsf/agent.xsp?symbol=PETYCJA&NrPetycji=BKSP-145-232/17 (accessed on: 11.07.2024).

[19] K. Eide, *Can a pharmacist refuse to fill birth control prescription on moral or religious grounds*, "California Western Law Review" 2005, Vol. 42, pp. 121–148.

[20] P. Bachmat, *Opinia w sprawie wprowadzenia klauzuli sumienia do ustawy – Prawo farmaceutyczne*, Warszawa, dnia 8 listopada 2017 r., BAS-WAP-1885/17: "In the opinion of the author of this opinion, the submitted petition is well-founded, except that the final solution to the issue of the normative shape of the conscience clause available to pharmacists and other entities indicated in the draft should involve: – firstly, with an unambiguous regulation that medicinal products whose possession, or ensuring their availability, is excluded on the grounds of the conscience clause do not include medicinal products necessary

Pharmaceutical Chamber has decided not to issue a uniform position on the petition regarding the conscience clause for pharmacists, pharmaceutical technicians and pharmacy owners. Interestingly, the previous authorities of this institution had clear views on this subject. At the beginning of 2018, representatives of the pharmacy self-government decided that the proposals for changes to the Act presented by the Association of Catholic Pharmacists were too general and the scope of their action should be precisely defined. At the same time, as emphasised by the press spokesman of the Supreme Pharmaceutical Chamber, it is important to ensure patients' access to all medicines available in the Republic of Poland. The petition addressed to the Sejm regarding the introduction into the legal order of provisions allowing the establishment of a conscience clause for pharmacists was an independent initiative of the Association of Catholic Pharmacists. The spokesman emphasised that at no stage of creating this document was the pharmacy self-government asked for consultations or proposals for constructive solutions. The spokesman assured that the pharmacy self-government has been listening with great interest for a long time to the discussion related to the alleged right of pharmacists to apply the conscience clause, e.g., when dispensing contraceptives to patients. He also emphasised that the vast majority of the statements of the majority of people who are in favour of or against the introduction of this regulation have an emotional tone. They refer more to their own worldview and political preferences than to their professional knowledge. Therefore, due to the fact that the entire discussion arouses many emotions, also among medical professionals, the Supreme Pharmaceutical Chamber decided not to issue a uniform position on this matter. At the same time, it was emphasised that the pharmacy self-government respects the views and arguments of both the opponents and the supporters of the proposed solutions.

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to avert an emergency threat to the life or health of a patient; – secondly, with a guarantee to a patient who, despite having a valid prescription, is refused a medicinal product on the grounds of the conscience clause, of an alternative path of access to a medicinal product authorised in Poland."

It is worth mentioning that in 2015, the then president of the Supreme Pharmaceutical Council emphasised that pharmacists have the right to a conscience clause. He then put forward the thesis that the tasks related to practicing the profession of a pharmacist, which are aimed at protecting public health and serving patients with professional knowledge and experience, render unjustified any attempt to objectify the role of a pharmacist and deny him the right to conscientious objection. He derived this right from individual rights and not from socially granted privileges. According to the president of NRA, a pharmacist has the right to a conscience clause on the same terms as any other person, which he derived from Art. 53 of the Constitution of the Republic of Poland. Moreover, a pharmacist has the right to a conscience clause as a person performing a profession of special public trust, whose conduct guarantees the protection of human health and life. According to the former president of the NRA, this attitude is strengthened by the oath that must be taken by a pharmacist in respect of whom a resolution has been adopted by the Supreme Pharmaceutical Council or the district pharmacy council granting the right to practice the profession. Moreover, he considered groundless fears that pharmacists would abuse the right to the conscience clause and, as a result, patients' access to early abortive drugs and broadly understood contraception would deteriorate.[21]

Information about the draft law caused quite a stir in the media, resulting in numerous critical comments. Organisations representing the pharmacy market distanced themselves from the topic. In its position, the Association of Pharmacy Employers PharmaNET clearly recognised the issue of the pharmacist's work ethos as an issue beyond professional patient service.[22]

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[21] A. Górka, *Radykalizacja klauzuli sumienia a prawa reprodukcyjne w Polsce*, "Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne" 2022, nr 41, pp. 132–133.

[22] Marcin Piskorski, CEO, commented: "I represent entrepreneurs who own pharmacies. We try very hard to separate these two issues: the mercantile one, for which we are responsible, from this professional service to the patient, and here we believe very strongly in pharmacists and we do not penetrate these ethos issues, related to pharmaceutical care", explained Piskorski. "I wouldn't like to

Requests to amend the Pharmaceutical Law Act have not been taken into account by the national legislator. So far, no changes have been introduced in Poland that would guarantee pharmacists the possibility of refusing to sell medicines in situations where it would be contrary to their conscience.[23]

2.4. Current Legislation

Public pharmacies are obliged to stock medicinal products and medical devices in the quantity and range necessary to meet the health needs of the local population.[24] In addition, pharmacies that are bound by a drug reimbursement agreement are also obliged to ensure availability of drugs and food products for special nutritional purposes for which a financing limit has been established.[25]

It should be emphasised that a pharmacist dispensing a contraceptive in a pharmacy does not know for what purpose it was prescribed to the patient by the doctor. Moreover, a pharmacist and a pharmaceutical technician may refuse to dispense a medicinal product only if: its dispensing may pose a threat to the patient's life or health; in case of reasonable suspicion that the medicinal product may be used for non-medical purposes; in the event of reasonable suspicion as to the authenticity of the prescription or demand; there is a need to make changes to the composition of the prescription drug in the prescription for which the pharmacist or pharmaceutical technician is not authorised, and it is not possible to communicate with the person authorised to issue prescriptions; at least 6 days have passed since the date of preparation

comment on that. These are not our issues. We are concerned with the market, not the ethos."

[23] M. Olszówka, *Analiza projektu ustawy o zmianie ustawy o zawodach lekarza i lekarza dentysty, ustawy o diagnostyce laboratoryjnej oraz ustawy o zawodach pielęgniarki i położnej, zawartego w druku senackim nr 1034/IX kadencja (sprzeciw sumienia)*, "Studia z Prawa Wyznaniowego" 2019, t. 22, pp. 367–371.

[24] Article 95(1) of the Pharmaceutical Law.

[25] Article 41 of the Act of 12 May 2011 on the Reimbursement of Medicines, Foodstuffs for Special Dietary Uses and Medical Devices.

of the medicinal product – in the case of a prescription drug prepared on the basis of a prescription or pharmacy label; the person who presented the prescription for dispensing is under 13 years of age; there is reasonable suspicion as to the age of the person for whom the prescription was issued.[26]

The current legislation strictly defines when a pharmacist has the right, or even the duty, to refuse to dispense a medicinal product from a pharmacy, but it does not provide for situations where the dispensing of a medicine would be contrary to the ethics, morality or faith of the pharmacist filling the prescription and therefore against his or her conscience.[27]

At the request of the manager, the provincial pharmaceutical inspector may exempt a pharmacy from selling certain narcotic drugs and psychotropic substances.[28] The same provision prevents a pharmacist from refusing to sell a medicine when it is actually out of stock. In such a situation, if a general pharmacy lacks the medicinal product you are looking for, including a prescription drug, the pharmacist should ensure its purchase in that pharmacy within the time agreed with the patient. The pharmacists' argument that the medicine is not available in wholesalers is easy to verify, because the entity running a pharmacy, pharmacy point or hospital pharmacy department cannot fulfil the obligation to provide access to a medicinal product subject to prescription and is obliged to inform about it within 24 hours via the Integrated System for Monitoring the Trade in Medicinal Products by the locally competent provincial pharmaceutical inspector, who determines the reasons for this lack.[29]

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[26] Article 96(5) of the Pharmaceutical Law.

[27] M. Gryka, A. Piecuch, M. Kozłowska-Wojciechowska, *Klauzula sumienia w zawodzie farmaceuty*, "Farmacja Polska" 2014, t. 70, nr 6, p. 316; B. Kmieciak, *Swoboda działalności gospodarczej aptekarza: uwagi prawne oraz aksjologiczne*, [in:] D. Bobak et al. (red.), *Efektywna działalność gospodarcza w Polsce. Kompendium przedsiębiorcy i inwestora*, Warszawa 2017, pp. 185–203.

[28] Article 95(2) of the Pharmaceutical Law.

[29] https://www.gov.pl/web/gif/zintegrowany-system-monitorowania-obrotu-produktami-leczniczymi-zsmopl (accessed on: 11.07.2024).

There is no regulation in pharmaceutical law similar to that contained in the Act on the professions of physicians and dentists, which allows for refusal to sell a medicinal product on grounds of conscience. Also, the ethical standards codified in the Code of Ethics for Pharmacists of the Republic of Poland do not provide for such a possibility. Also, taking into account the purpose of the institution, which is the "conscience clause", i.e., protection of moral integrity, it is difficult to indicate a moral norm that would be violated as a result of the sale of medicinal products.[30]

Poland, as a member state of the Council of Europe, is obliged to comply with the standards set by the European Court of Human Rights. The Tribunal referred to the issue of the possibility of using the conscience clause by pharmacists in the light of Art. 9 of the Convention in Pichon and Sajous v. France.[31] The Tribunal decided to reject the complaint, taking the view that as long as the sale of contraceptives is legal, they can be sold with a doctor's prescription and only in pharmacies, pharmacists cannot give priority to their views and impose them on other people as an excuse for refusing to sell contraceptive pills in pharmacy. The decision of the Court of Justice in Strasbourg, although it concerns France, applies by analogy to the operating standards of national pharmacies. Therefore, the state's response to prohibited practices of pharmacies cannot be their legalisation, but a decisive response of the authorities controlling

[30] M. Sobas, *Poszukując podstaw prawnych odmowy wydania leku przez aptekarza — czyli kilka uwag na tle wolności sumienia polskiego farmaceuty*, "Roczniki Administracji i Prawa" 2019, nr 19 (zeszyt specjalny), pp. 67–83.

[31] French pharmacists refused to sell prescription contraceptives to three women. The national courts found the pharmacists' action to be unlawful, agreeing that as long as the pharmacist is not expected to take an active part in the manufacture of the product, moral grounds cannot exempt anyone from the obligation to sell imposed by law on all traders. In addition, it was pointed out as a relevant circumstance in the case that this was the only pharmacy in the village where the applicant patients lived. In closing the proceedings, the Court of Cassation emphasised that "personal convictions cannot be legitimate reasons for pharmacists having the exclusive right to sell medicines". The pharmacists complained to the ECtHR, claiming a violation of Article 9 of the Convention and maintaining that the principle of freedom of thought, conscience and religion enshrined therein makes a pharmacist entitled to refuse to stock contraceptives whose use conflicts with his religious views.

pharmacies aimed at enforcing the standards of national and international law. The European Court of Human Rights has clearly indicated that preventing a pharmacist from refusing to sell medicines does not constitute a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Tribunal noted that as long as the sale of contraceptives is legal, available on the basis of a prescription issued by a doctor, and these preparations can only be purchased in a pharmacy; pharmacists have no right to impose their moral beliefs on others by refusing to sell the drug.[32]

Council of Europe Resolution 1763, the 'Right to invoke conscientious objection in health care', sets out standards for access to conscientious objection in the health professions.[33] The overarching aim of the resolution is to guide the Member States of the Union towards the protection of human life, in all its aspects, both public and private. The resolution calls for respect for the right to conscientious objection of persons who do not wish to participate in abortion procedures, euthanasia or contribute to actions that may result in the death of an embryo or human foetus. According to the resolution, persons who refuse to participate in these procedures may not be pressured, discriminated against, or held accountable for their decision. At the same time, the Parliamentary Assembly of the Council of Europe stressed the need to guarantee the right to conscientious objection clause in local legislation in such a way as to ensure that every patient has access to treatment.[34]

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[32] A. Lamačková, *Conscientious objection in reproductive health care: Analysis of Pichon and Sajous v. France*, "European Journal of Health Law" 2008, No. 15, pp. 7–43; Judgment of the European Court of Human Rights in Pichon and Sajous v. France of 2 November 2001, no. 49853/99. http://strasbourgconsortium.org/document.php?DocumentID=4942 (accessed on: 11.07.2024).

[33] Council of Europe Resolution 1763 on conscientious objection (the right to invoke the conscientious objection clause in health care) adopted by the Parliamentary Assembly of the Council of Europe at its 35th session on 7 October 2010. Available online: http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta10/eres1763.htm (accessed on: 11.07.2024).

[34] M. Campbell, *Conscientious objection and the Council of Europe*, "Medical Law Review" 2011, No. 19, pp. 467–475; S. Sadowska, *Znaczenie rezolucji Rady*

2.5. Positions for and Against the Pharmaceutical Conscience Clause

The subject matter referred to has been present in the legal and public debate for several years, if not decades. The public exchange of opinions was attended by, among others, The Ombudsman and the Chief Pharmaceutical Inspector; the Minister of Health also expressed an official position on this matter. Interest in the topic of the clause was increased by the introduction of prescriptions for contraceptives and the petition of the Association of Polish Catholic Pharmacists proposing the introduction of a conscience clause in the Pharmaceutical Law Act.[35]

In 2012, the Chief Pharmaceutical Inspector presented the position that there is no right to refuse to sell a medicinal product invoking the 'conscience clause'. In the event of persistent failure to meet the needs of the population in terms of dispensing medicinal products, the authorisation to operate a pharmacy may be withdrawn. Pharmacies do not have the right to limit the sale of medicines, except for those specified in the pharmaceutical law, i.e., narcotics of the l-N group and psychotropic substances of the ll-P group. However, taking into account the respect for individual rights in the light of the Constitution, in accordance with the more lenient position of the Chief Pharmaceutical Inspector of 2017, it seems appropriate to allow the possibility of a pharmacist refusing to sell contraceptives invoking the "conscience clause". However, an entrepreneur running a pharmacy in which such a situation occurs must ensure that contraceptive medicinal products are sold by another pharmacist. GIS made a similar statement when commenting on media reports that there are pharmacies in Poland that do not sell contraceptives due to the "conscience clause" being invoked by pharmacists working

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Europy nr 1763 w sprawie klauzuli sumienia w prawie polskim i międzynarodowym, "Życie i Płodność" 2010, nr 4, pp. 7–11.

[35] M. Prusak, *Sprzeciw sumienia farmaceutów*, "Teologia i Moralność" 2009, nr 6, pp. 219–233; M. Białkowska, *Sumienie czyste, używane*, "Przewodnik Katolicki" 2011, nr 13, https://www.przewodnik-katolicki.pl/Archiwum/2011/Przewodnik-Katolicki-13-2011/Spoleczenstwo/Sumienie-czyste-uzywane (accessed on: 11.07.2024).

there. Therefore, contrary to its "old" position, GIF allows for the use of the conscience clause by pharmacists, as long as the patient's right to health services is not limited (i.e., the patient is referred to another pharmacy), which in practice may be a problem, especially in smaller towns. It is worth noting that GIF did not indicate the legal basis for the obligation to "redirect" the patient to another pharmacy, and in the current legal situation there is no regulation in this area.[36]

In 2013, the Bioethics Committee of the Presidium of the Polish Academy of Sciences expressed a more radical and decisive tone, stating in its position that "despite the demands made by apothecaries and pharmacists, Polish law does not grant representatives of these professions the right to invoke the conscience clause". The position also emphasises that practicing the profession of a pharmacist, unlike the profession of a doctor, is not related to undertaking activities that directly harm or directly threaten a specific good that, according to a given person's moral beliefs, should be protected (e.g., the life of a foetus). In the opinion of the Committee, activities performed by a pharmacist (e.g., filling prescriptions) cannot therefore be covered by the conscience clause.[37]

It is also worth presenting the position of the Ombudsman, in whose opinion the practice of pharmacies not selling contraceptives due to the "conscience clause" invoked by pharmacists working there is contrary to applicable law and may lead to a limitation of patients' rights to health services. According to the Commissioner for Human Rights, the practice of not stocking a specific category of medicinal products for contraception by pharmacies is contrary to pharmaceutical law. This is especially important in smaller towns

[36] https://bip.brpo.gov.pl/sites/default/files/Odpowied%C5%BA%20GIF%20na%20pytanie%20o%20klauzul%C4%99%20sumienia%20w%20aptekach%2C%2015.05.2017.pdf (accessed on: 11.07.2024).

[37] *Position of the Committee on Bioethics at the Presidium of the Polish Academy of Sciences no. 4/2013 of 12 November 2013 on the so-called "conscience clause"*, "Law and Medicine" 2013, No. 52–53 (3–4), pp. 7–25: "II. Statutory regulation of the conscience clause 9. Under Polish law, the right to refuse to perform a health care service contrary to one's conscience is vested exclusively in a person practising the profession of doctor, dentist or the profession of nurse or midwife. The right to invoke the conscience clause is not available to representatives of other medical professions, in particular pharmacists."

where the possibility of purchasing medicines from another pharmacy is much more difficult. Moreover, the Ombudsman pointed out that since the pharmacist cannot check the purpose for which the doctor prescribed the contraceptive, and it does not necessarily have to be to prevent pregnancy, it is difficult to indicate that dispensing the medicine will pose a direct threat to some good. Therefore, it is questionable to consider such behaviour as violating the moral integrity of the pharmacist.[38]

In 2017, a group of MPs submitted an interpellation to the Minister of Health, asking, among others: about the compliance of a possible clause that could be introduced in connection with the petition submitted to Parliament with the constitutional principle of equality before the law. In response, the Minister of Health pointed out that in the current legal situation, the refusal to dispense a drug in a pharmacy or pharmacy point is only allowed in the cases specified in the Pharmaceutical Law and the in the cases specified in the Regulation of the Minister of Health of 2002 on the dispensing of medicinal products and medicinal devices from pharmacies. As indicated by the Minister of Health in the letter, a pharmacist has the right to refuse to fill a prescription or dispense a drug "in situations that raise doubts or suspicions as to their legality or safety", and all actions taken by the pharmacist "should be done with the patient's well-being in mind".[39]

There are many voices in the public space that support the introduction of a conscience clause for pharmacists, to the same extent as doctors.[40] Due to the lack of such statutory solutions, supporters of the right to refuse benefits due to beliefs invoke freedom of conscience and constitutional solutions. One of the institutions actively working for freedom of conscience and religion is Ordo Iuris. One of the last and most high-profile cases related to

[38] https://bip.brpo.gov.pl/pl/content/rzecznik-pisze-do-ministra-zdrowia-w-sprawie-klauzuli-sumienia-aptekarzy (accessed on: 11.07.2024).

[39] https://www.sejm.gov.pl/Sejm8.nsf/InterpelacjaTresc.xsp?key=7196FF04 (accessed on: 11.07.2024).

[40] M. Prusak, *Sprzeciw sumienia farmaceutów – Aspekty etyczne, teologiczne i prawne*, Kraków 2015; M. Prusak, *Sprzeciw sumienia w praktyce aptecznej*, [in:] P. Stanisz, J. Pawlikowski, M. Ordon (red.), *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, Lublin 2014, pp. 211–226.

the work of pharmacists was the defence by lawyers from this institution of a pharmacist from Kraków who, in 2021, refused to sell EllaOne pills to one of her clients. The woman justified her decision with the conscience clause and added that the substance contained in the drug may pose a threat to the unborn child. Due to this, the District Pharmaceutical Court in Kraków sentenced the pharmacist to a reprimand. The punished pharmacist filed an appeal against the court's judgement, in which she stated that she was not able to exercise her constitutional right to defence because the court did not give her the opportunity to provide explanations. The case was joined by the Chief Ombudsman for Professional Responsibility and lawyers from the Ordo Iuris Institute, who asked for the judgement to be annulled and the case to be reconsidered by the court of the first instance. Attention should be paid to the arguments of lawyers who emphasised during the proceedings that "the refusal to sell early abortive drugs cannot be considered a violation of the provisions of pharmaceutical law at all. This is contrary to the constitutionally guaranteed freedom of conscience." According to Ordo Iuris activists, the right of pharmacists or pharmacy owners to invoke the conscience clause is guaranteed by Art. 53 sec. 1 of the Constitution of the Republic of Poland. According to the law, everyone must be guaranteed freedom of conscience and religion. According to Ordo Iuris, a patient has no right to demand the issuance of early abortive drugs if the pharmacist invokes the conscience clause, because this would mean giving the patient the right to impose his moral beliefs on the pharmacist and forcing him to behave against his conscience. However, a situation where a pharmacist refuses to sell contraceptives or early abortive drugs cannot be considered as imposing the pharmacist's views on the patient. In 2023, after re-running the proceedings, the District Pharmaceutical Court in Kraków discontinued the proceedings. According to the court, the pharmacist's actions were characterised by negligible social harmfulness.[41]

[41] https://pulsmedycyny.pl/sad-umorzyl-postepowanie-w-sprawie-farmaceutki-ktora-odmowila-sprzedazy-ellaone-ordo-iuris-nie-daje-za-wygrana-1190375 (accessed on: 11.07.2024); https://ordoiuris.pl/wolnosc-sumienia/sad-umorzyl-postepowanie-przeciwko-farmaceutce-ktora-odmowila-sprzedazy-tabletek (accessed on: 11.07.2024).

2.6. Summary

In the light of the above-mentioned interpretation discrepancies, it should be stated that there is currently no clear statutory basis allowing pharmacists or pharmaceutical technicians to invoke the conscience clause when performing professional activities. Regardless of the statutory regulations, it should be noted that in one of its judgements the Constitutional Tribunal allowed for the possibility of a doctor invoking the conscience clause even in a situation where this clause would not be regulated by law. As the Tribunal pointed out: "The right of a doctor, like any other person, to refrain from actions contrary to his or her own conscience flows directly from the freedom guaranteed by the Constitution."[42]

According to the position of the Supreme Chamber of Pharmacy, a pharmacist has no right to refuse to dispense a medicine correctly prescribed in the prescription. In case of refusal, the pharmacy may even lose its license. Both the Pharmaceutical Law Act of September 6, 2001 and the Act of April 19, 1991 on Pharmacy Chambers place concern for the patient's well-being as the main goal of a pharmacist's work. Therefore, he should, on the one hand, ensure access to medicinal products, and on the other hand, limit it when there is a risk of using these products for purposes inconsistent with medicinal recommendations.[43]

The Pharmaceutical Law Act specifies that pharmaceutical services provided in a generally accessible pharmacy include, among others, dispensing medicinal products and medical devices. In addition, this legal regulation obliges generally available pharmacies to stock medical products in the quantity necessary to meet the needs of the local population. At the same time, the above-mentioned Act stipulates that a pharmacist and a pharmaceutical technician may refuse to dispense a medicinal product if its dispensing may pose a threat to the patient's life or health. This point is often cited

[42] Judgment of 7 October 2015, ref. K 12/14.

[43] E.W. Evans, *Conscientious objection: A pharmacist's right or professional negligence?*, "American Journal of Health-System Pharmacy" 2007, Vol. 64, pp. 139–141.

by supporters of the conscience clause, justifying their position by protecting a conceived human being at an early stage of its development. However, it should be borne in mind that contraceptives are often also used for therapeutic purposes, e.g., in the treatment of teenage acne. Recognising the motivation for taking a specific drug may be a significant problem. The solution to this problem may be the introduction of regulations similar to those in force in other countries, e.g. Great Britain.[44] Prescriptions are marked with special signs indicating the purpose for which the preparation was prescribed and determining its reimbursement. The availability of this type of preparations is necessary considering their use not only for contraceptive but also medicinal purposes. A significant problem here is the pharmacist's recognition of the purpose of taking them. The solution here is access for pharmacists actively involved in the treatment process to the patient's medical records or the introduction of currently used ones.[45] This would provide protection against invoking the conscience clause in the event of therapeutic use of the drug.[46]

The pharmacist, based on his or her own knowledge, is obliged to decide whether a product may pose a risk to the patient's life or health and, if he or she has such suspicions, refuse to dispense it. A factor that makes it difficult for the pharmacist to identify or verify situations in which the prescribed therapy could potentially endanger the patient's life or health is the lack of access to medical information about the patient, such as the patient's medical history, the indications for which the preparation was prescribed, information about other preparations used or conditions that may constitute

[44] Z. Deans, *Conscientious objection in pharmacy practice in Great Britain*, "Bioethics" 2013, No. 1, pp. 48–57. Royal Pharmaceutical Society of Great Britain, Code of ethics for Pharmacists and Pharmacy Technicians, 1 August 2007.

[45] For example, in the UK, appropriate labelling on the prescription identifying the purpose of the prescription and regulating payment (hormonal preparations used for therapeutic purposes, e.g., for acne, are paid for, but not as contraceptives).

[46] P. Merks, K. Szczęśniak, D. Świeczkowski et al., *Klauzula sumienia dla farmaceutów w środowisku farmaceutów praktykujących w Polsce i Wielkiej Brytanii*, "Farmacja Polska" 2015, t. 71, nr 8, pp. 2–9.

contraindications to the use of the product in question. This article is sometimes used by pharmacists who do not want to dispense hormonal contraception, especially postcoital contraception, arguing the refusal to dispense the product with a potential anti-embryonic effect that leads to the death of the embryo.[47]

Ethical dilemmas always require difficult decisions and should lead to compromises. Maybe it is worth using your extensive knowledge about the medicinal product and, through reliable information provided to the patient, make him/her aware of the action, use, storage, and possible side effects of the drug used? Will a professional and proactive approach to the patient combined with his/her education assuage our conscience a bit?

The degree of controversy over the issue of the possible introduction of a conscience clause for pharmacists into the applicable regulations can be seen by analysing the information that appeared in the Polish media in 2020. In the press article, the author stated that if the act amending the pharmaceutical law adopted by the Sejm comes into force, it will be possible to legally refuse, in a pharmacy, among others the selling of condoms. This fake news was quickly spread by social media users. Despite a quick reaction from even the Supreme Pharmaceutical Chamber, the wave of negative opinions and social reactions could not be stopped.[48] The pharmacy self-government clearly emphasised that the draft act on the pharmacist profession extends the right to refuse to dispense a product to include medical devices, but only in special cases when they can be used for non-medical purposes. This change was caused by the increasing use of products with the status of medical devices that were previously registered as medicines. It was clearly stated in the official position that such actions constitute manipulation and an attempt to discredit the draft law.

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[47] J. Dziekoński, *Sumienie w aptece*, "Magazyn Aptekarski" 2011, nr 5(94), pp. 14–17.

[48] https://www.polityka.pl/tygodnikpolityka/kraj/1977478,1,prezerwatywy-nie-sprzedam.read (accessed on: 11.07.2024); https://www.nia.org.pl/2020/11/04/stanowisko-naczelnej-izby-aptekarskiej-w-sprawie-rozpowszechniania-nieprawdziwych-informacji-dotyczacych-rzekomego-wprowadzenia-klauzuli-sumienia-do-zapisow-ustawy-o-zawodzie-farmaceuty/ (accessed on: 11.07.2024).

In the analysing of Polish legal regulations relating to the conscience clause, attention should be paid to Art. 96 sec. 4 of the Pharmaceutical Law, which states that "a pharmacist and a pharmaceutical technician may refuse to dispense a medicinal product if its dispensing may pose a threat to the patient's life or health", which also guarantees protection of a conceived human being at an early stage of its development. The provision of Art. 95 sec. 1 of the Pharmaceutical Law, which specifies the position of pharmacies in terms of supplying patients with medicinal products, is invoked against the right to refuse to issue a product:

> Generally accessible pharmacies are obliged to stock medicinal products and medical devices in the quantity and range necessary to meet the health needs of the local population, with particular emphasis on reimbursed medicines, for which a price limit has been set pursuant to separate regulations, subject to section 2.

However, it should be noted that in the matter of contraception, the obligation to provide citizens with free access to methods and means of conscious procreation applies to administrative bodies, which do not include pharmacies.

In the discussion regarding conscientious objection, the rights and duties of the pharmacist are intertwined with the rights of the patient. The health and well-being of the patient, which is the most important goal of all medical professionals, is, according to some, put at odds with the pharmacist's views on morality or religion. The autonomy of the patient is relevant here, but also the autonomy of the pharmacist in charge of dispensing medical prescriptions.[49] The interests of the patient do not always coincide with the moral convictions of the pharmacist and, when making legal changes, it is important to remember that the law should protect both the beliefs of pharmacists and the rights of patients. However, it should be emphasised that the discussion on pharmacists' conscientious objection has not

[49] T. Biesaga, *Autonomia lekarza i pacjenta a cel medycyny*, "Medycyna Praktyczna" 2005, nr 6, pp. 20–24.

only a practical dimension, but also a philosophical one –posing the question of whether the pharmacist is a profession of conscience whose role goes beyond passively supplying the population with medicines.[50]

2.7. *De Lege Ferenda* Conclusions

A pharmacist's duty is to protect the life and health of patients, therefore pharmacists who follow this principle should have the right to choose. There is no doubt that the legislation of the conscience clause, as well as the introduction of universal pharmaceutical care, constitutes a significant challenge on the Polish market.

The individual's right to freedom of conscience and religion is the basis of the democracy functioning in our country, and it is on this that the conscience clause is based, not on Christian rules, with which it is often identified. It guarantees the possibility of opposing certain practices both for Catholics and for people who are not guided by a religion but by ethical principles and scientific evidence. This provision does not limit women's freedom and does not legally assess hormonal contraception. Such drugs would still be sold in pharmacies, while respecting the moral values of the pharmacists dispensing them.

It should be noted that the right to refuse the sale of drugs would not only apply to hormonal contraception, but also to other drugs whose use may be harmful to the patient, e.g., botox, or raise controversy, such as euthanasia kits prepared in hospital pharmacies or available in open pharmacies, drugs used to assist suicide, or preparations used in the in vitro fertilisation, in which the process destroys many embryos.

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[50] M. Gryka, A. Piecuch, M. Kozłowska-Wojciechowska, *Klauzula sumienia w zawodzie farmaceuty*, "Farmacja Polska" 2014, t. 70, nr 6, p. 320; W. Głusiec, *Klauzula sumienia dla farmaceutów. Analiza opinii wydanej przez Comiteto Nazionale per la Bioetica*, "Diametros" 2012, nr 32, pp. 62–76, http://www.diametros.iphils.uj.edu.pl/pdf/diam32glusiec.PDF (accessed on: 11.07.2024).

One of the arguments in favour of the introduction of a pharmacist's conscience clause is the assumption that conscientious objection is a legal standard in medicinal professions and granting it to Polish pharmacists would significantly increase the prestige of the profession, putting it on an equal footing with other healthcare professionals.[51]

It should be noted that due to the lack of a legal basis directly regulating the "pharmaceutical" conscience clause, using it may involve serious negative legal consequences for the pharmacist, i.e.:

- repeated refusal to sell a drug or fill a prescription may be considered a persistent failure to meet the needs of the population, which may potentially lead to the withdrawal of the license to run a pharmacy;
- refusing to sell a drug or fill a prescription may also potentially be considered an unlawful violation of personal rights in the form of the right to family planning;
- refusing to sell a drug without good cause may also be considered an offense and may result in a fine;

[51] The opinions of the pharmaceutical community regarding the introduction and application of the conscience clause in the profession are divided. In a survey conducted (for an article in Pielęgniarstwo Polskie) among pharmacists and pharmacy students in Poznań, 71% of the total ticked the answer confirming knowledge of the conscience clause. Of those working in pharmacies, 7% refuse to sell hormonal or mechanical contraception and 34% refuse to sell so-called emergency contraception. Support for the conscience clause initiative was declared by 50% of those working and 65% of pharmacy students. On the other hand, a survey of pharmacja.net users shows that 37% of respondents are among those who support a pharmacist's right to refuse to dispense medicines if it is against his or her views, 57% are against it, 4% have never thought about this issue. In contrast, in terms of public support, the vast majority of respondents (76%) are against giving pharmacists the right to refuse a prescription for contraceptives when it goes against their beliefs. Only 12% support this initiative. J. Baranowska, S. Baranowski, J. Kuchta, Z. Liwińska, *Stanowisko farmaceutów i studentów farmacji wobec klauzuli sumienia*, "Pielęgniarstwo Polskie" 2012, nr 4(46), pp. 187–189.

- refusal to sell medicines may also be considered a breach of employee duties, for which the employee is liable under labour law.[52]

In practice, a pharmacist who wants to use the conscience clause should take into account the fact that divergent opinions of authorities on the legal admissibility of refusing to dispense a drug motivated by religious or philosophical beliefs may also translate into divergent pharmaceutical inspection practices in the event of receiving a report of a violation of pharmaceutical law. It is also difficult to predict the direction in which the judicial practice of common courts will develop in the field of infringement of personal rights related to the refusal to sell contraceptives, in particular in the context of women's reproductive rights.

Given the above, it should be considered that:

- The pharmacy should stock all medicinal products, even if their dispensing raises an objection of conscience on the part of the pharmacist. If a particular product is not available in the pharmacy, the pharmacist is obliged to make it possible to purchase the preparation within the timeframe agreed with the patient.
- Otherwise, invoking the conscientious objection clause, the pharmacist would be entitled to refuse to dispense to the patient a product to which he is legally entitled and which he can only purchase from the pharmacy. In this context, doubts arise as to whether the pharmacist's right to conscientious objection should take precedence over the patient's right to free access to the preparation to which he is legally entitled.
- The health clause cannot be equated with the medical conscience clause.
- The conscience clause cannot be equated with conscientious objection.

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[52] J. Czekajewska, D. Langer, E. Baum, *Sprzeciw sumienia w zawodzie farmaceuty. Badanie opinii farmaceutów na temat klauzuli sumienia*, "Ruch Filozoficzny" 2022, nr 1, pp. 171–198; Centrum Badań Opinii Społecznej, Komunikat z badań – Klauzula sumienia lekarza i farmaceuty, Warszawa 2014, http://www.cbos.pl/SPISKOM.POL/2014/K_094_14.PDF (accessed on: 11.07.2024).

- The absence of a pharmacist conscience clause does not depreciate the position of the pharmacist profession by excluding it from the medical profession.
- Being a member of the medical profession, or the lack thereof, is not an argument conclusive of the right to conscientious objection.
- The pharmacist is neither responsible for the assignment of the medicine nor for the condition and health of the person who requests it. All responsibility rests with the doctor, who is not obliged by any order to prescribe any particular product. The pharmacist's task is limited to guaranteeing the proper functioning of the structure in which he works.
- Granting the pharmacist the right of conscientious objection on a legislative level, with regard to emergency contraception, would in fact mean giving him a double power. On the one hand, the pharmacist censures the action of a doctor who has issued a prescription based on his own knowledge and conscience. On the other, he is encroaching on the woman's private sphere by imposing his will on her.
- A conscience clause for pharmacies could lead to a situation in which a patient is unable to exercise his or her right to fill a prescription in his or her possession. The assumption that each pharmacy will guarantee the presence of at least one employee within its premises who does not invoke the 'conscience clause' when selling emergency contraception is, in practice, unlikely. This means that the legalisation of the right of conscientious objection for the pharmacist will in effect become the establishment of a kind of conscientious objection law for the pharmacy.
- The pharmacist does not have all the necessary information in the individual case to be able to update the conscientious objection in accordance with current knowledge, conscience and in the light of the law, and thus to refuse the doctor's request for a medicine and negate the patient's fundamental right to receive a pharmaceutical preparation.

The cited analysis leads to the following *de lege ferenda* postulates:

- The legal norms concerning the exercise of the profession of pharmacist should guarantee the possibility of asserting the rights arising from conscientious objection on the principles set out in the Constitution of the Republic of Poland. However, this does not constitute the introduction of a pharmaceutical conscience clause into the legal system.
- The absence of a separate conscience clause for pharmacists should be made clear.
- The absence of an institutional conscience clause for pharmacies should be made clear.
- It is worth discussing the differences in the positions and education of those working in pharmacies regarding their tasks and rights.
- Education should be provided on the rights of pharmacists, especially on the distinction between an institutional conscience clause and conscientious objection.

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Chapter 3. Freedom of Conscience of Teachers in Hungary

3.1. Introduction

In my previous study (*Freedom of Conscience and Public Employees in Hungary*) – in the context of the same research, which is "Freedom of Conscience in the Institutional Aspect", organised as part of the Polish-Hungarian Research Platform 2023 scientific project – I wrote about the most frequent areas of the freedom of conscience from the perspective of the Hungarian public sphere and especially public administration.

In my current study, I focus on civil servants, and within that group, a special category of teachers. I will have a closer look at the freedom of conscience of teachers, to see what the nodes and areas of particular interest are and what legal conflicts and possible methods of resolution are present in the legal system, within the case law and in the literature. Ultimately, I would like to answer the question of what are the new results and new institutions of legal development in the area under study – primarily in Hungary, but also internationally.

With regard to the methods and possible results of the research, we must clarify two important preliminary questions: on the one hand, the novelty of the study lies not so much in the institutions identified, but in their grouping, and on the other hand the nature

of the current conflicts of conscience cannot be inferred from legal cases alone, because some of them do not reach a legal type of resolution, i.e., they do not go to court, and others only become available after years of long proceedings. How then can this question be examined? In the international literature, there are, for example, several examples of publicly available termination letters of teachers that have been examined and used to draw conclusions. Those termination or resignation letters show the current situation relatively accurately. Using philosophical inquiry and document analysis, Santoro examined 15 publicly available teacher resignation letters from the United States that were published on the internet between 2012 and 2014 to examine the pedagogical, professional, and democratic components of craft conscience.[1]

Moreover, I would like to come up with a short survey on the situation in Hungary: I asked 15 Hungarian teachers what are the most acute professional-human conscience problems they face in Hungary today. So, document analysis and interviewing must be part of my inquiry, my research to some extent. And since these methods are presented in this paper as useful research methods for the future, rather than as the exclusive basis of the current research, one of the main aims of the paper is to develop and offer a complex set of proposals, including methods.

So, I'm going to refer, as I have already indicated above, to the legislative achievements and I'll also describe the activities of the courts and the efforts of schools and other educational institutions in this area.[2] Moreover, we must also reflect on the activities of bodies (authorities) responsible for the administration of education. To sum up, I will explore the legal type institutions that make

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[1] D.A. Santoro, *Teachers' expressions of craft conscience: upholding the integrity of a profession*, "Teachers and Teaching" 2017, Vol. 23, Issue 6, pp. 750–761.

[2] For the full picture, we should also mention that in accordance with the relevant international literature, the notion *institutional conscience* also assumes that the conscience of each public institution (in our case school or public authority) is an existing sociological fact and that it also involves moral obligations, responsibilities and possibilities, which are otherwise not, or only to a limited extent, regulated by law.

it possible to prevent conflicts of conscience on the side of public administration in Hungary today.

To give an overall picture of the issue, I also need to present the social situation of teachers, the context in which problems of conscience arise.

In line with the above, I will first clarify the most important international contexts, then I will share basic information on the situation of Hungarian teachers, identifying and categorising their difficulties of conscience (from a partly sociological and partly legal perspective, of course, with reference to legal sources in each group), I'm going to assess the legal institutions that are capable (or at least designed) to deal with the problems that arise and finally, I will formulate my proposals.

3.2. The International Context of the Hungarian Situation

What does conscience mean in teaching, what does it mean: *Teaching with conscience?* According to the results of contemporary pedagogy *social justice* is something that lies at that heart of education in a democracy, within education toward a more vital, more muscular democratic state.[3] Data from the triennial PISA surveys on Hungary consistently show that the Hungarian school system is too unequal and too segregated. The 2016 and the 2019 PISA data show that among the 35 OECD countries, family background is one of the strongest determinants of student outcomes in Hungary – it means that most schools are unable to compensate for differences brought from home here in Hungary. Some failures of integrated development are also evidenced in the educational community and within the national literature, supported by research findings. In Hungary, the phenomenon of discrimination against Roma pupils

[3] W. Ayers, *Teaching with conscience in an imperfect world – an invitation*, New York 2016, p. 11.

is still very visible,[4] posing a major moral challenge to the educational system as a whole and to teachers as individuals – and this fact is a vital part of a quite negative institutional conscience.

My study of the international literature has also revealed a fundamental contradiction – closely connected with topics such as social justice. Today, in the Western-style or western-type education of teachers, the perception and presentation of diversity is seen as one of the most important goals – the importance of the attitude towards diversity has become a central element of education in Western societies – and this can intensify the tension between the respective official state ideology, religion and personal beliefs. Also in the case of the teacher. In the west it is dominant; the farther east we go the less relevant the individual approach to teacher training and education becomes. Within current teacher trainings in western countries the main point and goal is the development of consciousness and conscience through critical questioning as the way teacher candidates become aware of diversity and develop a desire to contest injustices.[5] And it leads to the most important question of our societies: how should we manage moral and religious diversity in a free society?

This approach has produced teachers that maintain a critical distance from their own convictions and values, respect the student's freedom of conscience and religion to avoid any indoctrination, and play the role of a cultural mediator. This new requirement has not gone over without question.[6]

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[4] S. Szemesi, *Az Emberi Jogok Európai Bírósága ítélete a roma gyermekek hátrányos megkülönböztetéséről a magyar speciális iskolákban: az oktatáshoz való jog és a hátrányos megkülönböztetés tilalma kapcsolatáról*, "Jogesetek magyarázata: JeMa" 2013, No. 4, pp. 93–98; L. Balogh, *A contemporary history of exclusion: the Roma issue in Hungary from 1945 to 2015*, "Nationalities Papers" 2018, Vol. 46, Issue 5, pp. 944–946; K. Fazekas, M. Csillag, Z. Hermann, A. Scharle (eds.), *Munkaerőpiaci Tükör 2018*, Budapest 2019.

[5] D.L. Roseboro et al., *The evolution of teacher candidates' thinking: coming to consciousness and developing conscience*, "Teaching and Learning" 2012, Vol. 26, No. 2, p. 58.

[6] M. Estivalèzes, *The professional stance of ethics and religious culture teachers in Québec*, "British Journal of Religious Education" 2017, Vol. 39, No. 1, pp. 55–74.

Teachers' conscience is concerned with the moral choice of "doing something and not doing something" and the value judgment of "right and wrong" in educational activities.[7] Teachers' conscience is the manifestation of the unity of the explicitness of selfless altruistic behaviour and the internalisation of professional moral obligations.[8] It is embodied in the comprehensive ability of intuition and rational judgment, reflection and evaluation. It not only obeys the ethical requirements of educational justice, but also has an educational beauty vision.[9] And that last point is really important within our region, the classic question evolves: does a teacher still have a teleological surplus function in contemporary Polish or Hungarian society? Western and Eastern answers are traditionally different: here in Central and Eastern Europe the teacher has traditionally a surplus role to some extent – more than elsewhere, mostly through his or her political surplus.

We can also observe that in the most developed societies there is a huge amount or high level of legal awareness: publications summarising the rights of students, teachers and parents are widely available – interestingly, in Hungary this is still scarce. Books such as *Teachers and the Law*[10] do not exist in Hungary. That book is divided into two parts. Part I, "The Legal Aspects of Teaching", addresses questions related to teacher contracts, dismissals, tenure, collective bargaining, liability, child abuse, defamation, and copyright laws. Part II, "Teachers' and Students' Rights", explores legal issues related to the scope and limits of personal freedom of expression, covering such topics as religion and conscience, personal appearance, due process, privacy, homeschooling, bilingual and multicultural education, student records, sex and racial discrimination, free speech, and academic freedom.

[7] J. Xuanmin, *On Teachers Conscience: Essential Connotation, Formation Logic, and Development Path*, "Education Science" 2023, Vol. 39, No. 1, pp. 43–49.

[8] Ibid.

[9] Ibid.

[10] L. Fischer, D. Schimmel, L. Stellman, *Teachers and the Law*, Sixth Edition, Allyn, Bacon 2002.

A fundamental question is where the teacher's place is in this legally complex system.[11]

3.2.1. GROUPING OF CONSCIENCE ISSUES

The first question is, how to group the types of conscience issues that a teacher may face? Conscience-based legal problems can be broadly divided into three groups: *first*, conflicts with students, parents and other teachers; *second*, status-related issues; and *third*, conflicts over education administration and policy, which go beyond classic labour law issues.

It is also clear that in western countries, issues such as the religious dress of teachers, the wearing of religious symbols on clothing or their placement in classrooms, are also coming into sharp focus.[12] Here, both in Poland[13] and Hungary, these are not yet issues of substance. It is still not the sharpest question how long secular laws are to be obeyed, and at what point state regulations which are obviously contrary to divine law are not to be enforced.

3.2.2. GROUPING OF INSTITUTIONS FOR THE PREVENTION OF CONFLICTS OF CONSCIENCE

The good news is that legal institutions have been invented in the developed world to normatively prevent at least some of the conflicts of conscience, in addition to ensuring general freedoms. These institutions traditionally are (at least the most important ones), as it follows:

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[11] J. Temperman, *State neutrality in public school education: An analysis of the interplay between the neutrality principle, the right to adequate education, children's right to freedom of religion or belief, parental liberties, and the position of teachers*, "Human Rights Quarterly" 2002, Vol. 32, p. 865.

[12] J. Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, Council of Europe Human Rights handbooks, Council of Europe, Strasbourg 2012, pp. 49–50.

[13] See, e.g.: L.L. Garlicki, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, "BYU Law Review" 2001, Issue 2, p. 467.

1. school choice by all actors (parents, teachers);
2. granting religious schools additional rights, allowing additional obligations in employment contracts. An exciting new question emerging in the literature is how moral principles can be reflected in the internal documents of various educational institutions, and how the principles and rules of the Bible can be incorporated into these documents of church-run institutions;[14]
3. parallel teaching of religious and secular moral knowledge within the schools by persons who volunteer to teach those two subjects and at the same time meet the most basic professional standards. Jocelyn Maclure and Charles Taylor provide a clearly reasoned, articulate account of the two main principles of secularism – equal respect, and freedom of conscience – and its two operative modes – separation of Church (or mosque or temple) and State, and State neutrality vis-à-vis religions.[15] The question arises, how to manage moral and religious diversity in a free society and within the educational system?
4. more or less freedom as regards the content of the material taught within the schools;
5. freedom in the methods used; and
6. a complex, multi-level institutional system of rights protection (at least in Hungary, for example a Commissioner for Education Rights, conciliation forums, courts and so on…

[14] See, e.g.: P.I. Szontagh, *A keresztyén pedagógusokkal szemben támasztott minőségi és etikai elvárások, valamint azok kodifikációs problémái.* Doctoral Thesis, Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola, Budapest 2018; and Á. Rixer, *A Biblia szövegeinek felhasználhatósága az egyházi fenntartású intézmények belső dokumentumaiban*, [in:] N. Birher, A.O. Homicskó (eds.), *Az egyházi intézmények működtetésének etikai alapjai*, Budapest 2019, pp. 25–36.

[15] J. Maclure, C. Taylor, *Secularism and Freedom of Conscience*, Harvard 2011, DOI: 10.4159/harvard.9780674062955. See also: M. Estivalèzes, *The professional…*, *op. cit.*, p. 55; O. Gerstenberg, *Germany: Freedom of conscience in public schools*, "International Journal of Constitutional Law" 2005, Vol. 3, No. 1, pp. 94–106; and S.S. Juss, *Freedom of Conscience Rights: Lessons for Great Britain*, "Journal of Church and State" 1997, Vol. 39, No. 4, pp. 749–768, DOI: 10.1093/jcs/39.4.749.

These solutions (and some further ones) are all-important, because they reduce the number of potential conflicts of conscience.

3.3. Institutional Aspects of the Freedom of Conscience of Hungarian Teachers

In this chapter, I first will briefly review the situation of teachers in Hungary: as part of this, I will introduce the changing role of teachers and the sociological characteristics of teachers. In addition to the findings from pedagogy and sociology, I will also draw on my own survey of teachers, in which I asked them about, first, what are the biggest problems of conscience in their profession in general, and second, what causes them personally the greatest conflict of conscience. And finally, I will review the institutional aspect of the freedom of conscience of teachers, in two approaches: on the one hand, I have collected the new legal instruments through which the state tries to prevent potential conflicts of conscience, and on the other hand, I have reviewed the decisions of the courts and the constitutional court that have arisen in connection with the aforementioned (previously mentioned) conflicts of conscience.

3.3.1. THE MAIN SOCIOLOGICAL FEATURES OF THE TEACHING PROFESSION IN HUNGARY

The main sociological features of the teaching profession according to Pinczésné[16] and Kuczi are:

1. the feminisation of the profession,
2. high social expectations, modest material appreciation,[17]

[16] I. Pinczésné Palásthy, *A pedagógusok hivatásszemélyisége*, p. 24; https://docplayer.hu/47766168-A-pedagogusok-hivatasszemelyisege.html (accessed on: 10.07.2024).

[17] In the Varkey Foundation's Global Teacher Status Index survey, Hungary is one of the ten countries where the teaching profession is the least valued, according to the composite measure. Hungarian teachers' salaries are well below those of graduates in international comparison (60 per cent compared to an EU average of 90 per cent)

3. low prestige of such intellectual careers,[18]
4. ageing,
5. high number of unfilled vacancies,
6. new tasks constantly emerging,[19]
7. the well-known phenomenon of burnout is most prevalent here. The phenomenon of teacher burn-out is so pronounced because for a teacher to work effectively, the active cooperation of another person, the pupil, the child, is needed. However, this cooperation is often damaged by the active or passive resistance of children.[20]

The literature clearly shows that a significant part of the conflicts of conscience of teachers is due to the changing role of the teacher: traditionally, the teacher is a dominant intellectual with stable values, has a transcendent vocation, is an unapproachable person, who sees the transfer of knowledge as his/her primary task. In contrast, teachers of the present are more open, more emotional, have a variety of values, a functional sense of vocation (they are more or less administrators), less dominant, more dependent, and appear in a partner role.[21] The school and kindergarten have also changed a lot. Children have become more aggressive, parents more dissatisfied or indifferent. Colleagues are more tired, managers are frustrated. The school, first and foremost, but also the nursery school, has become an increasingly stressful environment, and the fatigue and burnout catches up with the best teachers, because they are the ones who really put themselves into their work and give their best. They spend more time on the job and are more engaged than their peers.

[18] The shortage of teachers and the decline in the prestige of the profession is a global phenomenon. More than a third of European schools face a shortage of teachers and 81% of teachers feel unappreciated in their profession.

[19] P. Radó, *A magyar közoktatással szembeni társadalmi kihívások Javaslat az ELEGY Oktatáspolitikai Szakbizottság számára*, pp. 1–9, https://ckpinfo.hu/wp-content/uploads/2023/05/Elegy-tarsadalmi-valtozasok-veglegesitett.pdf (accessed on: 10.07.2024).

[20] http://www.lelkititkaink.hu/pedagogus_burn_out_kieges_elleni_trening.html (accessed on: 10.07.2024).

[21] I. Pinczésné Palásthy, *A pedagógusok …*, *op. cit.*, p. 4.

There are differences, however, not only between the old and the new role conceptions and along the change of social circumstances, but also according to the experience of the teacher.

The main problems of the early career teacher are:

- planning, methodological difficulties;
- discipline;
- challenges of adaptation;
- overload; and
- self-evaluation problems.[22]

The main problems of the experienced teacher are more likely to be:

- financial;
- motivational, role conflicts;
- credibility; and
- burn-out phenomenon.

Conflict of conscience occurs in educational institutions and among teachers when an external or internal expectation conflicts with other expectations or lived realities. In other words, the tension between pedagogical, legal and other principles formulated at an abstract level and actual practices is one of the main causes of the various conflicts of conscience in education.

3.3.2. TYPES OF CONFLICTS OF CONSCIENCE AND TYPES OF INSTITUTIONAL ANSWERS WITHIN EDUCATION

Basic types of conflicts of conscience – in general, according to the literature and the interviews conducted by me – are as follows:

1. Material type conflicts: "I cannot make a living, I feel I am stealing from my own children when I work as a teacher…" etc.
2. Conflicts of a professional nature: many feel and say that "I can't develop, design and apply my own method, I am not allowed to do so, and I feel that the pupils, the parents,

[22] Z.H. Biró, *Pályakezdő pedagógusok a 21. század elején*, [in:] T. Majsai, P.T. Nagy (eds.), *Lukács, a mi munkatársunk: a WJLF tisztelgő kötete Lukács Péter 60. születésnapjára*, Budapest 2009, pp. 41–52.

the school leaders, the educational administration, and even the wider public hinders me…", "I can't be myself, I don't agree with some of the compulsory elements (with the model curriculum, etc.)." This also includes the lack of professional conditions (lack of tools, textbooks available, etc.). Another problem is the high number of substitutions, and the situation of those teachers who cannot teach what they would like to or are best able to teach because of the large number of teachers missing from the system. This also includes those cases when the teachers have doubts mainly about their own abilities: these are questions of competence and also aptitude dilemmas. These are mere internal conflicts, conflicts of conscience, due to a perceived or real lack of professional cooperation skills.

3. Personal conflicts: these are quite often credibility dilemmas. The most typical, surprisingly, is the feeling of being untrustworthy: "I say with my words, with my very being, that it is worth doing, worth learning, you should be an educated person, while I don't believe it myself, it is not my experience, I don't feel appreciated by the people around me, by the society…" It also occurs as a conflict of conscience that "I would like to leave, but I don't want to let my students and colleagues down …"
4. Mixed ones: mixed, complex conflicts arise when several of the above are present simultaneously, and other difficulties in human life may be added to these (daily life management; relational, family and health problems, etc.). And – as was previously mentioned – burn-out is one of the most common features in this occupational group.

After this general grouping, it is also worth considering what are the most frequent conflicts of conscience within the educational sphere in the light of court and constitutional court decisions – from the last 3 years in Hungary. The following types of conflict seem to be the most common – beyond the traditional types:

1. Expressing opinion through social media (mainly through Facebook).[23] The Hungarian judiciary has developed a very uniform and consistent practice in relation to the public sector, and the best-known cases are good examples of that: e.g., the case of the teacher who posted, on Facebook, racist remarks directed at the employer.[24] It is well established in domestic case law where the boundaries of free speech for employees lie, and I have already reported on the practice of the courts, the Constitutional Court and the ECtHR in my previous paper. Labour law systems create boundaries for the freedom of expression. These restrictions are varied, since the different kinds of employer action preventing the harmful exercise of rights and sanctions negatively affecting the employees are all known.[25] The European Court of Human Rights has a wide range of case law in this sense, focusing primarily on the ways, the necessity, and the proportionality of the limitations of freedom of expression along with the legitimate sanctions the employer can apply.
2. COVID-19 vaccine refusal.[26]
3. Conflicts related to overtime and non-payment of additional allowances.[27]
4. Quality of textbooks.

[23] See, e.g.: L. Pók, *Lájkolni szabad? Munkavállaló véleménynyilvánítás az új Munka Törvénykönyve tükrében*, "Infokommunikáció és Jog" 2012, No. 4, pp. 160–163; B. Bitskey, *Nem illeti meg a véleménynyilvánítás szabadságából fakadó alapjogi védelem a munkavállaló által közzétett szakmai jellegű közlést, ha annak nincs közéleti kötődése*, "Munkajog" 2018, No. 4, pp. 49–51.

[24] Decision Mfv.10098/2019/4. of the Curia.

[25] M.L. Zaccaria, *Korlátozott szabadság?*, "Jogtudományi Közlöny" 2022, No. 1, pp. 24–32.

[26] https://infostart.hu/belfold/2023/06/14/per-lett-abbol-hogy-nem-akarta-beoltatni-magat-a-katona (accessed on: 10.07.2024); see also: Decision Mf.30071/2022/7.

[27] Decision Mfv.II.10.595/2017/4. of the Curia. See also: Mf.30005/2023/8, Mf.30005/2023/5.

5. Civil disobedience,[28] also called passive resistance, the refusal to obey the demands or commands of a government or occupying power, without resorting to violence or active measures of opposition; its usual purpose is to force concessions from the government or occupying power.[29] Civil disobedience is a symbolic violation of the law rather than a rejection of the system as a whole. The civil disobedient, finding legitimate avenues of change blocked or non-existent, feels obligated by a higher, extra-legal principle to break some specific law.[30]

   There were several such cases within the educational system in the last few years in Hungary, but there are no judgments in the current cases yet. There are also legal theoretical problems, such as the Radbruch formula: where is the borderline between unjust but tolerable and intolerably unjust and thus unlawful acts of state?

   For example, a question related to Hungarian teachers has emerged: does unjust conduct by the State, especially the limited right of teachers to strike, constitute grounds for unlawful civil disobedience of those teachers? What should be the legal consequences of such deeds? This issue also has a very strong conscientious connection: the fundamental right to strike is in conflict with the right of children to education, and many teachers argue that their aim, whether through strike action or civil disobedience, is precisely to protect the rights and long-term interests of children, i.e., they see their action as a clear duty of conscience.

   The explanatory memorandum to Act V of 2022 on regulatory issues related to the end of the emergency (Vtv.) also responds to this:

[28] D. Chong, *Political Protest and Civil Disobedience,* [in:] D.J. Wright (ed.), *International Encyclopedia of the Social & Behavioral Sciences,* 2 edition, Oxford, Elsevier 2015, p. 244.

[29] https://www.britannica.com/topic/civil-disobedience (accessed on: 10.07.2024).

[30] Ibid.

> The question that arises in the context of a walkout is whether it can be considered a strike or civil disobedience. Civil disobedience is not a legal category, it is not regulated by the Hungarian legal system, and due to its nature it is not a legal institution related to the world of work, but a means of political expression. The exercise of the right to strike, which is regulated by law, is a means of expressing workers' demands in relation to employment, working conditions and pay. Refusal to take up work for any other reason has consequences under labour law. The law therefore also regulates the legal consequences that may be imposed on public servants and employees employed by a public education institution who do not fulfil their employment obligations.

6. Organising a strike within the existing legal framework and as a kind of ultima ratio.[31]
7. External political pressure, independent of the content of the legislation, as a matter of conscience for the teachers.[32]
8. Relations with parents.[33]
9. Termination of the legal relationship (for all the aforementioned reasons).

We must take into account that a significant part of all the conflicts of conscience on the part of teachers is outside the scope of the law, and only a small part of the conflicts covered by the law can be dealt with by the new legislation. When we talk about institutional responses, we must always bear this in mind!

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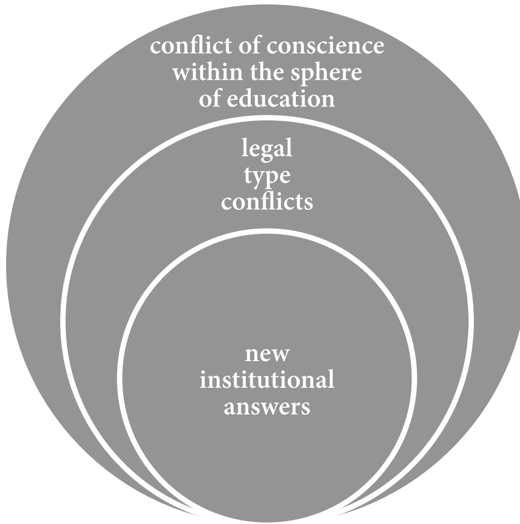
[31] S. Hungler, *A pedagógussztrájkok az ILO gyakorlatának tükrében*, "Munkajog" 2023, No. 1, pp. 16–23, E. Berki, *Sztrájkok és beavatkozások*, "Munkajog" 2022, No. 4, pp. 40–49.

[32] See, e.g.: OBH 5664/2004. Decision of the Parliamentary Commissioner for Civil Rights on *Short report on the collection of information and opinions of a political nature in public education institutions.*

[33] A. Kathyné Mogyoróssy, B.E. Nagy, *A szülők és pedagógusok kapcsolattartásának mintázatai*, "Educatio" 2017, Vol. 26, No. 4, pp. 657–668. DOI: 10.1556/2063.26.2017.4.12.

Figure 1. *The relationship between conflicts and responses to conflicts in education*



Source: author's own design.

Of course, freedom of conscience cannot only take the form of public expression of a certain opinion. Other typical fields have been the refusal to take an oath, and more recently vaccine refusal[34] and also civil disobedience of the teachers. It should be noted here that (the) rights of conscience are usually couched as "negative rights", i.e., the right to refuse a requested treatment (and also the requests, orders of the employer, etc.).[35] The dilemma of both the civil service oath and mandatory vaccinations is based on a generally binding requirement, compliance with which may lead to a "breach of conscience". It should be noted here that the restructuring of the whole system of public education may violate the teacher's conscience

[34] https://infostart.hu/belfold/2023/06/14/per-lett-abbol-hogy-nem-akarta-beoltatni-magat-a-katona (accessed on: 10.07.2024); see also: Decision Mf.30071/2022/7.

[35] D.M. Sullivan, *Professionalism, autonomy, and the right of conscience: A call for balance*, "Ethics, Medicine and Public Health" 2019, Vol. 11, Issue 1, pp. 11–15.

for reasons that do not affect the specific rights and obligations of the pupils or teachers directly: for example, the preparation time provided for by the law may be insufficient.

An analysis of the decisions of the Constitutional Court of Hungary and decisions of ordinary courts in this area is beyond the scope of this study, but will be an inescapable task of further research.[36]

Institutional responses try to reduce the number and intensity of conflicts of conscience in the Hungarian educational system in recent years (2021–2023): those responses focus on the elimination of incidents and prevention of new ones. Legal-type responses are legislative and partly enforcement-type responses, in so far as, as we shall see, even under the same legal conditions, enforcement practice may change.

The new institutions are as follows:

1. Increased use of existing enforcement sanctions (in particular for COVID vaccination in 2021–2022).
2. Introduction of a new status law (which contains clarification of certain rules and increased remuneration): Act LII of 2023 on the new career-path of teachers. The change of status means that while teachers have been public employees, as of 1 January 2024 they will be transferred to so-called public education employees, except for those who declare that they do not wish to do so and thus terminate their employment.
3. Protection of whistleblowers, creating new forums – to facilitate reporting of abuses.
4. Easing of the entry and employment conditions for teachers, the detailed rules in several cases also allow for the possibility of teaching without a proper degree or even a teaching qualification. Government Decree 401/2023 (VIII. 30.) on the implementation of Act LII of 2023 on the new career-path of teachers, within Articles 13–23, significantly relax the rules for the entry and performance of teaching posts.

[36] AB Decision: 20/2023. (VIII. 7.); 21/2023. (VIII. 7.); 1/2023. (I. 4.); 3128/2022. (IV. 1.); 9/2021. (III. 17.); 3195/2020. (VI. 11.); 9/2019. (III. 22.); 3024/2015. (II. 9.); 3191/2014. (VII. 15.) and Decision no. P.21421/2021/28; Decision no. Pf.20031/2022/4; and Decision no. Mf.I.40.048/2022/20.

5. Limitation of the right to strike. The Decision no. 1/2023 (I. 4.) of the Constitutional Court of Hungary was to decide whether certain provisions of Act V of 2022 on regulatory issues related to the termination of the state of emergency are unconstitutional or not. In its assessment, the Constitutional Court concluded that the right of children and young people to education takes precedence over all other rights, and therefore did not consider the restrictions to be contrary to the Fundamental Law of Hungary. In contrast, Balázs Schanda, judge of the CC, argued in his dissenting opinion that this ignored the essential content of the strike: the element of pressure on the employer. Schanda added:

> There is no doubt that the enforcement of the right of children and young people to education, and the safeguarding of their supervision, is of paramount importance, but it is equally important that the representatives of a profession – which is key to the right to education – can express their interests within a legal framework.

6. Allowing individual pay agreements because of the shortage of staff.
7. Increasing the number of consultations, in particular with trade unions, professional associations and civil interest organisations in the education sector (the quality and results of these are another matter).[37]
8. A complex system of rules on unethical behaviour has been set up (there are several "layers" within the acts, within the collective agreements and Hungary's National Teachers' Chamber's Code of Ethics for the Profession.

The Code is a set of professional rules for the teaching profession and as such is considered as other professional rules for work. The Act CXC of 2011 on National Public Education (hereinafter referred

[37] A. Fehérvári, *Bevezetés*, [in:] A. Fehérvári (ed.), *Pillanatképek. Társadalmi partnerek az oktatásirányításban*, Budapest 2011, p. 8.

to as the "National Public Education Act") entrusts the Chamber with the task of drafting a Code of Ethics for Teachers (hereinafter referred to as the "Code"), which consists of general ethical principles, detailed ethical and procedural rules. The Code does not prohibit teachers from playing a political role, but states that activities in social organisations and political movements must be clearly distinguished from activities in the workplace.

"We should behave, speak and dress in a way that enhances the dignity of our workplace and of public education", says the code, which can also be used to help colleagues settle conflicts locally, "in-house", which could otherwise only be resolved through litigation. The Code could also contribute to reducing the number of court cases in the profession.

The fundamental dilemma and conflict is whether the code of ethics merely expands and clarifies the provisions of otherwise applicable laws and collective agreements, or whether it can contain obligations that go beyond them. What is the correct approach to principles that are too general and not spelt out in any way, especially if membership of the National Teaching Staff is based on compulsory membership, i.e. it is not a voluntary renunciation of rights, a kind of self-limitation?

The following two provisions are good examples of overly general provisions: Art. (54) of the Code states that "A teacher shall stand by his colleague until his or her professional or ethical misconduct or omission has been proved beyond reasonable doubt" and Art. (35) sais that "A teacher shall respect the privacy of his pupils and students".

3.4. Conclusions and Proposals

Finally, I would like to make some proposals on the issue of freedom of conscience and teachers. I will now summarise my conclusions, findings and recommendations related to that topic.

Although teaching would appear to be an occupation considered central to a country's development and wellbeing, international research studies report difficulties recruiting and retaining teachers

even in the most developed countries – including Poland and Hungary as well. And I don't need to prove that the basic problems of conscience presented earlier are closely linked to employment difficulties, which adds to the relevance of my proposals.

We can see that the cases of conflicts of conscience and legal cases that are present elsewhere, even in Western Europe (dress restrictions, wearing and display of religious symbols in classrooms, conflicts related to the questioning of traditional gender) are few, while collective forms of assertion of interests, even in the form of meaningful support for co-professions, are also lacking – social solidarity is extremely low.

According to the literature and the interviews conducted by me, the basic types of conflicts of conscience are, first, those of the material type, or in other words, financial conflicts; second, conflicts of professional nature; third, personal conflicts, and fourth, are of mixture nature. I have at least one proposal in each of these areas.

So, as I mentioned earlier, issues related to strikes and civil disobedience were among the most frequently mentioned conflicts of conscience among teachers: in the very beginning of this year the Hungarian Constitutional Court concluded in its decision that the right of children and young people to education takes precedence over all other rights, and therefore did not consider the serious restrictions of the right to strike to be contrary to the Fundamental Law of Hungary. In contrast, as I have mentioned it, Balázs Schanda, judge on the CC, argued in his dissenting opinion that this ignored the essential content of the strike: the element of pressure on the employer.

And I have to add that this reasoning, this argument, reflects a flawed attitude based on which the child is the central actor in society today – everything happens around and for the child. A century ago, society was built around the elderly, the heads of families and the elderly – today this has changed completely and another unhealthy situation has emerged. The constitutional Court of Hungary has also miscalculated, because the teacher is as important player in education as the child – even if the immediate aim is to improve the child's well-being. This is also supported by the Public Education Act, Article 3 paragraph (1) of which states that "At

the centre of public education are the child, the pupil, the teacher and the parent, whose duties and rights form a unit."

It is clear that the distorted view of society is often reflected in the misapplication of the law: misapplication of the law can be the result of a wrong approach to life.

My second proposal is closely connected with the fact that research on conflicts of conscience within the field of public education also shows that the latency – the number of cases that do not turn into legal proceedings – is very high. Accordingly, for further research in this area, it is not enough to examine certain legal cases, but documentary analysis (e.g., analysis of resignation declarations) and interviews with people who have already left the sphere could help to get a more accurate picture of the main types of conscientious conflicts.

So, the nature of the current conflicts of conscience cannot be inferred from legal cases alone, because some of them do not reach a legal type of resolution, i.e., they do not go to court, and others only become available after years of long proceedings. How then can this question be examined? In the international literature, there are several examples of publicly available termination letters of teachers that have been examined and used to draw conclusions.

Those termination or resignation letters show the current situation relatively accurately.

My third proposal seeks to refer to the easing of the entry and employment conditions for teachers. The detailed rules in several cases also allow for the possibility of teaching without a proper degree or even a teaching qualification. The Government Decree 401/2023 (VIII.30.) on the implementation of Act LII of 2023 on the New Careers of Teachers, within Articles 13–23, significantly relaxes the rules for the entry and performance of teaching posts. This is also a dangerous direction from the point of view of conscience issues and their institutional implications, in so far as it could lead to motivational problems for both those already in the profession and those preparing to become teachers.[38]

[38] H.M.G. Watt et al., *Motivations for choosing teaching as a career: An international comparison using the FIT-Choice scale*, "Teaching and Teacher Education" 2012, Vol. 28, No. 6, pp. 791–805.

Fourth, according the "Act on Complaints and Public Interest Disclosures" adopted by the Hungarian Parliament on 23 May 2023 (Act XXV) primary and secondary schools must have in place a whistleblowing system no later than 24 July 2023. It mandates the establishment of an internal procedure for the protection of whistleblowers, by creating new forums – to facilitate reporting of abuses within all these institutions as well. By that regulation, a more complex system of rules on unethical behaviour has been set up, but these measures still need to be reflected throughout the entire legal system, not be confined to a single piece of legislation. On the one hand, these institutions must be included in codes of ethics (for example Hungary's National Teachers' Chamber's Code of Ethics for the Profession), schools' internal rules, collective agreements, etc., and on the other hand, their practical solutions and possibilities must be taught in attendance training courses, so that they do not become a means of abuse and thus also a problem of conscience. These courses can also be used to build up and fill in the missing culture of conflict management – with an importance that goes beyond themselves.

Fifth, we can also observe that in the most developed societies there is a huge amount or high level of legal awareness: publications summarising the rights of students, teachers and parents are widely available – interestingly, in Hungary this is still scarce. Books, written in Western countries, such as *Teachers and the Law*, address questions related to teacher contracts, dismissals, tenure, collective bargaining, liability, child abuse, defamation, copyright laws, and also explore legal issues related to the scope and limits of personal freedom of expression, covering such topics as religion and conscience, personal appearance, due process, privacy, homeschooling, bilingual and multicultural education, student records, sex and racial discrimination, free speech, and academic freedom. We do not have such compilations, especially in an updated and updated form, while their availability would not necessarily increase the number of disputes, but rather the awareness of behaviour, and could prevent many uncertainties and conflicts of conscience and cases of depression.

And the last of my proposals mentioned here is a new challenge that we must meet: in dozens of countries around the world, military education as a new subject has been introduced simultaneously in public education over the past year (quite often as military sciences), and OECD members are among them and among the countries planning to introduce similar training or courses.[39] Public education in both Hungary and Poland should prepare in advance for the teaching of this subject and its conscientious and other implications.

Obviously, there are other connections as well, some of which are more political than regulatory, such as the issue of incomes and salaries[40] – which I do not wish to address in this package of proposals.

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Chapter 4. Some Institutional Aspects of the Protection of the Freedom of Conscience in the Hungarian Legal Context

4.1. Introduction

It is not easy to give a legal definition for conscience. Conscience seems to be intimately individual, a special aspect of human dignity, shaped by convictions, religious or non-religious convictions. As with dignity, one can hardly provide for an exhaustive list of issues where conscience needs protection. Paradoxically, we can grasp the issues the more when dignity is disrespected, or conscience is violated. Besides the accommodation of changing individual claims based on conscience (the institutional protection of conscience) a growing set of issues is arising in institutions run by religious organisations (the protection of institutions based on belief and conscience). In their case the institution itself carries rights. Once self-evident exemptions need more and more protection in a growingly secular social environment.

4.2. Notions of Conscience – From a Secular Religion to the Respect of Individual Conviction

Historically, freedom of conscience and religion was recognised earlier than human dignity, the general right of personality. Most

actions – to do or not to do something – are protected by personal dignity or the privacy rights of the individual, however, the freedom of conscience and religion can add additional aspects.

Individual religious freedom is consequently declared together with freedom of conscience by international human rights instruments as well as by national constitutions. There are not only historical reasons for this linkage, but these rights are also inextricably linked. However, the concept of conscience is not legally defined. In 1990, the ministerial explanatory submitted to the bill in Hungary recognising conscientious objection to military service stated that the concept of conscience "has not been elaborated either in domestic or foreign legislation", adding that:

> conscience cannot be limited to religious motives. It must be understood as the inner system of values of the personality, with which conduct contrary to which would result in spiritual injury to the individual and in a violation of the individual's self.[1]

The ministerial explanatory note to the new law on freedom of religion in 1990 stated that "The concept of freedom of conscience is broader than that of freedom of religion, namely because the former is a freedom not only for religious people but for everyone".[2] This approach is highly questionable. Obviously, the right to religious freedom includes the right not to have a religious belonging and not to profess or practice it. Religious people do not give up their individual conscience. Ideally there should be no difference between the protection of conscience motivated by religion and conscience determined by other grounds.

A possible approach to freedom of conscience is to regard it as a kind of "secular religious freedom". This right protects the choice, acceptance, expression, practice and teaching of non-religious beliefs that determine one's identity to a similar degree as religious beliefs. Such worldviews, beliefs, such as humanism, pacifism, may

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[1] Act LXXVIII of 1990.

[2] Act IV of 1990 on the freedom of conscience and religion and on churches.

be deep, sincere and comprehensive, like a religious belief, but, unlike religious beliefs, they usually lack elements of transcendence.

Another possible interpretation was given by the Hungarian Constitutional Court in 1993.[3] According to it, the freedom of conscience can be understood as a right to the integrity of the person. This right protects the individual from being driven by the state into self-deception, from being placed in situations incompatible with his or her essential beliefs or, in extreme cases, from being forced to behave in a manner contrary to his or her convictions. What is relevant to the individual is primarily his or her own individual conscientious conviction, not the religious or philosophical community to which he or she belongs. Thus, in the case of compulsory military service, Article XXXI section (3) of the Fundamental Law provides that military service may be substituted by unarmed service on the basis of an individual's conscientious conviction. This reference to "secularised convictions", i.e., non-religious worldviews, in the context of the separate functioning of the state and religious communities, avoids the need for formal church membership or personal attachment to a religious community to be a prerequisite for the exercise of a religious right. This way it is not the membership in a given religious community that bears legal consequences but the conscientious conviction of the individual.

4.3. Individualised Accommodation of Religious Claims

Religious freedom is a fundamental right with personal, community and institutional aspects. While for centuries institutional regulation and the rights of the individual related to his or her denominational affiliation were the dominant factors, since the regime change the starting point of Hungarian ecclesiastical law has been the freedom of conscience of the individual, the personal freedom of religion, an individualised protection of freedom. A number of factors may have contributed to the emphasis in Hungarian ecclesiastical law on

[3] Decision of the Constitutional Court, 46/1993, (II. 12.).

the individual's choice rather than on entitlements dependent on denominational affiliation. The public registration of denominational affiliation has been abolished after World War II[4] and, for historical reasons, special guarantee rules have been created to ensure that access to historical data remains restricted.[5] Also as a consequence of historical experience, a generally reserved attitude towards religion has become a feature of Hungarian society. Hungarian society is characterised by both a strong cultural homogeneity and a general acceptance of customs (e.g., major festivities), but also by individualism and a lack of communities. A stronger than 'average' religiosity is the least likely to be publicly expressed – e.g., in a workplace environment, colleagues are more likely to share sensitive health information than their religious beliefs. This situation is also reflected in the fact that different rights and exemptions are granted to citizens on the basis of individual requests and not on the basis of religious affiliation.

To give a few examples, it is the individual – the parents – and not the denomination of the pupil who decides on the attendance of religious education in schools (and the state has no role in settling disputes that may arise between parents).[6] Thus, it may happen that a pupil belonging to a different denomination (or having no denominational affiliation) attends faith education provided by a particular church in the school. Certainly parents may fail to fulfil their promise made at the baptism of the child in this respect of religious upbringing and enrol their child in ethics classes instead of religious education, or to enrol him or her in faith education provided by another faith community, whether because of changing beliefs, indifference or individual sympathies.[7]

Under a system that has been in place for more than twenty years, the individual – the taxpayer – decides on an annually renewable basis (under the current rules, it can be done ten years in advance)

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[4] Law decree 19 of 1952 on civil registers.

[5] Act IV of 1990 on the freedom of conscience and religion and on churches, § 3 (2).

[6] Act CXC of 2011 on national public education, § 35 (1)

[7] P. Erdő, *A vallás szerepe az ember életében és az oktatás célja*, "Vigilia" 2009, pp. 562–567.

how the central budget will distribute the budget subsidy aid to religious communities: a specific part of personal income tax is used as the taxpayer decides, completely independently of the denominational affiliation of the individual concerned.[8] Even in this case, religious communities that make good use of the subsidies may be underwritten by people who do not belong to the religious community in question, and a large number of people who are formally members of a community may not make use of the option of designating payment. Both examples illustrate a striking difference compared to the denominational registration system in Germany, where both denominational religious education and church tax liability are linked to the legal fact of formal church membership – and where state legislation has created a specific "opt-out" option to ensure "negative religious freedom". The Hungarian solution completely prevents such problems, but at the same time, a minimum awareness of believers is needed: believers have to stand for their rights or at least express their demands. but at the same time makes it impossible to be unaware of the existence of believers.

Individuals may invoke religious assistance in public institutions: whether in a health care institution, a prison or the Defence Forces, individual needs and not church membership per se are the basis for the use of pastoral services. Even for those who require a special diet on religious grounds, it is their personal choice and not their religious affiliation that determines the choice (the additional cost of this has led to the need for the community concerned to declare the validity of the individual claim). The individual could (or could have) exercise(d) the right to refuse armed service on the basis of conscientious objection – religious affiliation is itself is not a ground for exemption, and it does not exclude the possibility of alternative service.[9]

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[8] Act CXXVI of 1996 on the use of a specific part of personal income tax according to the taxpayer's instructions, § 4/A.

[9] Fundamental Law of Hungary of 25 April 2011, Article XXXI (3).

4.4. Traditional Conflict Zones

4.4.1. FAMILY – UPBRINGING OF CHILDREN – PARENTAL RIGHTS VS. EDUCATION

4.4.1.1. *The Freedom of Conscience of Minors*

The most important human rights conventions prioritise protection of the freedom of conscience alongside with the freedom of religion. However, these are naturally regulatory frameworks given meaning by the national contexts in which they are applied. Although it is not binding, the Universal Declaration of Human Rights is the first "law" that enshrines human rights in a charter according to the principle of universality and which is considered to have the greatest impact. According to Article 18:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The Universal Declaration states that "the family is the natural and fundamental group unit" (Article 16 (3)) and acknowledges that "Parents have a prior right to choose the kind of education that shall be given to their children" (Article 26 (3)).

According to Article 18 of the International Covenant on Civil and Political Rights, promulgated in Hungary with Law-Decree No. 8 of 1976:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Of the international laws enacted under the auspices of the UN, the "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief", passed with resolution No 36/55 by the UN General Assembly on 25 November 1981, should also be mentioned, which, although it is not binding, still serves as a beacon. This Declaration affirms the previously declared norms that guarantee freedom of religion and urges states to take effective action to prevent and eliminate negative discrimination based on religion or belief. The Declaration affords special protection to the rights of parents in raising their children according to their beliefs.

The Convention on the Rights of the Child adopted in New York on 20 November 1989, promulgated in Hungary with Act LXIV of 1991, declares the right of the child to freedom of thought and religion and also acknowledges that parents have the right to provide direction in a manner consistent with the evolving capacities of the child in Article 14:[10]

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

[10] Á. Lux, *A gyermekek jogai,* [in:] A. Jakab, B. Fekete (eds.), *Internetes Jogtudományi Enciklopédia*, Alkotmányjog rovat, http://ijoten.hu/szocikk/a-gyermekek-joga 2018 (accessed on: 17.05.2024).

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

International human rights conventions contain fundamentally similar provisions on the freedom of religion, although the Convention on the Rights of the Child and the other documents lay differing degrees of emphasis on protecting the integrity of the beliefs of families. The different wording shows a different perspective that can be seen as a contradiction. The Convention on the Rights of the Child would provide children with the right to make independent decisions regarding religion, depending on age. A number of people have pointed out the contradiction between these two approaches.[11]

Both the Covenant and the Convention make a fundamental distinction between the freedom of religion and the freedom of religious observance: while the former is considered an absolute right, the latter may be restricted for certain reasons.

Under Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, promulgated in Hungary with Act XXXI of 1993, which is especially important for the binding adjudication of individual complaints:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[11] G. Schweitzer, *Az oktatáshoz való jog és a szülők lelkiismereti és vallásszabadsága Magyarországon*, "Acta Humana" 1994, No. 5(17), pp. 53–63.

Article 14 of the Convention provides for the prohibition of discrimination:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

For the freedom of religion, it is important to note that Article 2 of Protocol 1 expressly acknowledges the right of parents to provide education in conformity with their religious convictions:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

In addition to the historical role of the freedom of religion, the freedom of thought, conscience, and religion form an inseparable and prominent fundamental right that, according to the Convention, is one of the pillars of a "democratic society". Moreover, religion is a fundamental element of the cultural identities of nations. As Giovanni Bonello, a former Maltese member of the Court, expressed in his concurring opinion to the judgment in Lausti v. Italy:

> A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. (...) A European court

> should not be called upon to bankrupt centuries of European tradition.[12]

Until the 1990s, the Court did not formulate any substantive jurisprudence regarding freedom of religion, possibly because democratic states generally tend to respect this right and because the relationship between the State and religious communities has developed in accordance with the widely differing historical traditions in various nations, requiring international fora to apply a wide range of considerations in both regulation and practice. In certain States Parties, the Court determined it legitimate to uphold the position of the state religion,[13] while in others it protected the secular nature of the constitutional order.[14] Case-law has increased in quantity drastically in recent decades. The cases shed light on certain well-defined, controversial topics: how far can the State go in protecting any particular (majority) religion or the secular nature of the State if such results in a disadvantage to minority needs? How can the peaceful coexistence between the faithful of different religions with culturally different traditions be guaranteed, and how must the state respect the independence of religious communities?[15]

As regards the freedom of religion of children/minors/school-age children, the controversial issues are around the protection of specific clothing required by religious doctrine for both teachers and students in the educational institutions of various countries. In the case of a teacher fired from a state-run school in Geneva, with reference to the fact that the school is secular, the Swiss court accepted the reasoning that for the children, especially younger children, the teacher is a representative of the State, and the measure was necessary to protect the rights and freedoms of the children

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[12] Lautsi v. Italy, Judgment of 18 March 2011, no. 30814/06.

[13] Darby v. Sweden, Judgment of 23 October 1990, no. 11581/85, see.: commission report 45.

[14] Leyla Sahin v. Turkey, Judgment of 10 November 2005, no. 44774/98.

[15] B. Schanda, 9. *Cikk,* [in:] P. Sonnevend, E. Bodnár (eds.), *Az Emberi Jogok Európai Egyezményének kommentárja*, Budapest 2021, pp. 218–243.

in light of their impressionability.[16] The Court also rejected the complaint filed by a teacher at Istanbul University.[17] The question arises as to whether emphasising the young age – and thus the impressionability – of the students in one case weakens the reasoning regarding the headscarf of the university professor: in the case of the Turkish teacher, the court accepted the protection of the peculiar secular nature of the Turkish state instead of the grounds of religious pluralism. The Court accepted the application of the restrictive rules by referring to the protection of the "the rights and freedoms of others" in the case of both the university students[18] and the students participating in compulsory education: the protection of students' bodily integrity in physical education classes was found to be a suitable reason for the restriction,[19] while in a broader sense the secular nature of the State and public education may also give rise to the imposition of restrictions.[20] The State may also rightfully protect children from peer pressure by restricting the wearing of headscarves.[21] It should be noted that the practice of the court in accepting existent restrictions in all cases is based on the broad power of discretion of the states; it does not in any way follow from the judgments that the absence of the restriction would be worrisome.

States are given a wide power of discretion in connection with the organisation of public education, as the objective of public education is to transfer knowledge in an objective, critical, and pluralist way; however, an exemption may not be requested from compulsory public education even for religious reasons.[22] Schools may not have the objective or purpose of indoctrinating children or undermining

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[16] Dahlab v. Switzerland, Judgment of 15 February 2001, no. 42393/98.
[17] Kurtumulus v. Turkey, Judgment of 24 January 2006, no. 65500/01.
[18] Leyla Şahin v. Turkey, Judgment of 10 November 2005, no. 44774/98.
[19] Dogru v. France, Judgment of 4 December 2008; Kervanci v. France, Judgment of 4 December 2008, nos. 27058/05 & 31645/04.
[20] Aktas v. France, Judgment of 30 June 2009, no. 43563/08; Bayrak v. France, Judgment of 30 June 2009, no. 14308/08; Gamaleddyn v. France, Judgment of 30 June 2009, no. 18527/08; Ghazal v. France, Judgment of 30 June 2009, no. 29134/08; Jasvir Singh v. France, Judgment of 30 June 2009, no. 25483/08; Ranjit Singh v. France, Judgment of 30 June 2009, no. 27561/08.
[21] Köse and Others v. Turkey, Judgment of 7 December 2010, no. 37616/02.
[22] Folgerø and Others v. Norway, Judgment of 14 February 2006, no. 15472/02.

family education. Although the basis is respect for parental rights, these rights may also be restricted, i.e., although it is not permitted to turn children against their parents, parents may not require that the children not be subjected to any impact contrary to their beliefs. Granting exemption to children from sexual education has not received protection.[23] Exemption may also not be requested for compulsory co-educational swimming classes, as this would lead to the exclusion of immigrant children by the State. Moreover, participation also promotes integration in addition to teaching the child to swim.[24]

Freedom of religion is not affected by generally compulsory, neutral requirements. Just as no-one is exempt from the rules of the road for religious reasons, citizens also do not have the right to refuse the use of a tax number on religious grounds.[25] Referring to religious norms do not grant per se exemption from the obligation to observe state law. Accordingly, a sexual act with a girl younger than 16 is a crime even if the perpetrator and the victim are married under Islamic law.[26] The application of Seventh-day Adventist parents to obtain an exemption for their children from having to attend school on Saturday was also not approved.[27]

Refusing a blood transfusion may be a free expression of a person's autonomy (Article 8) and freedom of religion. The principle, though it may seem unreasonable to others and the medical community, may not be an impediment to dissolving or banning the operations of a religious community. Adult persons obviously have to be provided with the opportunity of making truly free decisions, and courts must be able to overrule the decisions made by

[23] A.R. et L.R. v. Switzerland, Judgment of 19 January 2018, § 40, § 49, no. 22338/15.

[24] Osmanoğlu et Kocabaş v. Switzerland, Judgment of 10 January 2017, no. 29086/12.

[25] Skugar and Others v. Russia, Judgment of 3 December 2009, no. 40010/04.

[26] Khan v. the United Kingdom, Commission decision, no. 35394/97.

[27] Martins Casimiro and Cerveira Ferreira v. Luxembourg, Judgment of 27 April 1999, no. 44888/98.

parents in respect of the minor members of the group in the interest of the children.[28]

4.4.1.2. *The Rights of the Child vs. Parental Rights?*

As an independent right, the freedom of thought, religion, and conscience is due to all natural persons regardless of citizenship and any restrictions to personal freedom. In respect of children, certain approaches, such as the Convention on the Rights of the Child, imply that the fundamental rights of a child's freedom of religion and parental rights may compete: according to the Convention, instead of selecting the education to be given to the child, the parent provides "direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child". The Holy See underlines in its reservation to the Convention the "primary and inalienable rights of parents", i.a., with regard to religious rights[29] (Benyusz, 2021).

The Fundamental Law of Hungary (the Constitution) provides special protection to parents in determining the religious education their children receive. However, a parent's religious conviction may not be a primary reason for keeping their child out of public education: Article XVI (3) of the Fundamental Law specifically states that the obligation of taking care of minor children extends to providing schooling. Exemption from specific subjects (biology, co-educated physical education, swimming lessons) raises special questions. Although Hungarian case law has not yet been faced with these issues, the Educational Authority has allowed the application of special schedules (previously, notaries had allowed home-schooling), which is debatable insofar as it is based only on the parents' religious needs.

[28] Jehovah's Witnesses of Moscow and Others v. Russia, Judgment of 18 August 2010, §§ 131–144, no. 302/02.

[29] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4#EndDec (accessed on: 15.12.2022).

Children and students have the right to participate in religious education (religion and ethics, or optional religious studies).[30] The parent decides on participation.[31] There are no legislative provisions regarding any possible disputes between the parents or between a parent and a child. General principles can be used to settle either of these potential conflicts. The parents have to come to an agreement between themselves regarding issues resulting from their worldview. In no situation does the State take a position on religious issues: the legal regulation of the denomination of a child to a couple of different Christian denominations is now history, even if the practice remains in many families. Like other, sensitive issues regarding education, the parental decision governs any possible disputes between the parent and the child. Hungarian law does not apply *Religionsmündigkeit*, whereby a young person over 14 is considered "mature" and may, in most Austrian and German states, freely opt out from compulsory denominational religious education or convert to another faith. (Parents may make all decisions regarding religious affairs until the child is 10 years old; between the ages of 10 and 12, the parents must take their child's opinion into account, but the child may only leave the given religion with the consent of both parents. When the child is between 12 and 14, the parents may decide to leave a religious community against the child's will, and after reaching the age of 14, the child may make independent decisions, including leaving school-based religious education.[32])

Conscience has a very individual aspect but conscience is primarily formed in the family. The instruments of law are only of limited use for settling the internal relations of families. The strength of religious convictions and religious traditions also forces the law to back down. Although the State may take action against the decisions of the parents to protect the rights of the child (for example,

[30] Act CXC of 2011 on national public education, § 46 (3).

[31] Decree 20 of 2012, (VIII.31.) EMMI § 182.

[32] Gesetz über die religiöse Kindererziehung; 15. Juli 1921 (RGBl. S. 939); https://www.oesterreich.gv.at/themen/gesetze_und_recht/religionsausuebung/Seite.820012.html (accessed on: 15.12.2022).

against the threat of female genital mutilation on religious grounds), the general rule is to protect the religious integrity of the family. It is the natural right of parents to strive to pass on their own convictions and traditions to their children. There is no single regulation or measure regarding how and when older children must be provided a say, or the right to make independent decisions, in these issues. In this respect, the internal relations and the millennia-old religious norms of the family as the "natural community" enjoy primacy. It is recommended that today's legal system of rules for governing state and man proceed with prudence: it must promote peace in the family and society, not internal tension.

4.4.2. CONSCIENTIOUS OBJECTION: MILITARY – WORKPLACE

Conscientious objection to military service has rather become a theoretical issue, as national service can only be introduced in case of defence.[33]

The conscientious objection of the of medical personal not to take part in abortions enjoys positive recognition.[34] The right not to perform or advise an abortion has come under attack in many European countries, and this is clearly curtailing the freedom of conscience of pro-life doctors and medical staff. Beyond sensitive issues of medical care there are hardly issues of conscientious objection arising in the workplace. This may be due to the lack of regulation but also to lack of interest and a natural attitude where convinced pacifists do not enrol to the military and vegetarians do not apply for jobs with butchers.

There are no special rules with regard to religious expressions at the workplace. The general constitutional rules would apply. It is to be noted that – partly as a heritage of the communist rule – the general social attitude regards religion as a private issue, most

[33] Fundamental Law of Hungary of 25 April 2011, Article XXXI (3).

[34] Act LXXIX of 1992 on the protection of foetal life, § 14. "A doctor and a health professional shall not be obliged to perform or assist in the performance of an abortion, except for a reason which endangers the life of the pregnant woman."

people would avoid religious gestures at work. Not exercising rights certainly does not mean that rights would cease to exist, but certainly the social practice is highly relevant, as the same gesture can be taken very differently under different conditions.

General provisions of labour law provide for the respect of personality rights and the requirement of cooperation of parties. An unnecessary limitation of religious rights would be unlawful. The boundaries of rights and tolerance, however have not yet been tested. There were no cases so far with regard to religious garments, jewellery, prayer in the workplace or anything similar. When it comes to conflicts, religious and non-religious beliefs would enjoy the same protection, and religion could not be defined in general, as it needed a case to decide if in the given context a claim would be considered as religious or not.

4.5. Horizontal Perspectives: Conscience at the Workplace

Institutions based on a specific identity – such as health care institutions maintained by a religious community – may need an institutional arrangement to provide for exemptions that enable preserving the identity of the institution. In this setting both the individual working at a church-run institution as well as the church running the institution bear rights.

The Fundamental Law provides for the freedom of religion in a comprehensive way including the freedom to manifest one religion in all possible ways.[35] Work relations may be governed by the general labour law[36] or special legal regimes foreseen for civil servants, policemen, judges, etc. Whereas labour law is regarded to be private law with a considerable flexibility, the service relations in the public sector are governed by public law and the civil servant falls under strict hierarchy. Atypical working relations have become a significant phenomenon, as a high percentage of active generations

[35] Fundamental Law of Hungary of 25 April 2011, Article VII (1).
[36] Act I of 2012 on the Labour Code.

are self-employed. The majority of the active generations, however, still have a traditional employment with a labour contract, and an employer – but usually without a trade union at the workplace.

4.5.1. AUTONOMY OF RELIGIOUS COMMUNITIES AND HUMAN RIGHTS OF WORKERS

Church autonomy is considered to be a core element of religious freedom. The institutional autonomy of churches – including church run institutions – is regarded to be as an important element of religious freedom. As churches run a significant part of the education, health care, and social care systems, they are notable factors of the labour market.

Fundamental rights may have a horizontal effect under certain conditions. In general, it is the state and not the church that has to respect and ensure religious freedom. The individual shall have the right to leave a religious community or a faith-based institution, but in the given context it is the community or the institution that can invoke their religious freedom, not the individual. A person dismissed from a church-run institution for religious motives could not invoke his religious rights against the church. The internal relations in a church-run institution are generally not governed by fundamental rights – aspects of equal treatment would qualify as a partial exception.

Work for churches can be carried out under four different legal regimes:

1. Ecclesiastical persons can be employed in ecclesiastical service that is not employment in the sense of state law, but a relation exclusively determined by internal church law. A priest or a pastor would usually work in ecclesiastical service, but churches also have the possibility of employing him in another legal regime – and they are free to qualify persons in their service as "ecclesiastical persons" (see above).
2. Employees of church institutions in genuine religious offices usually would be lay persons, such as a cantors or catechists. They usually stay in a regular work relation with a church

legal entity and, in their case, the requirement of a special loyalty is out of question – equal treatment considerations with regard to discrimination on the basis of religion would not apply to them.

3. Employees of church institutions in secular offices would be a third category. This is the category where equal treatment issues raise challenges both in theory and in practice, and individual convictions and the identity of the institution may collude. The intention of the lawmaker was probably not to grant exemption from the principle of equal treatment for employees, such as teachers of secular subjects at church-run schools, staff of church-run institutions of social care, etc. Positions of churches and of public authorities/equal rights advocates seem to be far apart in this regard. With two positions that are not reconcilable, one has to get a better understanding starting out from the reality of the given institutions. Many church-run institutions today are very much like secular ones: formally the institution is maintained by a church; practically, it is like any other public institution. When we have a look at the origin of these institutions, it becomes obvious that originally there were no secular institutions at all. Originally in Hungary (as elsewhere in Europe) religious orders started activities and institutions such as schools, hospitals, and universities. For them, it was obvious that the institution as such is expressing the commitment of the community from the doorman to the abbot. Though numerically overwhelmingly lay persons in work relations carry out most activities in most institutions nowadays, we nevertheless cannot forget the origins of these institutions. In the understanding of the churches, it is the institution as such that carries the identity and the message of the community. At the moment, when the institution is compelled to employ persons who do not share the commitment of the institution, the very identity and the reason of the institution are at stake. Church jobs are usually not especially well paid – which prevents many conflicts – but churches have become quite careful in formulating the terms of employment in the contracts.

A statement on the loyalty – the respect towards the identity of the employer – would generally be required in the contract. It has to be noted, that public institutions named after saints or important figures of ecclesiastical history do not fall under this category – people living in the Holy Trinity Street do not necessarily profess a faith in the Holy Trinity. A public hospital named after a saint (which is common in Hungary) is structurally different than a hospital run by the Catholic Church.

4. Other types of contracts may also engage people in the service of religious organisations, mainly contracts under civil law. For example, at a construction or reconstruction project, it is a contractor who is employing a number of workers to carry out the actual work. The painter painting the church does not enter into any kind of contract with the church in this case. In the contract, however, that church may insist on respecting of its special character. In these relations it should not be tolerated that workers use swear words or behave blasphemously (whereas at construction works vulgar language sometimes erupts).

4.5.2. THE CHALLENGE OF EQUAL TREATMENT AT FAITH-BASED INSTITUTIONS

Equal treatment has a horizontal effect and constitutes a common challenge subsequent to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. According to that document:

> In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

Article 4.2 provides:

> Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
>
> Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Seemingly there is a distinction between already existing faith-based requirements and eventual new ones. As the social perceptions change, the corresponding perception regarding exemptions keep changing. From kindergarten to university, the role of institutions maintained by religious communities has gained a significant role in Hungary. Safeguarding the rights of religious communities for shaping the identity of these institutions on the one hand, and a realistic approach to social reality on the other, has to be considered.

The Act on Equal Treatment and the Promotion of Equal Opportunities implementing the Equal Treatment directive 2000/78/EC provides for an *Equal Treatment Authority* as a remedy competent in equal treatment cases. Since 2021 the Authority is integrated into the ombudsman's office (Directorate General for Equal Treatment of the Office of the Commissioner for Fundamental Rights) and has the power of stating the breach of the equal treatment principle, to fine the institution that has violated the principle and to require it to change its policies. Decisions of the Equal Treatment Directorate can be challenged at the Municipal Court of Budapest. The Equal Treatment Agency/Directorate did not handle many cases concerning discrimination based on religion. Some of the few cases, however, are of interest – as well as the fact that in the given cases, the Authority rejected complaints. In one case, a mission of a religious community was challenged by a person who was rejected for a position opened for a webmaster. The job description did not mention that any kind of religiosity had been required, nor the nature of the work to be done required any kind of such commitment. Prior to the oral interview, he was asked to make a statement about his religious affiliation in his CV. After stating that he was not religious, he was interviewed successfully: his professional profile was in line with the employer, and he stated his readiness to take part in religious events and to report on them on the website of the community. His agnosticism was also mentioned in the discussion. During the procedure the mission stated that of its 15 employees, 3 or 4 had had no religious affiliation when they were hired. For the position of the webmaster, there were eight candidates, but finally the position was not filled for financial reasons. The mission stated that an understanding of religious issues had been useful for the job, but not a necessity. The Authority accepted the defence of the mission as the connection between the (lack of the religious) conviction and the treatment could not be established. Religious affiliation was only taken into account by the mission insofar this was necessary for the nature of the job – the sphere where the requirement of equal treatment did not apply at all. The interview was carried out notwithstanding the agnosticism of the applicant, which shows that they provided him a chance to demonstrate his abilities. It was also considered

that finally no one was hired, and in this way there was no one to be discriminated against.[37] In another case, an employee dismissed from a foundation providing assistance to the mentally ill carrying out its activities based on the Catholic faith, complained that the reason for her dismissal was her motherhood as well as her religious conviction. The foundation managed to provide evidence in the procedure for the fact that its activities are partly based on religious grounds, which means that employees have to have some kind of knowledge about religion, but do not have to be in fact religious. The procedure found no evidence for the claim that there had been a connection between the conviction of the employee and her dismissal – testimonies in the procedure stated other reasons of the dismissal.[38]

Unlike their counterparts in public institutions, employees of church-run institutions, such as schools, hospitals, and institutions of social care, are not public employees, but fall under general labour law. For this type of employees, a status similar to public servants is ensured (they are quasipublic employees). The employment relationship of persons employed in church-run schools, hospitals, etc., shall conform to public employment with respect to wage, working time, and rest periods.[39] Salaries, holidays, etc., are not subject to the discretion of partners – protecting, in a way, both of them. Staff of church-run institutions are also entitled to the same discount in public transport as public servants.[40] Equal treatment would be required from churches with regard to disabilities, but it would not apply to religious aspects.

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[37] Case EBH 213/2007.

[38] Government Decree No. 85 of 2007, (IV. 25.) Korm. § (1)b).

[39] Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities, § 20(2).

[40] Government Decree No. 85 of 2007, (IV. 25.) Korm. § (1)b).

4.6. Conscientious Objection in Concordatarian Law

As the Holy See is a subject of international law, the agreements stipulated by the supreme authority of the Catholic Church are legal and theological texts at the same time. The Basic Agreement between the Holy See and the Slovak Republic signed in 2000 has a unique provision on conscientious objection stating that "The Slovak Republic recognises the right of all to obey their conscience according to the doctrinal principles and morals of the Catholic Church" (Article 7). By its nature the Agreement only refers to the rights of Catholics, and a specific nature of the Catholic faith community is that individual conscience is shaped by the Church itself. According to the Fundamental Agreement, the High Contracting Parties had to conclude a special accord to define "the extent and conditions of the application of this right". This special agreement was finalised by the parties, but the domestic debate on it provoked heated political debates and finally failed. Despite this fact, the draft agreement between the Slovak Republic and the Holy See on the right to exercise objection in conscience is a unique document of particular and universal interest. It provides a unique compilation of issues that from the perspective of the Holy See provides for a summary on what the Catholic Church would regard as a requisite of the freedom of conscience.[41]

The parties would have reaffirmed their joint commitment:

> to protect the right to human life, human dignity, human physical integrity, human biological and psychological identity, family and marriage, invoking the commitments given in the Basic Treaty between the Slovak Republic and the Holy See, signed in the Vatican on 24 November 2000.

[41] M. Šmid, *On the Essence and the Meaning of Freedom of Conscience and Freedom of Religion: on Article 7 of the Basic Treaty between the Slovak Republic and the Holy See and on the Drafts of the Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objections in Conscience and of the Treaty between the Slovak Republic and the Registered Churches and Religious Societies on the Right to Exercise Objections in Conscience*, [in:] M. Moravčíková (ed.), *Výhrada svědomí – Conscientious objection*, Bratislava 2007, pp. 434–486.

The right to exercise objection 'regarding human life, human dignity, the meaning of human life, family and marriage, and the right of everyone to freely exercise objection in conscience in relation to these universal human values is recognised.

For the purposes of the Treaty, "principles of the teaching of faith and morals" meant the principles proclaimed in the Magisterium of the Catholic Church, and "objection in conscience" meant an objection raised in conformity with the principle of the freedom of conscience according to which anyone may refuse to act in a manner that he deems incompatible in his conscience with the teaching of faith and morals.

Conscientious rights are recognised both on the level of the individual as on the institutional level. On the level of the individual,

The right to exercise objection in conscience shall apply to:

a) the service in the armed forces or armed corps, including military service,
b) performances in the healthcare area, in particular acts related to artificial,
c) terminations of pregnancy, artificial or assisted fertilisation, experiments,
d) with and handling of human organs, human embryos and human sex cells,
e) euthanasia, cloning, sterilisation or contraception,
f) activities in the field of upbringing and education (…),
g) provision of legal services,
h) labour-law and other labour relations falling under the scope of this Treaty.

On the institutional level The Slovak Republic intended to undertake:

> not to impose an obligation on the hospitals and healthcare facilities founded by the Catholic Church or an organisation thereof to perform artificial terminations of pregnancy, artificial or assisted fertilisations, experiments with or handling of human organs, human embryos or human sex cells, euthanasia, cloning, sterilisations, acts connected with contraception, and not to make the establishment or

> operation of a hospital or a healthcare facility founded by the Catholic Church or an organisation thereof conditional on the performance of the aforementioned activities.
>
> (…)
>
> The right to exercise objection in conscience shall be applied according to the legal order of the Slovak Republic and within its limits. In setting out the scope and manner of exercising the right to objection in conscience, the Slovak Republic shall take care to preserve the essence and the meaning of this right.
>
> (…)
>
> The action as a result of the exercise of objection in conscience shall not entail legal liability of the person who has exercised that right. The right to exercise objections in conscience shall not warrant actions leading to the misuse of the objection in conscience. The misuse of the right to objection in conscience shall not entail protection from legal liability. The exercise of objection in conscience must not endanger human life or human health.

The Agreement has foreseen a joint commission with an advisory status for the purposes of executing it. The joint commission shall have a parity composition and include three representatives of each Contracting Party; it will be convened at least twice a year or at any time when so requested by a Contracting Party. The tasks of the joint commission included in particular: considering areas and particular activities which are objects of objections, in conscience, submitting comments concerning the drafts of generally binding legal acts, and initiatives leading to legislative amendments concerning the right to and exercise of objections in conscience and preventing its misuse, besides evaluating the implementation of this Agreement, and submitting proposals with a view to amending or supplementing the Agreement.

This unique document is a comprehensive collection of sensitive issues where conscience can matter in our age. It had provided both

for the institutional protection of individual conscience (of Catholics) and of for the protection of institutions maintained by the Catholic Church. Of course, a denominational parity had provided for equal respect of all convictions.

4.7. Conscience Based on Non-Religion

Non-affiliated conscience is an obvious reality. The belonging of those who refuse belonging is a contradiction in itself. The individual articulation of conscientious claims is not easy. Some legal systems provide for the channelled articulation of agnosticism. Whereas the German constitutional arrangement that foresees a quasi-corporation status for "world-view communities" has remained a dead letter for a century, the Belgian system of treating the Humanist Federation as a kind of belief community has led to a system where the agnostic community is handled on the analogy of religious communities. Certainly, religious communities are not necessarily homogeneous. The affiliation of different members may vary from devout adherents to members who rather have doubts. This may be true, but still there is a clear division line between members and non-members. Agnosticism may be supported by various thinkers and philosophical schools (e.g., Marxism), but non-belief is by nature heterogeneous. Many non-believers can be tempted by religion – and, like believers, may lose their faith. A person may change his or her conviction over a lifetime – especially under critical conditions. The respect for belief is due to a conviction – but the free formation of conviction deserves respect, too.

The freedom of conscience as well as the negative aspects the freedom of religion (the right not to have, not to profess, not to practice nor to teach any religion) enjoys protection equal to that of religious freedom in Hungary.[42] Philosophical groups or non-religious belief groups, however, are hardly articulated and have not gained a structured legal framework. This may be partly due to the legacy of communist rule: four decades of state forced atheism and institutional

[42] Fundamental Law of Hungary of 25 April 2011, Article VII (1).

atheist propaganda have discredited voices hostile to religion and religiosity. Certainly, a significant part of society could be defined as non-religious, but this is not expressed in an articulated manner.

The definition of religion seems to be crucial, as the law foresees a special regime for religion, whereas there is no special legal regime for non-religious beliefs. Religion is not just a matter of self-definition. The act on the legal status of religious communities provides for a definition of religious activities:

> Religious communities shall pursue activities linked to a worldview that is directed towards the transcendental, has a system of faith-based principles, the teachings of which relate to existence as a whole, and which embraces the entire human personality through specific codes of conduct.[43]

A belief without a transcendent aspect – for example, secular humanism or militant atheism – would qualify not as a religion, but as a non-theistic religion, in the manner that Buddhism or Taoism are accepted as religions without any concern. The distinction is of particular importance for the institutional perspective: religious communities can obtain a special, autonomous legal status as such, whereas non-religious communities, philosophical, and non-religious belief groups could be organised as associations but not as quasi-religious communities. Associations (of non-religious communities) would not enjoy the equal rights and public support for religious associations that qualify as religious communities.

In Hungary, one could not speak about a national debate or a concept of philosophical, non-religious beliefs. There are some humanist associations with a very limited presence in the society. From far-right neo-paganism to a network of Rudolf Steiner-inspired Waldorf schools, there is a heterogeneous scene of non-religious beliefs, but one could not speak about a rising phenomenon. Compared to state-sponsored Marxism during the decades of communist

[43] Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities, § 7/A (2).

rule, the phenomenon of philosophical, non-religious beliefs has decreased significantly.

On the 2011 census, 18% declared not to belong to any religious community but only 1.5% declared to be atheist. Sociological surveys show that a large majority of citizen who adhere to a religious community still proclaim to be "religious in their own ways".[44] Irreligion is probably even more individual than religion. Most non-believers would not follow a specific philosophy instead of a specific religion and would not belong to an organised group of non-believers. Whereas the proportion of irreligious citizenry is rising with younger generations, this would not apply to non-religious beliefs. The spiritual market has rather consumers than believers: the people experimenting with alternative spirituality are not likely to profess an articulated philosophy. Participation in esoteric meditation or reading humanist authors would not turn participants into adherents.

The Fundamental Law (the Constitution) ensures equal protection to the positive and the negative aspects of religious freedom. In this way, the right not to have a religion, not to profess, practice or teach a religion enjoys the same protection as the right to have, practice, exercise or teach a religion. The explicit right not to profess religion was added to the Constriction in 1989, at the time of transition to democracy after communism. This is a remarkable difference in the wording between the Hungarian Constitution and that of most human rights documents and constitutions. The reason for the formula was to provide for equality and to reduce a fear of forced religious practice after a communist period when religion was at first persecuted and later hindered and discriminated.

The Fundamental Law uses the wording "freedom of thought, conscience and religion".[45] This would cover both religious beliefs as well as non-religious beliefs and philosophical convictions. Professing a nonreligious belief would not be regarded as exercising the positive side of the freedom of religion but as making use

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[44] https://www.nnk.gov.hu/attachments/article/852/VallasOLEF2003.pdf (accessed on: 10.01.2022).

[45] Article VII (1).

of the negative aspects of the freedom of religion and exercising the freedom of thought and the freedom of conscience.

No notable case law has emerged since the collapse of the communist regime invoking the rights of non-religious individuals or groups or any kind of discrimination vis-à-vis religions or religious communities. Whereas the legal status of religious communities has been a debated topic both in public and with courts,[46] the status of communities of non-believers has not been raised so far. European Court of Human Rights jurisprudence or other international human rights instruments had no visible impact on the situation of philosophical and non-religious beliefs in Hungary.

Religious communities can acquire a special legal status as such. The base-level entity status for a religious community would be a religious association.[47] More numerous religious communities can after a obtain time a status ensuring more rights, and Parliament may recognise religious communities to provide for a legal framework for institutional cooperation between the state and a church. There is no recognition or special registration foreseen for philosophical, nonreligious beliefs. An eventual similar legal framework for philosophical, nonreligious beliefs similar to that for religious beliefs has never been a subject of discussion. The latter is certainly a result of a legal development of centuries whereas alternatives are widely associated with the communist regime and its violent atheism and curtailment of fundamental rights.

There are some philosophical and non-confessional associations, but none of them has gained much significance or visibility in society. Philosophical, non-religious communities could organise as associations and/or set up foundations to have a non-profit legal entity status. Acquiring legal personality would not raise serious difficulties. Associations and foundations enjoy a tax-exempt status (for

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[46] Magyar Keresztény Mennonita Egyház and Others v. Hungary – App. no. 70945/11, 23611/12, 26998/12 et al., ECHR Judgment of 8 April 2014, Section II.

[47] Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities, § 9/A.

example, with regard to property tax) and they are also exempt from fees (they do not pay inheritance tax or fees for private litigation).

There are no significant representations of the associative world of philosophical, non-religious believers organised at the national level. No special claim for legal protection for philosophical, non-religious beliefs as a collective right has been raised so far. The relationship between religious denominations and non-confessional philosophical associations is not a subject of legal regulation. There are no national agreements between the state and non-denominational philosophical associations at the national level. Philosophical and non-confessional associations do not play a significant social role at the national level. There is no special legal category among the nonprofit actors foreseen for philosophical, non- religious belief communities.

A visible difference between a religious association and an any other association (i.a., philosophical association) would be that a religious association can benefit from the tax assignment system foreseen for religious communities, whereas non-religious entities cannot. Taxpayers since 1997 can assign over 2% of their income tax every year. 1% can be directed to a religious community, and an addition 1% to any NGO or public benefit entity.[48] Taxpayers not wishing to support a religious community can direct their assignment to an alternative fund – but not to a non-religious entity. Certainly, taxpayers supporting a religious community can assign their second 1% to any association – in an unlikely case, even to a philosophical community.

Various secular, agnostic, humanist associations are present on the web and in the social media but do not seem to attract a wide range of followers (some seem to function as a one-man show). Examples could be the Hungarian Humanist Society (Magyar Humanista Társaság),[49] the Hungarian Secular Association (Magyar Szekuláris Egyesület),[50] or the Hungarian Atheist Society

[48] B. Schanda, *Financing of Churches and Religious Communities in Hungary*, "Ius Ecclesiae" 2009, pp. 653–667.

[49] http://humanistak.hu/ (accessed on: 10.01.2022).

[50] https://szekularis.blog.hu/ (accessed on: 10.01.2022).

(Magyar Ateista Társaság).[51] The latter has an almost daily activity in the social media, the first two mentioned have a new post once every few months. According to information on the Internet, the Atheist Society has 35 members, and 15,000 followers on Facebook.[52] Besides general criticism and ridiculing of religion, criticism is voiced with regard to all public gestures endorsing or supporting religion, beginning with the public support to church-run schools[53] and mentions of the positive impact of religion on morals. Criticism of religion reaches even the public spending of the metropolitan self-government of Budapest for expenditures on illuminating religious monuments and buildings.[54] A video of doctors and staff of the Gottsegen National Cardiovascular Centre titled "The Prayer of Our Heart"[55] motivated by the healing effect of prayer in which staff members and the wife of the president of the republic have recited the Lords' prayer[56] was also criticised as public endorsement of religion. Actions of this nature are motivated by the activism of a small group (often only one single individual) and do not reflect the concern of significant parts of the society – to the contrary: they may discredit the good will of activist's hostile to religion.

Philosophical and non-confessional organisations enjoy the freedom of speech and media without any restriction. There are no restrictions with regard to the access to the public space. Blasphemy constitutes a part of the freedom of expression, although human dignity, which for someone who believes in God is inseparable from faith, deserves protection.[57] The protection of the dignity of mem-

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[51] http://www.ateizmus.hu/ (accessed on: 10.01.2022).

[52] https://www.facebook.com/groups/ateizmus (accessed on: 10.01.2022).

[53] http://www.ateizmus.hu/blog/magyar-ateista-tarsasag-ensz-emberi-jogi-jelentese; https://humanists.international/2021/04/hungarian-atheists-upr-report-exposes-crisis-of-human-rights-and-democracy/ (accessed on: 10.01.2022).

[54] https://kimittud.atlatszo.hu/request/vallasi_szimbolumok_egyhazi_epul (accessed on: 10.01.2022).

[55] https://www.youtube.com/watch?v=8mcGNBwdmVc (accessed on: 10.01.2022).

[56] https://www.youtube.com/watch?v=8mcGNBwdmVc&t=10s (accessed on: 10.01.2022) https://kimittud.atlatszo.hu/request/17440/response/24840/attach/html/4/GOKVI%2079%2030%202021.pdf.html (accessed on: 10.01.2022).

[57] B. Török, *Can Religions or Religious People be Protected against Blasphemy?*, [in:] A. Koltay (ed.), *Media Freedom Regulation in the New Media World*, Budapest 2014, pp. 509–531.

bers of a faith community can be a legitimate reason to set limitations to free speech. Critical expression can also have a religious target or may target religious content, in particular when discussing public affairs. On the one hand, the target of criticism must be scrutinised. If religion itself is the target, critical expression may also hit those who have not been party to the public discourse, and beyond a certain limit, the members of a faith community do not have to tolerate provocations. Offending them cannot be considered a legitimate collateral damage of public debate. On the other hand, public figures (including representatives of religious communities) have to bear criticism, even if criticism relates to their religious conviction.[58]

In the national curriculum, philosophical schools from the antiquity though enlightenment to modern secularism are covered. There is no special assistance for philosophical, non-religious believers provided for in national legislation. On the other hand, there are no restrictions on any kind of service provided by non-religious belief communities to their members or to other individuals.

Membership in religious communities is a subject of church autonomy and has no relevance in any way in public issues. The state has no access to religious registers. The eventual consequences of a change in the religious beliefs of an individual are to be drawn by his or her own (previous) religious community according to the internal norms of the given religious community. The state would not notice such a change. Baptism belongs to the core of religious freedom of any individual. For minors it would be regarded as an evident part of parental rights. "Non-baptism" could hardly have a procedure. Numerous citizens enter no religious community nor opt for baptising their children. This can have no consequence regarding the state law – nor could baptism have legal consequence. During the communist system secular "name giving" celebrations were organised to provide an alternative to baptism. The practice enjoyed moderate success. Such services can still be

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[58] B. Schanda, *The Constitutional Court of Hungary on the borderlines of blasphemy. A note on two recent cases*, "Hungarian Yearbook of International Law and European Law" 2021, pp. 383–389, DOI: 10.5553/HYIEL/266627012021009001022.

provided by a registrar but they have lost their anti-religious character. Similar occasions are still available also from market-based private service providers (from name giving to secular funerals). Criminal law ensures protection to the freedom to conscience equal to that of the freedom of religion.[59]

In sensitive issues of bioethics, non-religious viewpoints are very prominent, but these are hardly articulated by associations providing an organisational background. In fact, there were no notable positions of philosophical or non-confessional associations in bioethical debates. Occasional humanist initiatives can be observed in blogs[60] and in the presence on social media,[61] but the social impact of these remains limited.

4.8. Conclusion – *De Lege Ferenda*

The freedom of conscience requires persons who stand for their rights, stand for their conscience. We can never provide for an exhaustive list of issues where conscience needs recognition, but the draft agreement between the Holy See and the Slovak Republic shows that a kind of institutional protection could be circumscribed. Defending the exemptions of faith-based institutions needs similar courage on another level. Whereas the general public usually has a sense of solidarity towards individual victims, institutions – such as churches – are more and more under attack. Arguing for the protection of church-run institutions "against" the individual rights of its employee may be unpopular. In an increasingly secular social environment, the understanding of claims of conscience and religion is declining and the protection of endangered rights needs to be strengthened. A similar emphasis is necessary to defend faith-based institutions, otherwise they lose their identity.

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[59] Act C of 2012 on the Criminal Code, § 215.

[60] see: https://humanistaelethome.wordpress.com/2019/06/21/veszelyben-az-emberi-jogok-nemzetkozi-humanista-nap-2019/ (accessed on: 17.05.2024).

[61] see: https://www.facebook.com/magyarhumanistatarsasag/ (accessed on: 10.01.2022).

For an enhanced protection of faith-based institutions, church autonomy needs to be reinforced. Church-run institutions need well-defined exemptions from equal treatment provisions in order to maintain identity based on the convictions of the religious community. On the level of the individual conscience – religious or secular – a better protection could well be better-protected by regulation that anticipates needs. The draft agreement between the Slovak Republic and the Holy See on conscientious objection could serve as a good source of inspiration for the legislator.

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Chapter 5. Protection of the Freedom of Conscience in Poland. Institutional Conscience Clause

5.1. Introduction

There have been many publications on the subject of the conscience clause in Poland.[1] The attention of the authors has focused on the analysis of the sources of human rights, which stem from the inherent dignity of man, which is the source of all

[1] Zob. M. Skwarzyński, *Sprzeciw sumienia w adwokaturze*, [in:] A Mezglewski, A. Tunia (red.), *Standardy bezstronności światopoglądowej władz publicznych*, Lublin 2013, pp. 201–220; M. Skwarzyński, *Sprzeciw sumienia sędziego jako element polityki wyznaniowej*, [in:] M. Skwarzyński, P. Steczkowski (red.), *Polityka wyznaniowa a prawo III Rzeczypospolitej*, Lublin 2016, pp. 155–176; M. Skwarzyński, *Korzystanie z klauzuli sumienia, jako realizacja wolności wewnętrznej czy/i zewnętrznej*, "Opolskie Studia Administracyjno-Prawne" 2015, t. 13, nr 4, p. 10; M. Skwarzyński, *Sprzeciw sumienia w europejskim i krajowym systemie ochrony praw człowieka*, "Przegląd Sejmowy" 2013, nr 6, pp. 9–26; J. Pawlikowski, *Prawo do sprzeciwu sumienia w ramach legalnej opieki medycznej. Rezolucja nr 1763 Zgromadzenia Parlamentarnego Rady Europy z dnia 7 października 2010 r.*, "Studia z Prawa Wyznaniowego" 2011, nr 14, pp. 313–337; A. Szostek, *Kategoria sumienia w etyce*, [in:] P. Stanisz, J. Pawlikowski, M. Ordon (red.), *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, Lublin 2014, pp. 15–25; A. Zoll, *Klauzula sumienia*, [in:] *Sprzeciw sumienia w praktyce*..., *op. cit.*, pp. 77–85; M. Skwarzyński, *Sprzeciw sumienia w europejskim*..., *op. cit.*, pp. 17–21; L. Bosek, *Prawo osobiste do odmowy działania sprzecznego*

individual rights.[2] This article aims to present the research conducted within the framework of a scientific project aimed at analysing the possibility of institutional protection of freedom of conscience. The article will discuss the legal consequences of the Constitutional Court's judgment of October 7, 2015, for the Polish legal order as well as present various options for the so-called institutional protection of freedom of conscience.

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z własnym sumieniem na przykładzie lekarza, "Forum Prawnicze" 2014, nr 1, pp. 87–89, 92–95; L. Bosek, *Problem zakresowej niekonstytucyjności art. 39 ustawy o zawodach lekarza i lekarza dentysty*, [in:] *Sprzeciw sumienia w praktyce…*, *op. cit.*, pp. 87–90, 100–103; O. Nawrot, *Prawa człowieka, sprzeciw sumienia i państwo prawa*, [in:] *Sprzeciw sumienia w praktyce…*, *op. cit.*, pp. 107–109; R. Sztychmiler, *Nowa interpretacja klauzuli sumienia*, [in:] *Aktualne problemy…*, *op. cit.*, pp. 327–345; R. Sztychmiler, *Klauzula sumienia w ochronie życia i zdrowia w prawie Trzeciej Rzeczypospolitej*, [in:] *Polityka wyznaniowa…*, *op. cit.*, pp. 135–152; A. Zoll, *Prawo lekarza do odmowy udzielenia świadczeń zdrowotnych i jego granice*, "Prawo i Medycyna" 2003, nr 13, p. 18; O. Nawrot, *Klauzula sumienia w zawodach medycznych w świetle standardów Rady Europy*, "Zeszyty Prawnicze Biura Analiz Sejmowych" 2012, nr 3, pp. 12–16; M. Nesterowicz, N. Karczewska-Kamińska, *Prawa pacjenta do świadczeń medycznych a prawo lekarzy (szpitali) i osób z innych zawodów medycznych do klauzuli sumienia*, "Prawo i Medycyna" 2015, nr 2, passim; J. Pawlikowski, *Spór o klauzulę sumienia z perspektywy celów medycyny i etyki lekarskiej*, [in:] *Sprzeciw sumienia w praktyce…*, *op. cit.*, pp. 145–170; B. Dobrowolska, *Sprzeciw sumienia w praktyce pielęgniarki i położnej. Analiza rozwiązań polskich i wybranych rozwiązań europejskich*, "Studia z Prawa Wyznaniowego" 2013, nr 16, pp. 249–263.

[2] K. Orzeszyna, *Godność ludzka podstawą praw człowieka*, [in:] R. Tabaszewski (red.), *Człowiek – i jego prawa i odpowiedzialność*, Lublin 2013, p. 23 i n.; J. Krukowski, *Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki*, [in:] L. Wiśniewski (red.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997, pp. 39–42; W. Jedlecka, J. Policiewicz, *Pojęcie godności na tle Konstytucji RP*, [in:] A. Bator (red.), *Z zagadnień teorii i filozofii prawa. Konstytucja*, Wrocław 1999, p. 146; J. Zajadło, *Godność jednostki w aktach międzynarodowej ochrony praw człowieka*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1989, nr 2, p. 111; K. Complak, *Uwagi o godności człowieka oraz jej ochrona w świetle nowej konstytucji*, "Przegląd Sejmowy" 1998, nr 5, p. 42 i n.; Z. Hołda, [in:] Z. Hołda, D. Ostrowska, J. Hołda, J.A. Rybczyńska (red.), *Prawa Człowieka, Zarys wykładu*, Warszawa 2014, p. 12; M. Piechowiak, *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*, Lublin 1999, pp. 343–347; F.J. Mazurek, *Godność osoby ludzkiej podstawą praw człowieka*, Lublin 2001, pp. 75–80.

5.2. Right to Conscientious Objection

The right to conscientious objection (sometimes referred to as the "conscience clause") is a legal proposal for resolving a situation in which there is a conflict between norms of state law and worldview or religious norms, and manifests itself in a legally guaranteed possibility to "refuse to perform a legally imposed duty on the basis of religious or moral convictions".[3]

In a democratic state, the ideal would be the conformity of the legal norm with the norms of individual conscience. The motive of the norm of conscience in conflict with the norm of state law can be religious, ethical, moral, ideological and other (secular) values, as well as contradiction with a certain system of beliefs, ideas.[4]

Every human being has the right to his or her own world view and should be allowed to freely express his or her personal religious and ethical convictions. States with a democratic system have to protect the freedom of conscience of their citizens and should not use mechanisms of oppression. Discrimination against faith should be forbidden. Various international documents confirm this: The Universal Declaration of Human Rights; the European Convention on Human Rights; the International Covenant on Civil and Political Rights; The Universal Declaration of Human Rights, 1948; The European Convention on Human Rights, 1950; The International Covenant on Civil and Political Rights, 1966; and Resolution 1763 on the Right to Conscientious Objection in Lawful Medical Care, 2010.

According to the definition of Galewicz, the clause of conscience is understood in Polish medical law as both an ethical norm and a legal norm.[5] According to the scholar, freedom of belief is one

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[3] P. Stanisz, *Klauzula sumienia*, [in:] A. Mezglewski, H. Misztal, P. Stanisz, *Prawo wyznaniowe*, Warszawa 2011, p. 104, pt. 111.

[4] W. Bar, *Obowiązek służby wojskowej w państwie Izrael a „sprzeciw sumienia"*, "Prawo–Administracja–Kościół" 2005, nr 1–2, pp. 6–7.

[5] W. Galewicz, *Jak rozumieć medyczną klauzulę sumienia*, "Diametros" 2012, nr 34, pp. 137–141; J. Czekajewska, *Szacunek dla autonomii kobiety ciężarnej a wolność sumienia lekarza. Etyczne konsekwencje odmowy wykonania świadczeń zdrowotnych przez pracowników służby zdrowia*, "Kultura i Edukacja" 2016, nr 3, pp. 33–46.

of the human basic values. The right to one's own worldview is not a privilege, but a "basic value" that shapes humanity. Respect for the freedom of conscience stems from respect for the human person and for their dignity.

The ECHR in the case of R.R. v. Poland noted the need to guarantee the realisation of both the right of a health care worker to conscientious objection and the patient's right to accessibility to medical services.[6]

According to the Constitutional Court, the right to freedom of conscience and religion includes not only the ability to represent a freely chosen worldview, but the right to act in accordance with one's conscience, including freedom from coercion to act against one's conscience and the right to refuse to do so. In its January 15, 1991 ruling, the Court recognised the right of a doctor to refrain from issuing a ruling on the permissibility of aborting a pregnancy and from performing such a procedure.[7]

The right of physicians, dentists and auxiliary personnel (nurses and midwives) to refrain from performing health services that are incompatible with the principles they have accepted in their conscience is regulated by Article 39 of the December 5, 1996, Law on the Profession of Physician and Dentist and Article 12(2) of the July 15, 2011[8] Law on the Profession of Nurse and Midwife.[9]

The Constitutional Court's judgment of October 7, 2015, in case number K 12/14, which concerned the physician's conscience clause, confirmed that the source of conscientious objection is the human right to freedom of conscience and religion. The Court stated that

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[6] § 211. Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal procedures which make it possible to vindicate her rights, the Polish State complied with its positive obligations to safeguard the applicant's right to respect for her private life in the context of controversy over whether she should have had access to, firstly, prenatal genetic tests and subsequently, an abortion, had the applicant chosen this option for her. Judgment of the ECHR 26 May 2011 case R.R. v. Poland, application 27617/04.

[7] Decision of 15 January 1991, U 8/90, OTK 1991, No. 1, item. 8, See: J. Oniszczuk, *Orzecznictwo Trybunału Konstytucyjnego w latach 1986–1996*, Warszawa 1998, pp. 279–280.

[8] Journal of Laws of 2023, item 1516, as amended.

[9] Journal of Laws of 2011 No. 174, item. 1039.

freedom of conscience 'by itself being a fundamental human right, is at the same time the source of many other rights and freedoms, it is a kind of "law of rights"'.[10]

A critical assessment of the 2015 Constitutional Court ruling is present in the literature. According to Tomasz Żuradzki:

> The understanding of conscience is not only incompatible with the classical Christian conception of conscience courts, but also undermines the main reason for the introduction of the conscience clause into law, as it exposes patients to additional costs, even in situations where there is no need to protect the integrity of medical conscience.[11]

5.3. The Requirement to Justify Conscientious Objection

The requirement to justify conscientious objection has not been discussed in the Polish scientific literature on the conscience clause.[12] Foreign literature has recognised the importance of the problem of justification and has devoted several articles to it.[13] T. Żuradzki presented an original concept according to which the basis of the conscience clause is not moral judgments, but a specifically understood precautionary principle. This author suggested that in order to use the conscience clause, an additional rank requirement is needed: the judgment of conscience on the basis of which someone refuses to perform a given service is of a moral nature and is sufficiently

[10] Judgment of the Constitutional Tribunal of 7 October 2015, K 12/14, pkt. 4.1.1.

[11] T. Żuradzki, *Uzasadnienie sprzeciwu sumienia: lekarze, poborowi i żołnierze*, "Diametros" 2016, nr 47, p. 99.

[12] Ibidem, p. 99.

[13] R.F. Card, *Conscientious Objection, Emergency Contraception, and Public Policy*, "Journal of Medicine and Philosophy" 2011, No. 36, pp. 53–68, R. Card, *Reasonability and Conscientious Objection in Medicine: A Reply to Marsh and an Elaboration of the Reason-Giving Requirement*, "Bioethics" 2014, Vol. 28, No. 6; L. Kantymir, C. McLeod, *Justification for conscience exemptions in health care*, "Bioethics" 2014, Vol. 28, No. 1; J. Marsh, *Conscientious Refusals and Reason-Giving*, "Bioethics" 2014, Vol. 28, No. 6.

significant. Here is an example: a doctor refuses to provide a given service to people of a given sexual orientation, gender, religion, race, explaining that he is forbidden to do so by his conscience formed by a given religious affiliation. In this case, the court of conscience can be described as improper in the normative sense: it appeals to discriminatory moral or religious beliefs. In doing so, no one doubts the authenticity and accuracy of the beliefs of the doctor in question. It seems that according to the ruling of the Constitutional Court of 7.10.2015, which opposes the examination of the content of the justification for conscientious objection, this type of case would give grounds for invoking the conscience clause. Admittedly, the Court stated in its reasoning that discrimination would not be permitted under other regulations, such as the Code of Medical Ethics. The problem, however, is that at the same time the Court stated that "the right to conscientious objection should be considered a primary right in relation to its limitations".

In light of T. Żuradzki's concept, invoking the conscience clause is permissible (legally, but also ethically) only if the following conditions are met together:

1. authenticity: there is no testimony to support that the judgments in question are not authentically professed by the doctor in question;
2. relevance: judgments of conscience are not based on false beliefs about the circumstances of the medical case, current scientific knowledge, the content of ethical or legal norms;
3. appropriate rank: the normative judgment that forms the basis for invoking the conscience clause is of a moral nature and of a sufficiently high rank, which can be verified, for example, by means of a generalisability test.

Until 2015, Polish law required doctors who refuse to perform some health service on the basis of a conscience clause to justify their refusal in medical records. This requirement was interpreted in two different ways: either as a formal requirement to cite legal provisions in the documentation and discuss the situation from the medical

side, or as a requirement to also state the content of a specific religious or moral norm or rule.[14]

A doctor could refrain from performing medical services that were inconsistent with his conscience, subject to Article 30,[15] except that he was required to indicate viable options for obtaining this service from another doctor or treatment provider, and to justify and record this fact in the medical record. A doctor practicing his profession on the basis of an employment relationship or in the health service was further required to notify his superior in writing in advance. This was the wording of the regulation until 2015.

In 2014, the Supreme Medical Chamber challenged these regulations to the Constitutional Court, raising four main objections. According to the Supreme Medical Chamber, in light of the Polish Constitution and international regulations, doctors: 1) they should be able to invoke the conscience clause also in certain "non-urgent" situations; 2) they would not be required to indicate viable options for obtaining a given service from another doctor or treatment provider; 3) they would not be required to notify their supervisor in advance in writing of a refusal to perform a service; and 4) they would not be required to either record or justify their use of the conscience clause in their medical records.

The Constitutional Court granted part of Supreme Medical Chamber request in a ruling on October 7, 2015. However, a total of four dissenting opinions were filed.[16] The Court's October 7, 2015 ruling focused least on the requirement to justify the denial of medical services.[17] The Constitutional Court assumed that the justification should "be of a medical nature", so according to (the most

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[14] E. Zielińska (red.), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, Warszawa 2008, p. 561.

[15] The doctor is obliged to provide medical assistance in any case where delay in its provision could cause danger of loss of life, grievous bodily harm or serious disorder of health, and in other cases of urgency.

[16] Two judges advocated rejecting Supreme Medical Chamber complaint in its entirety; one advocated declaring unconstitutional only the provision on "urgent situations"; one also deemed unconstitutional the requirement to notify a superior in writing.

[17] T. Żuradzki, *Uzasadnienie...*, *op. cit.*, p. 102.

widespread interpretation in the Polish scientific literature and legal commentaries) the "justification" enshrined in Article 39 of the law in question should be understood substantively, i.e., as a requirement to also cite the content of the specific norm or principle that formed the basis for invoking the conscience clause.

> The Court acknowledges that the challenged provision does not specify what the required "justification" for the refusal should contain. [...] Considering the purpose of the provision, the Court stated that [...] the justification for the reasons for the refusal to perform a service should be medical in nature, and not serve to explain the doctor's worldview or to indicate the moral principle underlying his behaviour. Indeed, the purpose of keeping medical records is not to record in writing the doctor's philosophical and legal views, but to record medical data (for example, the results of tests, analyses or measurements carried out) proving that at the time of the refusal to perform a service there was no danger of the patient's life or serious bodily injury or disorder of the patient's health. It is a misunderstanding to require a doctor to explain in his medical records what worldview he follows in his life and professional work.[18]

The requirement to "justify", i.e., to give substantive reasons for invoking the conscience clause, is necessary to make it possible to review the doctor's individual decision, i.e., to determine whether in fact his refusal to perform a service is due to the "dictates" of his conscience and not for some other reason.

The Attorney General, in a 2015 case, stated that [...] it is not the ethical motivation itself that is subject to examination (for this is sovereign), but the circumstance of whether the ethically questionable action for the doctor was not necessarily due to

[18] Judgment of the Constitutional Tribunal of 7 October 2015, K 12/14, pp. 52–53.

the danger of loss of the patient's life, serious bodily injury or serious disorder of health, constituting a case of urgency.[19]

5.4. The Concept of Conscience – the Veracity of an Individual's Beliefs

The vagueness of the concept of conscience creates the temptation to interpret any intensely held view held by an individual as dictated by the dictates of his conscience. Such a position was taken by the Committee on Bioethics, stating that:

> Neither the intensity of someone's conviction about the rightness of his or her own view, nor the fervour in proclaiming it, are in themselves a sufficient rationale for acting in the name of that view, especially when such action produces negative consequences on the part of others, leads to a restriction or violation of their rights. People can manifest sincerity and passion in proclaiming beliefs that are grounded in prejudice and irrational dislike or disgust. Pure intuition exuding its own content and rejecting the requirement for justification can become a blind and dangerous force. For this reason, a clear indication by a medical professional of the rationale for which he refuses to perform a health service seems to be a requirement that is by all means justified.[20]

The Committee's position on the issue of justification, i.e., the explicit indication of the specific moral norm to which the doctor refers in a given situation, was criticised by Andrzej Zoll, who stated: "The mere invocation of conscience is sufficient."[21]

[19] Prokurator Generalny, Pismo PG VIII TK 48/14; K 12/14 z dnia 26 marca 2015, p. 83, https://trybunal.gov.pl/s/k-1412 (accessed on: 24.07.2024).
[20] T. Żuradzki, *Uzasadnienie…*, *op. cit.*, p. 105.
[21] A. Zoll, *Klauzula…*, *op. cit.*

The crucial question still remains whether or not, when judgments of conscience are based on "prejudice and irrational aversion or disgust", we are still dealing with a genuine conscientious objection that deserves consideration. In light of the doctrine of Catholic social teaching, which recognises that "moral conscience is the judgment of reason by which the human person recognises the moral quality of a particular act" (Catechism of the Catholic Church, 1777), justification of a pragmatic, rational nature is required.[22]

The CT ruling is a milestone in the approach to understanding the rank of conscience and its sources. It may, for example, refer to a very specific – and definitely not derived from the mainstream Christian tradition – understanding of conscience judgments as some intuitions or revelations that cannot be expressed or evaluated. Alberto Giubilini assumes that this is the conception adopted by the proponents of legalising the conscience clause.[23] Such a subjectivist conception of conscience would be very far from the classical Christian theory allowing, after Thomas Aquinas, the possibility of erroneous judgments of conscience.[24] Thus, a judgment of conscience – if we understand it according to the classical conception – is a rational judgment, capable of being derived from some premises by means of rational reasoning and publicly presented and defended.

Historically, legal regulations on conscripts preceded those on doctors. In Poland, the law exempted from military service those whose "religious beliefs or professed moral principles do not allow them to perform such service". However, a person wishing to obtain such an exemption had to present: 1) a statement of professed religious beliefs; 2) an indication in the professed religious doctrine of the grounds excluding the possibility of military service, and

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[22] M. Machinek, *Czy kompromis może być alternatywą dla sprzeciwu sumienia?*, "Medycyna Praktyczna", 14.05.2015, http://www.mp.pl/etyka/podstawy_etyki_lekarskiej/show.html?id=99231 (accessed on: 24.07.2024).

[23] A. Giubilini, *The Paradox of Conscientious Objection and the Anemic Concept of "Conscience": Downplaying the Role of Moral Integrity in Healthcare*, "Kennedy Institute of Ethics Journal" 2014, Vol. 24, No. 2, pp. 159–185.

[24] Tomasz z Akwinu, *Dysputy problemowe o synderezie i sumieniu*, tłum. A. Białek, Lublin 2010.

demonstrate actual ties to the professed religious doctrine or indicate professed moral principles that conflict with the duties of a soldier performing military service; and 3) a statement of the religious beliefs or professed moral principles that conflict with the duties of a soldier performing military service.

According to the regulations as well as case law, the conscript had to present his beliefs to the commission and indicate "the actual collision of performing military service in its basic form with his religious beliefs or professed moral principles".[25] In this judgment, the court stressed that "without externalising (specifying) these principles, it would be impossible to assess whether they are of such a kind as to prevent military service". Similarly, in another judgment, it was stated that "it is important to make an objective, verifiable determination that in a given case there is a conflict between the conscript's declared beliefs and the fulfilment of the universal duty of defence".[26]

Such a solution, of course, has its pragmatic justification: it is easier for military commissions to check a conscript's affiliation with a particular religious group than to examine the validity of arguments against a particular armed conflict. It is worth noting that in the case of the medical conscience clause, there has also been a divergence of interpretation as to whether a doctor is allowed only general or also selective conscientious objection. Some interpreted the Polish regulations as allowing a doctor to decide on a case-by-case basis – as long as he or she informs his or her supervisor in advance that he or she refuses to perform a given service. Under such an interpretation, a doctor could, for example, in principle perform a given service, such as an abortion, but refuse to perform it in a particular case in which he considered it incompatible with his conscience (e.g., he would not agree to perform it in the case

[25] Judgement of the Voivodship Administrative Court of 16 November 2005, IV SA/GI 47/04.

[26] Judgement of the Voivodship Administrative Court of 26 November 2008, II SA/Wa 1300/08.

of a "high probability of severe and irreversible foetal impairment", but would agree in other cases permitted by Polish law).[27]

The Court's October 7,2015 ruling likened medical regulations to conscription regulations, ruling out the possibility of selective conscientious objection for doctors as well: "such a statement is to be general and prior, to include a statement that the doctor will not perform certain health services at all (for the future)".[28] Such an interpretation – while it obviously facilitates the management of health care facilities – is problematic from a philosophical point of view, because, after all, unconditional objection to the performance of abortions is not at all an obvious position. It is easy to imagine a doctor who recognises that foetuses have full moral status, but allows abortions to be performed, among other things, in situations where the pregnancy originated from rape, and even recognises that it would be morally wicked to refuse to perform an abortion in such a situation.

In its October 7, 2015 ruling, the Court further clarified the requirement of prematurity in the case of doctors, stating that notification of invocation of the conscience clause should be:

> apriori, addressed to the superior in principle at the time of the establishment of the employment or service relationship, alternatively – during its duration – when the doctor, as a result of a change of outlook, wishes to refrain from performing services that he or she could previously perform in accordance with his or her conscience.[29]

Such an interpretation has very far-reaching consequences: first, it assumes that a doctor can change his views at any time and, upon request, exclude himself from performing certain services; second, the one-time submission of such a declaration means that the competent doctor is no longer confronted with the necessity of refusing to perform services to a particular patient, because they are simply not referred to a particular doctor; third, prior

[27] T. Żuradzki, *Uzasadnienie…*, *op. cit.*, p. 110.
[28] Judgment of the Constitutional Tribunal of 7 October 2015, K 12/14, p. 48.
[29] Judgment of the Constitutional Tribunal of 7 October 2015, K 12/14, p. 48.

notification to the employer of a refusal to perform certain services does not, according to the CT, require any justification on the part of the doctor and cannot be verified by anyone. Virtually the only case in which a doctor practicing in the context of an employment relationship would have to provide some justification for refusing to provide a service is if he or she had previously made a statement that certain services would not be performed at all, but was nevertheless faced with the need to perform such a service, because either the patient or the patient's supervisor claims that "delay could cause danger of loss of life, serious bodily injury or serious disorder of health". If, in this case, the doctor disagreed, he would indeed have to justify his refusal somehow. However, such justification would be purely medical in nature, i.e., it should explain why, in the doctor's opinion, the delay does not threaten the danger of loss of life, etc.[30]

In recent years, there have been interesting academic discussions about the permissibility and understanding of selective conscientious objection in professional soldiers. In some countries, conscientious objection is also beginning to be allowed in practice. A particularly interesting case is the United States: between 2002 and 2006, as many as 425 people applied for obdurate status there, and in 224 cases the case was resolved favourably – despite the fact that the U.S. military was entirely professional at the time, and despite the fact that in theory, according to the law there, conscientious objection is defined as follows: "a strong, constant and sincere objection to participation in any form in war or the carrying of arms because of religious affiliation and/or beliefs".[31]

5.5. Consequences of the Constitutional Tribunal Ruling of October 7, 2015

A doctor in the current state of the law in Poland: 1) he never has to disclose the content of his religious or moral views, which are the basis for conscientious objection; 2) he never has to justify

[30] T. Żuradzki, *Uzasadnienie...*, *op. cit.*, p. 111.

[31] Ibidem.

how his worldview would prevent him from performing a given service; 3) no one can verify or control his prior statement of refusal to perform services (a possible control of the statement of refusal can only apply if the doctor does not share the belief of either the patient or his superior that "delay could cause danger of loss of life, etc."; 4) he can report a refusal to perform a given type of service at any time during his work.

Such a position is problematic, as pointed out by some judges presenting a dissenting opinion to the judgment (e.g., that other laws recognised by the Court as constitutional nevertheless limit the freedom to externalise religion; or that the right to conscientious objection is available to members of virtually any profession in light of the ruling). Moreover, the introduction by the Court's judgment of a "conscience clause on demand" for physicians in the absence of any control leads to the fact that such medical declarations would have to be respected even if there was no violation of the doctor's moral integrity, because the judgment of conscience would prove, for example, inauthentic, misguided or not moral at all.

The purpose of the introduction of the legal institution of the conscience clause was to protect some people from performing activities that would contradict their judgments of conscience, or, as it is defined in the literature, violate their moral integrity.[32] The literature has accepted that integrity of this type can be understood as one of three types of relationships.[33] First, consistency between one's accepted principles or what one considers important. Second, consistency between accepted principles and motivation. Third, congruence between principles and action.[34]

Does the value of moral integrity apply to any principles or normative judgments that one would accept? The idea that the law protects a person's moral integrity means that certain beliefs are protected because someone recognises them as important, but they

[32] J.F. Childress, *Appeals to Conscience*, "Ethics" 1979, No. 89/4; M. Wicclair, *Negative and Positive Claims of Conscience*, "Cambridge Quarterly of Healthcare Ethics" 2009, No. 18.

[33] L. McFall, *Integrity*, "Ethics" 1987, Vol. 98, No. 1, pp. 5–20; T. Żuradzki, *Uzasadnienie…*, *op. cit.*, p. 115.

[34] T. Żuradzki, *Uzasadnienie…*, *op. cit.*, p. 115.

should be important enough from an unbiased perspective to be considered valid by some reasonable person. Thus, contrary to what is sometimes believed, the mere fact of a genuine and strong attachment to some principles or normative judgments is not sufficient for us to have a violation of integrity and for this attachment to be respected in a special way by the legal system.[35]

According to the much-used definition by Lynne McFall, integrity excludes "opportunism, superficiality, shallowness".[36] Moral integrity implies concern only with a specific type of normative principles or judgments that are, from the perspective of the subject, "unassailable" and co-determine the identity of their adherent. This in turn implies, according to Żuradzki, the necessity of revealing the specific moral or religious norms that are the basis of conscientious objection. Żuradzki gives the example of:

> Let's imagine that a doctor performs services in his private office that he refuses to do because of the conscience clause in a state facility. This is sufficient testimony in favour of the inauthenticity of the conscience judgments they invoke.

In reality, the doctor does not adhere to these views he invokes. By recognising this type of conscientious objection, we would only be protecting the convenience or some interest of those involved, not the integrity of their conscience.

The requirement for authenticity is therefore obvious, although checking authenticity is not always so easy. The second example given by Zuradzki, "a doctor mistakenly believes that a particular pharmacological agent or procedure causes the early embryo to die, when in fact it only prevents fertilisation". He refuses the service, claiming that his conscience does not allow him to be complicit in the destruction of human embryos, but if the doctor had formed an accurate conviction about the effect of the agent in question,

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[35] Ibidem.
[36] L. McFall, *Integrity*, *op. cit.*, p. 11.

the conflict of conscience with performing the service in question would not have occurred".

It is worth noting that in both of these cases, the requirement of justification would not contradict the Court's interpretation, recognising that the right to conscientious objection is not a privilege of the physician, but a primary category that constitutional law and international regulations merely vouch for.

In order to be sure of authenticity and reasonableness, the doctor should be required to prepare a written justification and present it to some committee in order to be able to detect whether there is any conflict at all. In this sense, the requirement is intended only to check the authenticity and accuracy of judgments of conscience. Robert F. Card, who defends the application of both of these requirements in the case of the medical conscience clause, refers to them together as the reasonablility view requirement.[37]

In Zuradzki's proposed interpretation, however, these two requirements would not be sufficient, and a rank requirement would still be needed: a judgment of conscience on the basis of which the refusal to perform a given service is moral and sufficiently significant. The purpose of the rank requirement is merely to demonstrate that in a given case we are dealing with a genuinely moral judgment – only in such a case would a doctor, acting against his normative judgments, suffer a certain harm, which is defined in the literature as a violation of moral integrity. Thus, the role of the body assessing justification would be solely to determine whether a given judgment exceeded a certain threshold, above which we can actually have a violation of moral integrity. According to the proposition presented here, a violation of a doctor's moral integrity, relevant in the context of the conscience clause, would only be encountered when he or she would be forced to act contrary to generalisable moral judgments in the proper sense.

Not only in Polish practice, the main service for which some doctors use the conscience clause is abortion. Some physicians recognise that foetuses are entities with full moral status, and that various considerations that make it possible to remove them in accordance

[37] T. Żuradzki, *Uzasadnienie…*, *op. cit.*, p. 117.

with the law (in the Polish case: the pregnancy originates from a crime, or a threat to the life or health of the mother) do not – in their view – constitute a sufficient rationale to justify abortion. In accordance with the authenticity requirement discussed above, it would therefore be appropriate to require consistency of conviction on the part of those invoking the conscience clause, i.e., for example, that doctors who recognise that embryos and foetuses have full moral status from the moment of conception should not engage in any other activities that would put them at risk of death. But what about situations in which a doctor is not certain that a given service will result in the death of an entity with full moral status?

Proponents of the permissibility of the conscience clause in the case of writing prescriptions for "day-after" remedies argue that this uncertainty is irrelevant. As long as there is any risk that the remedies in question impede the implantation of embryos, then a doctor convinced of the full moral status of early embryos should be able to invoke the conscience clause (this type of argument is also made by proponents of extending the conscience clause to pharmacists).

Accepting the possibility of extending the application of the conscience clause to the morning-after pill, however, would give rise to the necessity of also rejecting so-called natural methods of contraception. A doctor invoking the conscience clause in the case of abortions or writing out the morning-after pill should also – in order to meet the authenticity requirement – refuse to provide information on natural methods of contraception as well.

According to Zuradzki's concept, it is allowed to invoke the conscience clause if the justification meets three requirements: authenticity, relevance and rank. In the Polish legal situation, these requirements can sometimes be met in cases of abortion. In other countries – also euthanasia on request, or assisted suicide. In light of this proposal, however, there is no possibility of invoking the conscience clause in situations in which the court constitutes a justification that is not a valid moral judgment, but a judgment based on controversial philosophical premises about the criteria for acting in situations of uncertainty about whether a given medical service can contribute to the death of an entity that someone thinks may have full moral status. Thus, in practice, invocation of the conscience

clause would not be permitted in situations involving prescriptions for the morning-after pill and similar services.[38]

5.6. The Meaning of Conscience

Many different meanings of "freedom of conscience" can be discerned in different periods, as well as in the present. In one (not the) sixteenth and seventeenth century context, 'freedom of conscience' was virtually equivalent to "freedom of religion". But this came in different shapes and sizes. It could mean: (1) the immunity of the forum internum, that is, a prohibition of inquisition. A more extended version of freedom of conscience (2) allowed the domestic exercise of one's religion. In the most lenient interpretation, freedom of conscience entailed not only (1) and (2) but also the right to public religious practice. Besides this tripartite example of freedom of conscience as religious freedom, one could mention a more contemporary notion of freedom of conscience as the right of the individual to act according to his conscience in a societal context.[39]

James Childress wrote: "Conscience is a mode of consciousness and thought about one's own acts and their value or disvalue."[40] Köhler also suggested that conscience is a kind of consciousness.[41] Conscience differs from 'normal' consciousness in that it is necessarily deeply concerned.[42]

The conception of conscience by John Calvin:

> Christian freedom, in my opinion, consists of three parts. The first: that the consciences of believers, in seeking

[38] Ibidem, p. 123.
[39] A. Schinkel, *Conscience and Conscientious Objections*, Amsterdam 2006, p. 383.
[40] J.F. Childress, *Appeals…*, *op. cit.*, p. 317.
[41] E.W. A. Köhler, "Conscience", lecture delivered at the River Forest Summer School, 1941, source: http://www.confessionallutherans.org/papers/conscience.htm (accessed on: 24.07.2024).
[42] K. Hörmann, *Lemma "Gewissen"*, [in:] K. Hörmann (ed.), *Lexikon der christlichen Moral*, Tyrolia-Verlag, Innsbrück 1976, section 1.

> assurance of their justification before God, should rise above and advance beyond the law, forgetting all law righteousness. (...) The second part, dependent on the first, is that consciences observe the law, not as if constrained by the necessity of the law, but that freed from the law's yoke they willingly obey God's will. (...) The third part of Christian freedom lies in this: regarding outward things that are themselves indifferent, we are not bound before God by any religious obligation preventing us from sometimes using them and other times not using them, indifferently.

The first part of Christian freedom relates to so called the cognitive element of conscience, the element of justification before God, of divine judgement. The second and third parts of Christian freedom are more concerned with the emotive aspect of conscience. These parts of freedom of conscience entail the conscience being relieved from excessive worry, that is only a hindrance in ("joyous") obedience to God.[43]

Karol Wojtyła clearly explains the connection between values, norms, and human goods. According to natural law, we have a natural inclination to knowledge of truth that is naturally apprehended by practical reason as a basic good. The first principles of the natural law are expressions of such goods; they direct us to pursue and preserve a good such as knowledge. A secondary principle or moral precept predicated on the good of knowledge is the norm "do not bear false witness", and that norm is linked to the moral value of veracity in our communications. Thus, "the source of norms is found in natural law".[44]

Conscience presupposes an ultimate concern; openness of conscience presupposes the recognition of the ultimacy of that concern.

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[43] M. Luther, [1520–1525], *Die Freiheit des Gewissens: Texte zur Orientierung*, P. Helbich (ed. with introduction), Gütersloher Verlagshaus, Gütersloh 1994, p. 21; M. Luther, [1501–1546], *Werke, Weimarer Ausgabe (Kritische Gesamtausgabe)*, Hermann Böhlau, Weimar 1883, Vol. 42, p. 512.

[44] Karol Wojtyła, *Human Nature as the Basis of Ethical Formation*, [in:] *Person and Community*, *Person and Community*: *Selected Essays*, translation by Theresa Sandok, New York 1993, p. 96.

It also depends on the cultivation of a sensitivity to value and its obstruction or destruction. This does not mean that a complete objectivity can be reached, or that someone with a mature conscience will be able to discern what is objectively right. Objectivity is merely a standpoint taken by a subject, who attempts to interfere as little as possible with the way in which the world presents itself to him or her.[45]

> Faith as ultimate concern is an act of the total personality. It happens in the centre of the personal life and includes all its elements. (…) It is not a movement of a special section or a special function of man's total being. They are all united in the act of faith.[46]

Tillich writes that:

> the term "ultimate concern" unites the subjective and the objective side of the act of faith – the fides qua creditur (the faith through which one believes) and the fides quae creditur (the faith which is believed). The first is the classical term for the centred act of the personality, the ultimate concern. The second is the classical term for that toward which this act is directed, the ultimate itself, expressed in symbols of the divine. This distinction is very important, but not ultimately so, for the one side cannot be without the other.

In terms such as ultimate, unconditional, infinite, absolute, the difference between subjectivity and objectivity is overcome. The word "ultimate" in "ultimate concern" applies both to the "object" of the concern and to the subjective side of the concern, that is: to someone's being not simply concerned, but ultimately concerned.

Theorists of conscientious objection have often tried to arrive at a single definition of the phenomenon of the conscientious objection.

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[45] A. Schinkel, *Conscience…*, *op. cit.*, p. 365.

[46] P. Tillich, *Dynamics of Faith*, New York 1957, p. 4.

Mostly we understand a conscientious objection [is] an objection (...) that an individual has against an action that is required of him, because he feels obliged in conscience to act otherwise in the concrete situation.[47] In British and American literature, one encounters similar definitions of conscientious objection: "To refuse (military service) for reasons of conscience."[48]

> Conscientious objection springs from a person's refusal to do, or to abstain from doing, what he believes he ought not to do or to do, even though the law commands the contrary, and this because he believes his very integrity as a moral agent is involved in disobeying the law.[49]

The above definitions point to two aspects of conscientious objection. Conscientious objection is always defined by reference to conscience on the one hand, and the relational aspect constituted by the public objection (in a legal context) on the other hand.[50]

According to Anders Schinkel there are three core elements of the symbol of conscience, these being: 1) the element of ultimate concern; 2) the element of the witness; and 3) the element of intimacy. The element of ultimate concern typically comes in one of two guises: that of authority or that of inspiration – they are, however, not necessarily mutually exclusive. The element of intimacy also

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[47] A. Schinkel, *Conscience...*, *op. cit.*, p. 490.

[48] E.R. Cain, *Conscientious Objection in France, Britain and the United States*, "Comparative Politics" 1970, Vol. 2, No. 2, p. 275. This definition of conscientious objection (or conscientious refusal, as John Rawls also calls it, which is the same thing) is abstracted from the following sentences: "Since the era when Christians became reluctant to march to the drums of Roman legions, governments have had to face the problem of citizens who refuse military service for reasons of conscience. In the eyes of many, the right to conscientious objection is as difficult to justify as the right to revolution." Cain is one of many who narrow down conscientious objection to conscientious objection to military service.

[49] H.J. McCloskey, *Conscientious Disobedience of the Law: Its Necessity, Justification, and Problems to Which it Gives Rise*, "Philosophy and Phenomenological Research" 1980, Vol. 40, No. 4, p. 536.

[50] G. Harries-Jenkins, *Britain: From Individual Conscience to Social Movement*, [in:] C.C. Moskos, J.W. Chambers (eds.), *The New Conscientious Objection: From Sacred to Secular Resistance*, New York, Oxford 1993, p. 67.

tends to manifest itself in one of two forms: secrecy and privacy. On this basis, Anders Schinkel constructed his own (fluid) concept of conscience. He proposed to view conscience as a mode of consciousness; as a 'definition' of conscience, he suggested that conscience is a concerned awareness of the moral quality of our own contribution to the process of reality, including our own being.[51]

5.7. The Institutional Protection of the Conscience

In the American literature, much attention has been devoted to the so-called institutional conscience. Elizabeth Sepper (*Taking Conscience Seriously*) presents three different grounds for applying institutional conscience: mission-operation theory; the theory of collective morality; moral association theory.[52]

According to the first proposition (the mission-operation theory) the institution's overarching moral identity or conscience is then expressed through its mission and ongoing processes (such as budgeting, strategic planning and continuing education). The following provisions can be made within the operations of a given medical entity: a statement of faith for physicians and for the institution, a statement of the institution's overarching purpose (saving and preserving human life in the spirit of Christian values; attention to preserving the moral integrity of employees; the hospital's ethics are based on all-human values, including Christian values; the dignity of each person allows the hospital to refuse anti-humanistic actions; medical knowledge cannot be the basis for actions that violate the dignity of the human person).

In order for a healthcare entity to have a recognised "conscience", the reason for refusal must be mentioned in its ethical policy or "existing or proposed religious, moral or ethical guidelines, mission statement, constitution, bylaws, statutes, regulations or other relevant documents". This mission-operation theory emphasises

[51] A. Schinkel, *Conscience…*, *op. cit.*, p. 493.

[52] E. Sepper, *Taking Conscience Seriously*, "Virginia Law Review" 2012, Vol. 98, p. 1543.

the value of allowing an institution to create and maintain institution-wide norms that give it a distinct identity. The theory further appreciates that institutions may provide a mechanism for reinforcement of individual norms. For instance, a weak-willed provider of a particular religious moral viewpoint might seek out an institution with that religion's policies in order to bind himself to the mast.[53]

The theory of the moral collective can usefully describe the value that society wishes to capture through the shorthand of "institutional conscience". Legislative recognition of institutional conscience can then serve to ensure that individuals can realise their conception of the good life in community with others, disassociate themselves from acts or persons they disapprove of, and agree to institutional norms that reinforce their own beliefs. This can be achieved by introducing into internal regulations such provisions that guarantee collective freedom of conscience (the hospital recognises the special position of humanistic values, including Christian values; the hospital accepts the Christian system of values; the dignity of the human person is the basis of the hospital's actions; legal norms opposed to the dignity of the human person do not apply to professional conduct; violation of the dignity of the human person is a violation of hospital ethics; the hospital respects the individual conscience of its employees; conflicts are resolved in the light of the individual conscience of its employees).

By its own admission, the moral-collective theory fails to describe institutional conscience per se. First, it ascribes conscience to a group of people, not an institution. The institution itself does not have a conscience, but rather functions as a means by which various individuals express their moral convictions. Second, the theory does not describe conscience as such. By focusing on the collective, it neglects that conscience regards not simply shared moral values or religious affiliation, but rather how each individual presents herself to the world. It assumes that individuals who agree on universal rules can perfectly predict their individual moral judgments in advance for every possible situation. But, as we know, principles such as "life is inviolable" are often insufficiently determinate to

[53] Ibidem.

dictate agreement on particular situations. Indeed, even affiliation with the same religion has been shown not to significantly reduce conflicts between physicians and religious health facilities over patient care.[54]

Despite its theoretical flaws, the moral-collective theory may usefully describe the value society means to capture through the shorthand of "institutional conscience". Legislative recognition of institutional conscience might then serve to ensure individuals can live out their conception of the good life in community with others, disassociate themselves from acts or individuals of whom they disapprove, and agree on institutional norms that reinforce their own convictions.[55]

The moral-collective theory does, however, have the advantage of accurately describing some subset of healthcare businesses. For instance, an individual doctor may seek to hire a nurse committed to treat patients according to his moral vision for the practice; in this most straightforward case, the individual and institutional conscience are one and the same. At a step removed, a group of family members who hold moral convictions in common might seek to exclude from the practice those who disagree. Another step down the road, several doctors might partner based on their religious ideals. Within these tight-knit groups of individuals, the moral-collective theory prioritises the collective over the dissenting individual. The underlying concern is preventing one individual from defeating the ability of the whole to live out its shared vision of a moral life. Large and less-cohesive entities, however, do not represent associations based on moral convictions. Corporations, as conglomerate entities, exist indefinitely and independently of changes in their founders or the individuals who act as administrators or employees.[56]

This theory provides an opportunity for the individual to feel secure within the institution. This is an important aspect of collective freedom of conscience. We must not lose sight of the need to

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[54] Ibidem, p. 1544.
[55] Ibidem.
[56] Ibidem, p. 1545.

take care of the patient's welfare in terms of the right to exercise his freedom of conscience. We are not talking here about the tension that is created between the patient's welfare and his religious beliefs, but about the possibility of fully realising the right to freedom of conscience and religion within the institution.

Hospitals, for instance, encompass hundreds, if not thousands, of employees and affiliates. Working conditions, pay, and convenience, among other things, likely figure into decisions to work within a particular hospital. One cannot assume the individuals are all united in their moral convictions and that institutional policy reflects each of them.[57]

Recognising institutional conscience for large healthcare institutions departs radically from a theory based on collective moral convictions. In a pluralistic society and healthcare system, allowing certain individuals to live out their moral beliefs through these institutions comes at the cost of imposing those individuals' moral beliefs on others (be they patients or colleagues). Within hospitals, each board member, administrator, medical staff member, and employee may vie for institutional decisions that reflect his or her ethical, moral, or religious views. Allowing any one of these groups to represent the "conscience" of the institution raises thorny questions about whose moral convictions count.[58]

The relevant group may be one of two broad categories of people (nurses and doctors providing care, and those responsible for setting up and running the corporate structure: trustees, administrators, founders or partners). This theory may apply to hospitals run by the churches, which can be linked to the religious organisation or religious group with which they are affiliated. The privileging of founders and administrators makes practical sense in terms of broad business decisions regarding facility-wide priorities, charity care percentages and staffing policies. Moreover, religious hospitals wishing to implement non-moral medical services would have to prohibit any institutional control of medical decisions, since they could not control doctors' decisions regarding their conduct

[57] Ibidem, p. 1546.
[58] Ibidem, pp. 1546–1547.

in accordance with their professional ethics and moral convictions (conscience).[59]

What is important about this theory, as mentioned above, is that it is almost impossible to create a public conscience in a pluralistic society. Thus, this theory can easily be used as a tool to force employees to act against their own principles, including religious principles. Since institutional conscience is undefined in law and theory, public hospital administrators may never implement such an institutional conscience. Another danger is that "institutional conscience" may become detached from generally accepted social norms and become a place for non-religious (sectarian) worship. This could mean that "institutional conscience" will frustrate adherence to and protection of individual beliefs.

For-profit and public institutions also present particular difficulties for a vision of institutional conscience as a moral collective. Within for-profit businesses, even though moral convictions might come into play, the profit motive (in some cases, an obligation to maximise shareholder wealth) must drive decision making. With regard to public facilities, one might expect commitment to provide all legal, medically necessary treatment to be the public conscience. But, because institutional conscience is undefined in law and theory, administrators of public hospitals may insist on refusal. In sum, at a certain juncture, "institutional conscience" no longer recognises coming together based on shared values. It becomes merely a way to impose moral convictions on others and thwart the individual exercise of conscience, it protects societal interests neither in conscience nor in moral association.

A separate category is "institutional conscience" for religiously oriented entities. After all, it cannot be the case that a religious entity is restricted from promoting its vision. Here the situation is specific. A religious entity has the right to freedom of conscience and religion in the collective aspect, so it can fully realise its mission. Thus, the running of hospitals or schools by a religiously oriented entity means that such an entity has the right to realise its vision and select personnel accordingly. This is important because

[59] Ibidem, p. 1547.

in a pluralistic society, such entities have a not inconsiderable role to play. At the same time, the law must not impose additional obligations on such entities, as this would be a manifestation of discrimination. The problem is when a religiously oriented entity performs medical services with public money. Then a dilemma arises as to whether such an entity can fully carry out its mission. This conflict of interest may mean that the implementation of the public task will face restrictions. It should be remembered that such a restriction of public service is illegal. The performance of a religious mission cannot eliminate the due performance of public tasks. The ideal situation is when a religiously oriented entity does not perform public tasks with public money. However, such a situation is only hypothetical. Most public services have their source in state funding and this means that the "institutional conscience" for religiously oriented entities is absolute only if it is based on an independent source of funding.

5.8. Changing the Law and Other Possibilities to Use the Results of Research

First and foremost, it is important to note that the 2015 CT judgment has opened the floodgates wide for the use of conscientious objection. In this new reality, it seems reasonable to introduce a justification for the conscience clause. T. Żuradzki's proposal seems to be a very good solution.

In addition, better and more effective institutional protection of freedom of conscience should be introduced. American solutions (the three theories) could be a model for the introduction of relevant changes. The first of these assumes the existence of a religious market and the possibility for an institution to decide to follow moral convictions. The second theory indicates that the institution itself does not have a conscience, but rather functions as a means by which various individuals express their moral convictions. This, in the Polish reality, means that a JPII public hospital should be a public hospital that carries out JPII's mission. The third theory concerns religiously oriented facilities run by ecclesiastical entities.

The results of the research carried out during the project can be used in practice by public authorities. Their implementation depends on political will and a parliamentary majority.

5.9. Conclusions

The judgment of the Constitutional Tribunal seems to be crucial for whole legal system; it can be said that the conscience clause applies to all professions. Despite its advantages, proposals of the institutional conscience clause has several limitations. First, it does not solve the problem of patient access in areas underserved by individual doctors. In the most difficult cases, a particular service might become unavailable in a particular community because the sole specialist (or a number of specialists) refuses to provide it. In such instances, suggest requiring an objector to render necessary care if no substitute provider can be found, creating incentives for the individual refuser to work in proximity to willing providers and for the state to mitigate the problem.

Consequently, some scholars recommend that conscience clauses be limited to institutions affiliated with a religious organisation. Such religious oriented hospitals might be unique. From a patient access perspective, this approach is undeniably superior to the status quo. Public, for-profit, and religious oriented institutions would have an obligation to deliver all treatments within their abilities. At those institutions, moral and religious viewpoints of administrators would not be imposed on individual patients, nurses, and doctors.

Ultimately, a legislative framework based on institutional category, distinguished by cohesion, size, and message, would promote pluralism in society. Smaller facilities with cohesive staff and clear moral positions could represent an array of moral or religious approaches to medicine. Large, pluralistic institutions, though providing the same baseline level of care, could distinguish themselves in other ways as well. A hospital might have the kindest nursing staff, adopt a team-based approach to patient care, or remunerate its employees especially well.

This proposed framework, especially when combined with creative accommodations of religious hospitals, offers a manageable and coherent approach to the particular problem of the individual institution conflict. Focusing on this inherent tension between individuals and institutions is most pressing, because it cannot be satisfactorily addressed through professional standard setting. The asymmetries in treatment of the individual-institution conflict demand legislative resolution.

More significantly, trust in the medical profession is best fostered through a legal regime where patients are confident that a doctor who does not share their moral views will ensure no harm comes to them. Exercise of conscience would not be deterred under this approach, but refusing providers would have strong incentives to conduct early and effective notice, provide all information, and deliver referrals. This proposed framework, especially when combined with creative accommodations of religious hospitals, offers a manageable and coherent approach to the particular problem of the individual institution conflict. Focusing on this inherent tension between individuals and institutions is most pressing, because it cannot be satisfactorily addressed through professional standard setting. The asymmetries in treatment of the individual-institution conflict demand legislative resolution.

Currently, however, most legislation extends beyond the tensions between providers and institutions. In addition to creating rights against discrimination for refusing providers, it immunises refusing providers from civil and criminal liability and assures they cannot face professional discipline for their refusal to treat patients. In effect, conscience legislation foresees and authorises refusing providers' harming patients. Harming patients carries no repercussions for refusers. The proposals would instead limit legislative involvement to non-discrimination, resolving the institution-individual conflict in favour of individuals in large institutions. If a provider were to harm a person, however, he could face liability.

Invoking conscience in order to refuse to perform employment obligations is rapidly spreading beyond medicine to pharmacists, lawyers. Future legislative efforts and scholarly thinking should strive to take conscience seriously. No longer should employees or

staff within a refusing institution be presumed to share its moral positions. Instead, potential conflicts between institutional interests and individual conscience should be explored and justified. Similarly, courts should consider the equality of individual conscience in interpreting current statutes, especially those broad medical conscience clauses that plausibly can be read to allow willing providers to exercise conscience in face of countervailing policies.

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Jagiellonian University | DOI: 10.32041/9788367149730/6

Chapter 6. The Right to Freedom of Conscience in the Professions of Judge and Prosecutor in Poland

6.1. Introduction

Freedom of conscience and religion is not only a human right to a specific worldview (and its externalisation), but also the right to deal with one's own conscience. It also means freedom from coercion to act contrary to one's own conscience.[1]

Conscientious objection and the conscience clause are derivatives of religious freedom of an individual.[2] Every person, including a lawyer, has the right to act in accordance with their own conscience and the right to freedom from specific coercion to act against their own conscience.[3] This applies to any situation in private and professional life.

It must be noted that freedom of conscience and religion is not only a human right to a specific worldview (and its externalisation),

[1] J. Szymanek, *Wolność sumienia i wyznania w Konstytucji RP*, "Przegląd Sejmowy" 2006, nr 2, p. 39; A. Mezglewski, H. Misztal, P. Stanisz, *Prawo wyznaniowe*, Warszawa 2011, pp. 117–118.

[2] P. Winczorek, *Wolność wyznaniowa*, "Państwo i Prawo" 2015, nr 4, p. 7; M. Skwarzyński, *Protecting Conscientious Objection as the "Hard Core" of human dignity*, "Ius Novum" 2019, Vol. 13, No. 2, pp. 275–296.

[3] P. Stanisz, *Klauzula sumienia*, [in:] A. Mezglewski, H. Misztal, P. Stanisz, *Prawo wyznaniowe*, Warszawa 2011, p. 104, item 111.

but it is also the right to deal with one's own conscience.[4] It also means freedom from coercion to act contrary to your conscience. Hence the right of every person (including a lawyer) to conscientious objection understood in a broad and general sense, also in its normalised (institutionalised) form called the "conscience clause". Historically, the earliest conscience clause appeared in the laws on soldiers in active service. Over time, it was also guaranteed to doctors and pharmacists, and later, selectively, to representatives of other professions, the catalogue of which is still open. Therefore, there are no legal and factual obstacles for lawyers of different specialties to be able to use this right.

What lies at the core of the concept of conscientious objection is the need to be guided by moral values and to reject solely formalised legal norms. This is a kind of safety valve in case legal norms violate basic ethical or moral norms.[5]

In Polish literature there is a view that freedom of conscience is never the absolute right and may be subject to limitations. Moreover, an answer can be found in the Constitution of 1997 (Art. 31, para. 3).[6] At this point, it is worth recalling the view prevailing in the literature on the subject (by Jakub Pawlikowski) that conscientious objection may be invoked not only by doctors and nurses, but also by representatives of other professions,[7] and therefore by lawyers of various specialties, too.

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[4] See the following three paragraphs for Z. Zarzycki, *Institutional Protection of Conscience in Selected Legal Professions. The example of an advocate, an attorney at law, a notary and a court bailiff, Report*, [in:] M. Wielec, P. Sobczyk, B. Oręziak (eds.), *Hominum causa omne ius constitutum sit. Collection of Scientific Papers of the Polish-Hungarian Research Platform*, Vol. II, Warszawa 2024.

[5] G. Radbruch, *Ustawowe bezprawie i ponadustawowe prawo*, [in:] G. Radbruch, *Filozofia prawa*, tłum. E. Nowak, Warszawa 2013, pp. 250–251.

[6] The Constitution of the Republic of Poland of 2nd April, 1997, as published in Journal of Laws No. 78, item 483. Article 31, sec. 3: "*Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.*"

[7] J. Pawlikowski, *Spór o medyczną klauzulę sumienia a konstytucyjne zasady równości i bezstronności światopoglądowej władz publicznych*, "Studia z Prawa Wyznaniowego" 2019, t. 22, pp. 41–82.

6.2. Part One. The Profession of Judge in Poland

6.2.1. HISTORY OF THE JUDGE'S PROFESSION IN POLAND

Historically, the judiciary is as old as human civilisation. In pre-partition Poland, we had monarchical and state courts. The concept of common courts appeared during the period of the Enlightenment in the second half of the 18th century.[8] In Poland, the first common courts appeared only at the beginning of the 19th century.[9] This was a consequence of the adoption of a modern model of the rule of law and the concept of the tripartite separation of powers (legislative, executive and judicial). In independent Poland, there were initially post-partition courts, and the unification of the common judiciary system took place in 1928.[10] In the period of the People's Republic of Poland, the judiciary was strongly politicised and subordinated to the goals of the socialist state. The political and economic changes in 1989 were followed by the democratisation of the state and the new organisation of courts in Poland. Currently, in Poland, the administration of justice is implemented by the following courts: common courts,[11] the Supreme Court,[12] administrative

[8] S. Płaza, *Historia prawa w Polsce na tle porównawczym. Część 1: X–XVIII w.*, Kraków 2002, pp. 597–598.

[9] S. Płaza, *Historia prawa w Polsce na tle porównawczym. Część 2: Polska pod zaborami*, Kraków 1998, p. 179 and the following pages.

[10] Regulation of the President of the Republic of Poland of 6 February 1928 – the Law on the Common Courts system (as published in Journal of Laws No. 12, item 93) with legal force from 1 January 1929; S. Płaza, *Historia prawa w Polsce na tle porównawczym. Część 3: Okres międzywojenny*, Kraków 2001, pp. 625 and 650–677; M. Materniak-Pawłowska, *Ustrój sądownictwa powszechnego w II Rzeczypospolitej*, Poznań 2003, p. 272; M. Materniak-Pawłowska, *Zawód sędziego w Polsce w latach 1918–1939*, "Czasopismo Prawno-Historyczne" 2011, nr 1, pp. 73–80.

[11] Article 177: "*The common courts shall implement the administration of justice concerning all matters save for those statutorily reserved to other courts.*"

[12] Article 183:
Sec. 1. "*The Supreme Court shall exercise supervision over common and military courts regarding judgments.*"
Sec. 2. "*The Supreme Court shall also perform other activities specified in the Constitution and statutes.*"

courts,[13] and military courts.[14] There are approximately 10,000 judges in Poland (2022).

6.2.2. FREEDOM OF CONSCIENCE OF THE JUDGE IN POLAND

The legal status of judges in Poland is regulated in the Constitution of 1997[15] and in the Act of 27 July 2001 – the Law on the Common Courts system (i.e., as published in *Dziennik Ustaw* of 2024, item 334, as amended). In addition, judges have a duty to observe the Collection of Principles of Professional Ethics of Judges and Court Assessors,[16] adopted by the National Council of the Judiciary[17] on 13 January 2017 (i.e., Resolution no. 25/2017).

In none of the aforementioned sources of law will we find an explicit statement of the judge's right to conscientious objection.

6.2.3. THE LAWYER'S CONSCIENCE AND THE TEXT OF THE JUDGE'S OATH[18]

Before taking office (i.e., before commencing professional activities), each judge (and, respectively, each court assessor) takes an oath

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[13] Article 184: "*The Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration. Such control shall also extend to judgments on the conformity to statute of resolutions of organs of local government and normative acts of territorial organs of government administration.*"

[14] The Act of 21 August 1997 – the Law on the Military Courts system (i.e., as published in Journal of Laws of 2022, item 2250).

[15] The Constitution of the Republic of Poland of 2nd April, 1997, as published in Journal of Laws No. 78, item 483. Chapter VIII: "Courts and Tribunals", Articles 173–187.

[16] https://krspl.home.pl/pl/dzialalnosc/zbior-zasad-etyki-zawodowej-sedziow/c,18,uchwaly/p,1 (accessed on: 09.07.2024).

[17] The Constitution of the Republic of Poland of 2nd April, 1997, Article 186, sec. 1: "*The National Council of the Judiciary shall safeguard the independence of courts and judges.*"

[18] A. Machnikowska, *Klauzula sumienia w zawodzie prawnika*, [in:] O. Nawrot (red.), *Klauzula sumienia w państwie prawa*, Sopot 2015, p. 127.

with a strictly defined statutory content. The judge and the court assessor take such an oath before the President of Poland. The text of the oath is directly provided in a specific corporate act and cannot be shortened, extended or changed by the individual taking it. This text contains important guidelines that a lawyer should follow not only in the exercise of his profession, but also in his private life.

Therefore, the judge solemnly vows as follows: "to perform the judge's duties conscientiously, administer justice in accordance with the provisions of law, **impartially according to own conscience**" (Art. 66, sec. 1).[19] The rules of judicial service are regulated by the provisions of professional ethics, which provide that "A judge may not be subjected to any influence violating his/her independence, regardless of their source or cause" (sec. 9).[20]

In addition, the judge should "perform his/her duties in the field of judicial administration conscientiously, taking into account the authority of the office of judge and the good of the judiciary" (sec. 14).[21]

In the judge's oath, there is such a phrase: "the judge has the right to administer justice in accordance with the provisions of law, **impartially according to his/her conscience**".

The role of "conscience" in the exercise of the profession of judge is to be the guarantor of his/her "impartial", i.e., maximally objectified attitude, in administering justice in accordance with the provisions of law.[22] In the social opinion, the judge is perceived as a stronghold of justice, so it will be much closer to this profession to be guided by "conscience" than it is in the case of a notary or bailiff.

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[19] The Act of 27 July 2001 – the Law on the Common Courts system (i.e., as published in Journal of Laws of 2024, item 334, as amended).

[20] Collection of Principles of Professional Ethics of Judges and Court Assessors, adopted by the National Council of the Judiciary on 13 January 2017 (i.e., Resolution no. 25/2017), https://krspl.home.pl/pl/dzialalnosc/zbior-zasad-etyki-zawodowej-sedziow/c,18,uchwaly/p,1 (accessed on: 09.07.2024).

[21] Ibidem.

[22] According to the *Polish Language Dictionary PWN*, https://sjp.pwn.pl/szukaj/sumiennie.html (accessed on: 09.07.2024), the word "conscientiously", "conscientious" means: 1. "*scrupulously discharging one's duties*", 2. "*performed accurately, reliably*". But the word conscience means: "*the ability to judge one's own conduct and the awareness of moral responsibility for one's actions.*"

In my opinion, these two statutory formulations are sufficient legal guarantees for the judge to be able to legally invoke his/her conscience, but to a narrow extent – his/her impartiality in administering justice, i.e., in passing judgments.

The question also arises whether each of the above-mentioned lawyers can finish the oath with the words 'So help me God'. And whether such a text of the oath can be a guarantee for them for conscientious objection. Bailiffs have had the possibility of such an oath since 1 January 2019, directly guaranteed in their act (Art. 17, sec. 3 of the Law on Court Bailiffs),[23] while other legal corporations do not have it. The exception are judges, because they have had this possibility since 1 October 2001 (Art. 66, sec. 1),[24] likewise with prosecutors.

6.2.4. THE LIMITS OF THE JUDGE'S FREEDOM OF CONSCIENCE IN PRACTICE

Each judge and court assessor should comply with the law and the principles of judicial ethics.[25] The main duty of the judge is to act in accordance with the oath; guarding the seriousness of the position and dignity of the office (Art. 82, sec. 1).[26] The judge should guard the seriousness of the judge's position while performing professional activities and during non-working hours and avoid anything that could bring detriment to the dignity of the judge or weaken confidence in his impartiality (Art. 82, sec. 2).[27]

The Collection of Principles Ethics for Judges and Court Assessors prohibits a judge from yielding to any influence that violates his/her

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[23] The Act of 22 March 2018 Law on Court Bailiffs (as published in Journal of Laws of 2024, item 1458, as amended).

[24] The Act of 27 July 2001 – the Law on the Common Courts system (i.e., as published in Journal of Laws of 2024, item 334, as amended).

[25] Z. Cichoń, *Klauzula sumienia w różnych zawodach*, [in:] *Prawnik katolicki a wartości prawa*, Kraków 1999, pp. 44–51.

[26] The Act of 27 July 2001 – the Law on the Common Courts system (i.e., as published in Journal of Laws of 2024, item 334, as amended).

[27] Ibidem.

independence and autonomy, regardless of their source or cause.[28] In addition, the judge should perform his/her duties in the field of judicial administration conscientiously, taking into account the authority of the judge's office and the good of the judiciary.

Establishment of an employment relationship with a specific judge is preceded by a long-term and meticulous competition procedure, in which each candidate is subject to thorough verification and analysis of professional, but also ethical and psychological suitability. The idea is to eliminate people who do not guarantee the proper exercise of the profession of judge. In the event of any infringements, the authority of the state and the specific professional group, the professional environment, would be endangered. In particular, the judge should distance himself/herself both from the defendant and from the subject of the case, as well as from lawyers appearing in the trial. The judge is bound by the obligation of impartiality and independence as well as the obligation of professional secrecy.[29]

Each judge enjoys full freedom and independence in the performance of professional activities. The judge must be free from the influence of the media and other parties; he/she must avoid the so-called "conflict of interest".[30] For example, judges may not undertake to conduct a case:

- against a person close to him/her (e.g., wife/husband, common-law wife/husband, child, parents, grandparents, brother-in-law), and
- against a person with whom they have a serious personal dispute (e.g., a neighbour),
- or for or against a person with whom they have a special camaraderie or professional affinity.

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[28] Cz. Jaworski, *Niezależność i niezawisłość*, [in:] H. Izdebski, P. Skuczyński (red.), *Etyka zawodów prawniczych: etyka prawnicza*, Warszawa 2006.

[29] M. Skwarzyński, *Korzystanie ze sprzeciwu sumienia w kontekście zasady równouprawnienia i kryterium zawodu*, "Studia z Prawa Wyznaniowego" 2016, nr 19, pp. 63–83.

[30] K. Szczucki, *Klauzula sumienia – uwagi de lege lata i de lege ferenda*, "Studia Iuridica" 2009, nr 50, pp. 168–169.

A judge, like every person, has the right to express conscientious objection. But the question arises whether it is always possible. To answer this question, two situations need to be distinguished:

- how the judge acts in the course of professional activities,
- and how the judge acts in private life.

The question should be asked whether the judge can invoke conscientious objection.

1. Just as every person he/she has a constitutional human right to freedom of conscience and religion, as guaranteed by the Polish Constitution of 2 April 1997 (Art. 53, para. 1 and para. 2).[31]
2. Unfortunately, the judge does not have such a possibility in his/her professional life, in his/her work, because the corporate law does not provide for such a possibility.

Some judges (including prosecutors) are particularly sensitive to certain categories of court cases. They approach their affairs with a large dose of negative emotions, experience them personally, are stressed, hypersensitive, tired, etc. There are certain categories of issues that they might not take up at all and not settle if they had the opportunity, the choice. The source of a judge's right to object may be various factual grounds, e.g., among others, religious beliefs, conscientious objection, worldview, philosophical, moral, ethical, and of a mixed nature.

In this regard, I enumerate, for example, court cases that may cause a conflict of conscience in a particular judge (see also point 2.4, at the prosecutor's office):

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[31] The Constitution of the Republic of Poland of 2nd April, 1997, as published in Journal of Laws No. 78, item 483. Article 53:

Sec. 1: "*Freedom of conscience and religion shall be ensured to everyone.*"

Sec. 2: "*Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.*"

- criminal cases, the accused of, e.g., murder of a person, murder of a child, paedophilia, rape, accusation of abortion, euthanasia, destruction of human embryos, crimes against religion, e.g., insulting a cross, insulting the Bible, murder or abuse of an animal,
- civil cases, e.g., divorce or compensation of the defendant priest or parish for paedophilic acts and similar cases and in the future perhaps also cases for registration or refusal to register homosexual unions (marriages) and various civil cases and administrative cases in which LGBT people participate.

In the light of the above considerations, the judge cannot refuse to take up and pass judgements on a case that creates conscientious objection in him/her, because his/her conduct would be contrary to ethical and professional principles.

However, in practice, judges deal with cases that raise conscientious objection in the following way: they may exclude themselves from handling the case. However, they may not exploit this exclusion without a valid reason. The right to exclusion relates more to familiarity with the person of the accused or defendant than to a negative attitude to the subject of the case under consideration.

6.3. Part Two. The Profession of Prosecutor in Poland

6.3.1. History of the prosecutor's profession in Poland

Historically, the modern prosecution service is of French origin. The prosecution service in Poland appeared in the Duchy of Warsaw in 1808 along with the reception of the new (mixed, inquisitorial and investigative) French criminal procedure.[32] From the beginning, the prosecution service and prosecutors played a special role in the structure of the judicial authority and the functioning of the state. The prosecution service was separated from the judiciary

[32] S. Płaza, *Historia prawa w Polsce …, Część 2: Polska pod zaborami…, op. cit.*, pp. 163–167, 191–192 and 196, 200.

and state administration. It was established as a modern judicial authority for the prosecution of crimes. In independent Poland, the prosecution service initially operated in accordance with post-partition regulations, and in 1929 it was unified on the basis of new Polish regulations.[33] In the period of People's Republic of Poland, the prosecution service was based on the Soviet model and in an organisational sense separated from the structures of the Ministry of Justice. At that time, it was headed by the Prosecutor General. After 1989, there were significant organisational and systemic changes in the prosecution service in accordance with pro-democracy models. In 2016, the prosecution service was again subordinated to the Minister of Justice, who is also the Prosecutor General. In Poland, there are approximately 6 thousand prosecutors (2018).

6.3.2. FREEDOM OF CONSCIENCE OF THE PROSECUTOR IN POLAND

The legal status of prosecutors is regulated solely by the Act of 28 January 2016 – the Law on the Prosecution Service (i.e., as published in *Dziennik Ustaw* of 2024, item 390, as amended). The Polish Constitution of 1997 unfortunately lacks any legal guarantees for the prosecution service and prosecutors. Each prosecutor and prosecutor's assessor is obliged to observe the Collection of Principles of Professional Ethics for Prosecutors, adopted by the National Council of Prosecutors by the Public Prosecutor General on 12 December 2017.

In none of the abovementioned sources of law will we find an explicit statement of the prosecutor's right to conscientious objection, let alone the conscience clause.

[33] The unification of the prosecutor's office system in interwar Poland took place along with the unification of the judicial system on the basis of Regulation of the President of the Republic of Poland of 6 February 1928 – the Law on the Common Courts system (as published in Journal of Laws No. 12, item 93) with legal force from 1 January 1929; S. Płaza, *Historia prawa w Polsce…*, *Część 3: Okres międzywojenny…*, *op. cit.*, pp. 697–700; M. Materniak-Pawłowska, *Prokuratura II Rzeczypospolitej w świetle obowiązującego ustawodawstwa*, "Studia Iuridica Lublinensia" 2016, t. 25, nr 3, pp. 659–674.

6.3.3. THE LAWYER'S CONSCIENCE AND THE TEXT OF THE PROSECUTOR'S OATH[34]

Before taking office (i.e., before commencing professional activities), each prosecutor (and, respectively, each prosecutor's assessor) takes an oath with a strictly defined statutory content. A prosecutor and a prosecutor's assessor take such an oath before the Public Prosecutor General. The text of the oath is directly provided in a specific corporate act and cannot be shortened, extended or changed by the individual taking it. This text contains important guidelines that a lawyer should follow not only in the exercise of his profession, but also in his private life.

Therefore, the prosecutor on the occasion of his/her appointment solemnly vows as follows: "to perform the duties of my office conscientiously" (Art. 92, sec. 1).[35] Also, the provisions of professional ethics dictate that "the prosecutor performs duties conscientiously and reliably" (sec. 8).[36]

In my judgement, on the basis of *the Dictionary of the Polish Language,*[37] it should be stated that the word "conscientiously" refers to a different semantic field than the performance of duties in accordance with (the law), and "conscience". The first word ("conscientiously") stresses rather accuracy, fidelity in performing duties, which do not always have to be consistent with the lawyer's religious or ethical views, but must correspond to the legal (e.g., secular) norm and the manner of its implementation, its interpretation, which means that they can be interpreted independently of the sphere of ethical and religious experiences.

[34] A. Machnikowska, *Klauzula sumienia ...*, *op. cit.*, p. 127.

[35] The Act of 28 January 2016 – the Law on the Prosecution Service (i.e., as published in Journal of Laws of 2024, item 390, as amended).

[36] Collection of Principles of Professional Ethics for Prosecutors, adopted by the National Council of Prosecutors by the Public Prosecutor General on 12 December 2017 (https://www.gov.pl/web/prokuratura-krajowa/zbior-zasad-etyki-zawodowej-prokuratorow (accessed on: 09.07.2024).

[37] According to the *Polish Language Dictionary PWN*, https://sjp.pwn.pl/szukaj/sumiennie.html (accessed on: 09.07.2024), see footnote 17.

In my opinion, these two statutory formulations are sufficient legal guarantees for the judge to be able to legally invoke his/her conscience but to a narrow extent – his/her impartiality in administering justice, i.e., in passing judgments.

Each prosecutor can finish the oath with the words "So help me God" (Art. 92, sec. 1).[38] The prosecutors have had this right since 1 October 2001, judges likewise.

6.3.4. THE LIMITS OF THE PROSECUTOR'S FREEDOM OF CONSCIENCE IN PRACTICE

Each prosecutor and prosecutor's assessor should comply with the law and the principles of prosecutors' ethics.[39]

The main duty of the prosecutor is to undertake actions determined in the acts, following the principle of impartiality and equal treatment of all citizens (Art. 6).[40] The main duty of the prosecutor is to act in accordance with the prosecutor's oath (Art. 96, sec. 1).[41] The prosecutor should guard the seriousness of the profession while performing professional activities and during non-working hours and avoid anything that could bring detriment to the dignity of the prosecutor or weaken confidence in his/her impartiality (Art. 96, sec. 2).[42]

The Collection of Principles of Professional Ethics for Prosecutors requires each prosecutor to perform activities "conscientiously and reliably, undertaking them without delay so as not to expose the participants in the proceedings and the State Treasury to unnecessary costs" (Sec. 8).[43] In addition, the Prosecutor must not yield to

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[38] The Act of 28 January 2016 – the Law on the Prosecution Service (i.e., as published in Journal of Laws of 2024, item 390, as amended).

[39] Z. Cichoń, *Klauzula sumienia …*, *op. cit.*, pp. 44–51.

[40] The Act of 28 January 2016 – the Law on the Prosecution Service (i.e., as published in Journal of Laws of 2024, item 390, as amended).

[41] Ibidem.

[42] Ibidem.

[43] Collection of Principles of Professional Ethics for Prosecutors, adopted by the National Council of Prosecutors by the Public Prosecutor General on

any influence that violates his/her independence, and in the event of their occurrence, he/she is obliged to inform his/her superior about the occurrence of such a circumstance (sec. 9).[44]

Establishment of employment relationship with a particular prosecutor is preceded by a long-term and meticulous competition procedure, in which each candidate is subject to thorough verification and analysis of professional, but also ethical and psychological suitability. The idea is to eliminate people who do not guarantee the proper exercise of the profession of prosecutor. In the event of any infringements, the authority of the state and the particular professional group, the professional environment, would be endangered. The prosecutor is obliged to remain detached from the accused, the court, and the conducted case as well as the lawyers in the trial.

A prosecutor unfortunately does not enjoy full freedom and independence in the performance of professional activities, because he/she has to carry out orders of his/her superior. But a prosecutor must be free from the influence of the media and other parties; he/she must avoid the so-called "conflict of interests". For example, prosecutors may not undertake to conduct a case:

- against a person close to them (e.g., wife/husband, common-law wife/husband, child, parents, grandparents, brother-in-law), and
- against a person with whom they have a serious personal dispute (e.g., a neighbour),
- or for or against a person with whom they have a special camaraderie or professional affinity.

A prosecutor, like every person, has the right to express conscientious objection. But the question arises whether it is always possible. To answer this question, two situations need to be distinguished:

- how a prosecutor acts in the course of professional activities,
- and how a prosecutor acts in private life.

The question should be asked whether a prosecutor can invoke conscientious objection.

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12 December 2017, https://www.gov.pl/web/prokuratura-krajowa/zbior-zasad-etyki-zawodowej-prokuratorow (accessed on: 09.07.2024).

[44] Ibidem.

1. Just as every person, he/she has a constitutional human right to freedom of conscience and religion, as guaranteed by the Polish Constitution of 2 April 1997 (Art. 53, para. 1 and para. 2).
2. Unfortunately, the prosecutors' corporate law does not provide for such a possibility.

Some prosecutors are particularly sensitive to certain categories of prosecutors cases. They approach their affairs with a large dose of negative emotions, experience them personally, are stressed, hypersensitive, tired, etc. There are certain categories of issues that they might not take up at all and not settle if they had the opportunity, the choice. The source of a judge's right to object may be various factual grounds, e.g., among others, religious beliefs, conscientious objection, worldview, philosophical, moral, ethical, and of a mixed nature.

In this regard, I enumerate, for example, prosecutors cases that may cause a conflict of conscience in a particular prosecutor (see also point 1.4, at the judge's): criminal cases, the accused of, e.g., murder of a person, murder of a child, paedophilia, rape, accusation of abortion, euthanasia, destruction of human embryos, crimes against religion, e.g., insulting a cross, insulting the Bible, murder or abuse of an animal, etc.

In the light of the above considerations, a prosecutor cannot refuse to accept a case that creates conscientious objection in him/her, because his/her conduct would be contrary to ethical and professional principles.

However, in practice, prosecutors deal with cases that raise conscientious objection in the following way: they may excuse themselves from handling the case. However, they may not exploit this exemption without a valid reason. The right to exemption concerns cases of familiarity with the defendant rather than a negative attitude to the subject of the case under consideration.

6.4. Summary[45]

In Poland, there is no institutional protection of conscience in selected legal professions.

- Corporate laws of the selected legal professions do not offer a possibility for a judge and prosecutor to refuse to perform professional activities in the situation when these are contrary to the conscience of the lawyer performing them a judge and a prosecutor (just as in the profession an advocate, an attorney at law, a notary, and a court bailiff).
- A substitute for institutional protection of conscience in the profession of judge and prosecutor is the possibility to excuse themselves from handling the case on account of 'an important reason' or circumstances that may undermine his/her "independence".
- The authorities of the professional self-government (of judges and prosecutors) have no legal grounds (constitutional, statutory) to enact codes/collection of principles (a set of rules) of ethics or other standards that would allow lawyers to invoke conscientious objection.
- Neither the authorities of the professional self-government of judges nor prosecutors have the right to invoke institutional or individual conscientious objection.

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[45] See Z. Zarzycki, *Institutional Protection of Conscience…*, *op. cit.*, [in:] M. Wielec, P. Sobczyk, B. Oręziak (eds.), *Hominum causa omne ius constitutum sit. Collection of Scientific Papers of the Polish-Hungarian Research Platform*, Vol. II, Warszawa 2024.

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