

## **Conscientious objection at the European Court of Human Rights - Comments on the Bayatyan v. Armenia judgment and some other pending cases.**

Grégor Puppink, Ph.D., Director of the ECLJ.

Delivered at the Eighteenth Annual International Law and Religion Symposium, "Religious Freedom in a Pluralistic Age: Trends, Challenges, and Practices," 2-4 October 2011

On July 7, 2011, in the case **Bayatyan v. Armenia** (application no. 23459/03), the Grand Chamber of the ECHR issued a landmark ruling concerning the conviction of a Jehovah's Witness in 2003 for his refusal to participate in military service. The Court determined the applicability of article 9 of the Convention, which protects freedom of conscience and religion, to conscientious objection to military service. The applicant, Mr. Bayatyan, was imprisoned for his refusal to perform military service despite the fact that Armenia, upon joining the Council of Europe in 2001, introduced civilian service as an alternative to compulsory military service within three years and pardoned all conscientious objectors sentenced to imprisonment.

This historic ruling from the Grand Chamber overturns well-established case law, in particular, a precedent-setting ruling from the third section from the 27th of October 2009. The ruling abolishes the former Commission's approach according to which the original intention of the States not to include an explicit right to conscientious objection in the drafting of the Convention prevented its jurisprudential creation by the Court. Indeed, while drafting the Convention, the contracting States refused the following proposal: "*the conscientious objectors who oppose to war for religious reasons will be exempted from military service*".

The Court based its new approach on the doctrines of the "practical and effective rights" (§ 98) and of the "*Convention seen as a living instrument*" (§ 102), according to which "*the Convention is interpreted and applied in a manner which renders rights practical and effective, not theoretical and illusory*" and "*in the light of the present-day conditions and of the ideas prevailing in democratic States today*", taking into consideration "*the changing conditions in the member States and the emerging consensus as to the standards to be achieved*".

Even if the States refused to recognize a right to conscientious objection to military service while drafting the Convention, for the Court, this does not necessarily imply that the Court cannot – under certain conditions – deduce such development from the Convention's text, through its interpretation. This may be done if the new development can be firmly grounded on an existing right, if the member State consents to this new obligation, and if

this consent is part of a broader consensus within the other contracting States. In the present case, it can be reasonably argued that a right to conscientious objection to military service may derive from the right to freedom of conscience and religion. In its opinion, the Court observed the evolution that took place since the Commission's decisions (from early '60 to early '80), noted the existence of a real consensus among member States recognizing the right to conscientious objection (§§ 101, 102 and 103), and duly considered Armenia's engagement in 2001 to recognize a right to conscientious objection and to pardon all the conscientious objectors sentenced to prison (§§ 104, 108 and 115), i.e. Armenia consent and obligation to conscientious objection since 2001, two years before convicting the applicant in 2003.

The Court recognized the right to conscientious objection to military service by establishing the applicability of article 9 of the Convention independently from article 4 § 3 b) of the Convention. Because article 4 § 3 b) says that "for the purpose of this article the term "forced or compulsory labor" shall not include any service of a military character or in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service", it was interpreted as an obstacle to recognize a right to conscientious objection to military service. (§§ 93 to 96, 99 and 109)

The enjoyment of the right to conscientious objection to military service for an individual requires that the person prove that their objection is based on religious grounds and that the State has the possibility to satisfy this requirement (§ 110) through, for instance, the establishment of a civilian service as an alternative to compulsory military service. As considered by the Court, this "right to conscientious objection" based on religion could be applicable to fields other than military service. Indeed, the question of one's enjoyment of such a right is currently before the ECHR in several cases, a first one concerning a public servant's refusal to conduct civil partnership ceremonies and a second one a sex and relationship therapist refusing to counsel same sex couples. In both cases, the parties objected on the grounds of their conscience or beliefs (*Ladele and McFarlane v. UK* application no. 51671/10 and 36516/10). In the case of the first applicant, after the Civil Partnership Act of 2005 entered into force, the applicant was permitted to make informal arrangements with her colleagues to swap work so that she was not required to conduct civil partnership ceremonies. At the time, two of her colleagues were homosexuals. After she received complaints in March 2006, however, disciplinary proceedings were instituted against her. In the second case, the applicant was suspended pending disciplinary investigation and later dismissed for gross misconduct. In a third case, *Herrmann v. Germany* (application no. 9300/07), which is referred to the Grand Chamber, the applicant complains about his legal obligation to tolerate hunting on his land even though he is morally opposed to hunting. His complaint is based on freedom of thought, conscience and religion, as well as on Article 1 of Protocol No.1 (protection of property) and Article 14

(prohibition of discrimination). Mr. Herrmann objects to complying, in the name of his conscience, with a legal obligation.

Because the right to conscientious objection is increasingly invoked for various situations, there is a need to deepen its understanding. In order to understand the issue properly, one must realize that conscientious objection is not an autonomous notion. It is not a “good” or a right in itself, but it must be estimated according to the object to which it applies. For instance, conscientious objection to slavery is good because slavery is bad; on the other hand, conscientious objection to instruction is bad because instruction is good. Conscientious objection manifests a relationship of morality. Therefore, the right to conscientious objection is not grounded on the goodness or the badness of an individual’s conscience who personally objects to instruction or slavery. It is grounded in the objective evilness of slavery, i.e. in the objective wrongness of the practice objected to. A conscientious judgment is a judgment about the rightness or wrongness of particular acts.

If it is easy to agree on the objective evilness of slavery, torture, and voluntary killings, such as assassination, euthanasia and abortion, it is sometimes more difficult to establish the objective wrongness of other practices. This may apply to military service, blood transfers and vaccinations. For those practices, their supposed wrongness may be grounded only on subjective or religious prescriptions rather than on prescriptions of conscience. They are “religious prescriptions” and not “prescriptions of the conscience”.

For those strictly religious prescriptions, the objection is not grounded on conscience anymore – because it doesn’t comply with the moral rationality – but is only grounded on subjective religious grounds. Some religions object to military service, blood transfers and vaccinations, even if those practices, objectively, are not immoral *per se*. Therefore, conscientious objection to blood transfers cannot be grounded on conscience. At the opposite, however, it can be grounded on one’s religious belief. Concerning same-sex unions, it is doubtful that a religious belief is necessary to object to it. In fact, homosexuality is commonly considered as objectively wrong; it is not a question of religion.

Objecting to eating pork every day or eating beef on Friday doesn’t create any real problems, because the common good of society is not directly affected by private religious prescriptions. Another problem arises, however, when someone objects to a practice that concerns the common good based on their religious or subjective ethical prescriptions. This problem is observed with objections to military service, blood transfers, and vaccinations that are aimed at preserving the health and security of society. This is also the problem in the case of hunting that is aimed at preserving a “healthy fauna in accordance with the local ecological and economic circumstances”, in other words, at preserving the “general interest of the community”.

This is why objection to military service, based on conscience, may only exist when the military service doesn't pursue the common good. Indeed, the European Court of Human Rights as well as international law have recognized until now that conscientious objection to military service may be required if and only if the use of the force doesn't pursue the common good. The Court articulated this recently in *Polednova v. Czech Republic* (no. 2615/10, 21st June 2011) and reaffirmed its findings in *K.-H. W. v. Germany* (no. 37201/97, [GC], 22nd of March 2001). The *K.-H. W.* case concerned a soldier from East Germany who received orders to shoot a trespasser at the border. The Court ruled that: *"even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognized human rights, in particular the right to life, which is the supreme value in the hierarchy of human rights. (...) such orders could not justify firing on unarmed persons who were merely trying to leave the country"* (§§ 75 and 76). *"he should have known, as an ordinary citizen, that firing on unarmed persons who were merely trying to leave their country infringed fundamental and human rights"* (§ 104).

It is because it is objectively bad to shoot a trespasser at the border that the soldier should have objected, following the prescription of his conscience rather than unjust orders.

In the *Polednova* decision, concerning a woman's murder conviction for having acted as a State Prosecutor in 1950 at the "political" trial in which four opponents of the communist regime were sentenced to death, the Court also judged that "[it] wouldn't accept the argument of the applicant according to which she was only obedient to her experienced superiors' instructions on which she completely relied". The Court based its judgment on the fact that "the applicant should have been conscientious" : *"the applicant should have been conscientious of the fact that the issues related to the guilt and punishment were already decided by the political authorities before the trial and that the fundamental principles of justice were completely abused (...), the applicant contributing, as a State Prosecutor, to create the appearance of legality of the political trial (...) and identified herself with this unacceptable practice."*

In both these rulings, the European Court reaffirmed a fundamental principle set forth in Nuremberg after WW II, the 4th of the "Nuremberg Principles", asserting that:

*"The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him"*.

Like in Nuremberg, both *Polednova* and *K.-H. W.* were sentenced for not having conscientiously objected to a gravely unjust order. In such situations, conscientious objection is not only a right, but also a duty.

Comparing conscientious objection in the field of abortion and military service, it can be said that in the medical field, conscientious objection is based on a clear moral ground (and not on religious one), as it is always objectively unjust to put an end to an innocent human life—before birth as well as after birth. Meanwhile in the field of military service, the moral ground for conscientious objection cannot be so clearly established, because participation in the protection of society is a just task. Since military service cannot be objectively considered as bad in itself, a permanent and general objection to its accomplishment is more of a “religious objection” than a “conscientious objection”, whereas objection to abortion is properly a “conscientious objection”.

To conclude these short remarks, the conscientious objection principle proclaims the moral and legal right and duty to conscientiously object to demands and orders, though legal, as long as they are unjust. In just situations, this right does not exist.

Very differently, an objection based on a purely religious or subjective ethical belief or conviction calls for the recognition of the autonomy of the “individual sphere” toward society. It asks society to be tolerant towards their individual conviction or belief to the extent permitted by the common good, or as the Court says, the “general interest of the community.”

In some situations, the objection can be grounded both on conscience and religion. This is the case, for instance, of objection to abortion, slavery or prostitution – which are aimed at respecting human life and dignity. In the Christian tradition, respecting human life and dignity is both a conscientious and a religious prescription. It is essential that reason and faith – *fides* and *ratio* – shall not contradict each other: faith doesn’t prevail over reason as “*grace doesn’t destroy nature*”, as St Thomas Aquinas says.

Because the society in most of Western Europe is not always willing to perceive the objective wrongness of abortion or euthanasia, believers conscientiously objecting to those practices may ask society to tolerate their objection only as a religious-based objection. As a result, objection to abortion becomes, in the eyes of society, a purely subjective and irrational individual opinion that may or not be tolerated in regard to other social interests.

Those claiming for recognition of the right to objection grounded both on conscience and religion shall not renounce claiming this right on the primary ground of conscience, rather than claiming it only in the name of religious tolerance. Furthermore, the Court tasked to elaborate on this right should be careful to not consider such objections as purely religious; otherwise this would be a loss not only for justice, but more deeply for the common sense, and for the rationality of society.