WRITTEN OBSERVATIONS

submitted to the European Court of Human Rights
in the case

Teliatnikov v. Lituania
(Application No. 51914/19)

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I. Modalities of recognition of the right to conscientious objection to military service

1. The right to conscientious objection to military service has been recognised and progressively affirmed by the Human Rights Committee (A) and the European Court of Human Rights (B), but in different ways, the former attaching this right to the internal forum, the latter to the external forum.

A. The jurisprudence of the Human Rights Committee

2. While it was not until 2006 that the UN Human Rights Committee formally recognized the right of conscientious objection to military service under the International Covenant on Civil and Political Rights,[1] it had previously prepared for this recognition by giving this right an increasingly solid foundation. Thus, for the first time, in a decision of 7 November 1991 in the case of *J.P. v. Canada*, it had reversed its position and admitted incidentally that "*article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures*".[2] Shortly thereafter, in 1993, in its General Comment No. 22 on freedom of thought, conscience or religion (art. 18),[3] while recognising that the "*Covenant does not explicitly refer to a right to conscientious objection*", the Committee found for the first time "*such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief*" (Para. 11). The Chairman of the Working Group that drafted the General Comment, Mr Dimitrijevic, stated that the conscientious objection referred to "*was not an objection to military service as such but an objection to killing other human beings.*"[4]

3. In 2006, in the cases of *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea*, the Human Rights Committee found that States that do not allow conscientious objection to military service violate article 18, paragraph 3, of the Covenant. The Committee has observed "that while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious belief." (Para. 8.3). It is interesting to note that, in that decision, the Committee emphasized that conscientious objection to military service constituted, in the present case, a manifestation of the objectors' conviction, that the punishment imposed on them was a restriction by the State on their freedom to manifest their beliefs, and that, consequently, such a restriction was permissible only if it was "prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others", in accordance with Article 18(3) of the Covenant. In addition, the Committee stressed that this restriction must not "not impair the very essence of the right in question".[5] The legitimacy of the restriction on the right to conscientious objection was analysed as if the objection were a manifestation of freedom of conscience. In a separate opinion, however, one member of the Committee (Mr. Solari-Yrigoyen) reckoned that the Committee's position should have been based on article 18, paragraph 1, of the Covenant rather than on article 18, paragraph 3. If the right to

[1] See HRC, *L.T.K. v. Finland*, Communication No. 185/1984, Dec. 9 July 1985.
[2] HRC, *J P v. Canada*, Communication No. 446/1991, Dec, 7 November 1991.
[3] HRC, General Comment No. 22 on Freedom of Thought, Conscience or Religion, 1993.
[4] HRC, Summary record of the 1237th meeting, CCPR/C/SR, 1237, Para. 45.
[5] HRC, *Yeo-Bum Yoon and Mr. Myung-Jin Choi v. Republic of Korea*, communication No. 1321-1322/2004, Views of 3 November 2006, Para. 8.3.; *Jung et al. v. Republic of Korea*, communications No. 1593-1603/2007, Views of 23 March 2010.

object is based on article 18, paragraph 1, then it directly guarantees conviction and cannot be restricted.

4. In two Views issued in 2011 in the case of *Jeong et al. v. Republic of Korea*,[6] the Human Rights Committee will adopt Mr. Solari-Yrigoyen's position, henceforth making the right of conscientious objectors to military service derive directly from the right to freedom of conscience and religion: "The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion." (Para. 7.3). This right is thus regarded by the Committee as constituting the right to freedom of thought, conscience, and religion; it is not optional and is not granted by the State. It is implicitly but necessarily contained in freedom of conscience.[7] The Committee adds: "Repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibit the use of arms, is incompatible with article 18, paragraph 1, of the Covenant."[8] This change is significant because, as the Committee notes in its General Comments : "Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice"[9] guaranteed by Article 18, paragraph 1 of the Covenant.

5. The Human Rights Committee has subsequently taken a similar view, as evidenced by the case of *Atasoy and Sarkut v. Turkey*.[10] Recalling, as it had already stated in *Jeong et al v. the Republic of Korea*, that the right to conscientious objection to military service is "*inherent*" to freedom of conscience – that is to say, it is entirely within the internal forum – (unlike external manifestations of belief which are a matter of external forum), the Committee considers that it is also necessary to examine the necessity of the sanction (which would be the case if the basis for the right to conscientious objection to military service were still Article 18, paragraph 3, of the Covenant), but only the effectiveness of this right. Considered as a component of the internal forum, the right to conscientious objection cannot be limited, even in time of public emergency which threatens the life of the nation (art. 4.2 of the Covenant). This right to object is not a right to provide an alternative service, but a right not to be forced or punished for its refusal. According to the Committee, the State "A State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command."[11] The State has no obligation to provide alternative service, but if it decides to do so, it must be sufficiently distant from the military and not constitute a form of punishment: it "must not be of a punitive nature" and "must rather be a real service to the community and compatible with respect for human rights".[12] The objector shall not be subject to any sanction.

6. While this new approach affirms the existence of a universal right to conscientious objection to military service, it has important theoretical implications. Moreover, several members of the Human Rights Committee have seen it as an "important" "error": Considering that the "Refusal to perform military service for reasons of conscience is among the "broad range of acts" encompassed by the freedom to manifest religion or belief in worship, observance, practice and

[6] HRC, *Jeong et al. v. Republic of Korea*, Communications Nos. 1642-1741/2007, Views of 24 March 2011.
[7] From *Jeong et al. v. Republic of Korea*, March 24, 2011.
[8] HRC, *Jong-nam Kim et al. v. Republic of Korea*, Communication No. 1786/2008, Views of October 25, 2012.
[9] CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 1993, Para.3.
[10] HRC, *Cenk Atasoy and Arda Sarkut v. Turkey*, Communications No. 1853/2008 and 1854/2008, Views of March 29, 2012.
[11] HRC, *Jeong et al. v. Republic of Korea, op. cit.* Para. 10.4
[12] HRC, *Cenk Atasoy and Arda Sarkut v. Turkey*, Para. 10.4; see also CHR, *Jeong et al. v. Republic of Korea, op. cit.*

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teaching"[13], and that "the Committee has not yet provided a satisfactory explanation justifying its new approach to the issue,"[14] they expressed the wish that it would return to its "initial approach based on the freedom to manifest one's religion or belief in practice."[15] From their point of view, the refusal to perform military service (*i.e.*, the refusal to act *against* one's conscience), as well as being prevented from wearing the Islamic veil (*i.e.*, being prevented from acting *according* to one's conscience), would both be *manifestations* of convictions and should be subject to the same regime.

7. Other members of the Human Rights Committee (Sir Nigel Rodley, Mr. Krister Thelin and Mr. Cornelis Flinterman), while supporting the new approach, acknowledged the difficulty of identifying, within the framework of this approach, a criterion "on how to distinguish conscientious objection to military service from similar objection to paying taxes or, for that matter, compliance with other legal obligations on conscientious grounds."[16] Indeed, arguing that the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion raises genuine questions: What makes conscientious objection to military service inherent in freedom of conscience? Is it *conscientious objection* or *military service*? In other words, is conscientious objection in itself an inherent right to freedom of conscience, or is it the object of the objection (in this case military service) that makes the right of objection inherent to the main right? It is in fact a question of judging whether conscientious objection is a *subjective* (abstract) right asserted by its subject or an *objective* (concrete) right defined by its object.
It should be noted that successive UN Special Rapporteurs on Freedom of Religion or Belief have also taken both positions.[17] The position that conscientious objection would involve the internal forum supports the view that objection is a subjective right. This position leads to the paradoxical situation that the right to object derives its absolute character from the subjectivity (and therefore relativity) of individual conscience.

8. Claiming that the right to conscientious objection is a right in itself (subjective), inherent in freedom of thought, conscience and religion, then raises the problem of its necessary concrete limitation, without which it would be destructive of the legal and social order. On the other hand, asserting that this right derives from its object implies a judgement on that object, for example: *Can military service be legitimately considered bad, and if so, why not civil service?* Although the majority of the Committee defended the first thesis, several of its members (led by Sir Nigel Rodley) nevertheless argued that it is because of the "the sanctity of human life" that "[t]he right to refuse to kill must be accepted completely",[18] which takes the form, *inter alia*, of a right to "conscientious objection to military service" and "puts it on another plane than that of other deep human goods protected by the Covenant." Thus, according to this approach, military service is not the accidental object of the objection, it is the very cause of it, it determines it: the right to object does not originate in the individual conscience considered in isolation, but in the moral problem objectively posed by the fact of killing, namely, in its object apprehended by the moral conscience. It is because the objection to the potential obligation to kill is considered just in itself, by reason of its very object, that it benefits everyone, without "differentiation among conscientious objectors on

[13] Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, 104th session, concerning communication nos. 1853/2008 and 1854/2008.
[14] *Id.*
[15] *Id.*
[16] Concurring Separate Opinion of Sir Nigel Rodley, Mr. Krister Thelin and Mr. Cornelis Flinterman in HRC, *Cenk Atasoy and Arda Sarkut v. Turkey*.
[17] Heiner Bielefeldt, et al, Freedom of Religion or Belief, An International Law Commentary, p 269 et seq.
[18] Opinion individuelle concordante de Sir Nigel Rodley, M. Krister Thelin et M. Cornelis Flinterman dans l'affaire CDH, *Cenk Atasoy et Arda Sarkut c. Turquie*.

the basis of the nature of their particular beliefs".[19] When the objection is considered just, then it does not matter whether the moral or religious nature of the objector's conviction be moral or religious: the objection is then justified by its object. Conversely, when acts are not recognised as justifying an objection in themselves, the objection is then viewed from a subjective point of view.

9. It should be added that cases of conscientious objection in areas other than military service have, apparently, not yet been referred to the Human Rights Committee. However, as mentioned above, the Committee stated in its *Yoon and Choi* decision of 3 November 2006 that: "while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious belief."[20] This is indeed a general, but not absolute, protection of the right to conscientious objection. At the time it adopted this decision, the Human Rights Committee was still analysing conscientious objection as a *manifestation* of freedom of conscience (external forum), subject to the limitations provided for in Article 18, paragraph 3, of the Covenant. Its recent case-law, which does not allow such a limitation on this right in relation to military service, reinforces the effectiveness of this protection at least against other practices likely to cause harm to human life.[21] Logically, and even more so, the Committee should also accept conscientious objection to euthanasia or abortion, which systematically put an end to human life, whereas military service only involves a risk of killing, in the public interest, most often in a situation of necessity or self-defence and in accordance with the laws of war.

B. The jurisprudence of the European Court of Human Rights

10. The development of the case-law of the European Court of Human Rights is another example which highlights the great difficulty - faced by the Human Rights Committee - in grasping the nature and scope of the distinction and the articulation between freedom of conscience and freedom of religion, between positive and negative manifestations of beliefs.

11. In 2011, the European Court, taking a dynamic and evolving approach to the interpretation of the European Convention, recognised a right of conscientious objection to military service in the case *Bayatyan v. Armenia*.[22] The Court held that "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9" (Para. 110). The Court went on to find that the refusal to respond to being summoned for military service was a manifestation of his religious beliefs and that the conviction of the person concerned for evading his military obligations was to be construed "an interference with his freedom to manifest his religion as guaranteed by Article 9 § 1" (Para. 112). The Court concluded that there had been a violation of Article 9 by pointing out that there were effective alternatives capable of safeguarding the competing interests involved.

12. By adopting, in the *Bayatyan v. Armenia* judgment, such a position (being no doubt less theoretical than practical since it corresponds to the usual mode of reasoning of Strasbourg judges), The Court thus aligned itself with the at the time position of the United Nations Human Rights Committee, as set out in the case of *Jeong et al. v. the Republic of Korea*, since it considered that

[19] General Comment 22, Para. 11.
[20] HRC, *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Communication No. 1321-1322/2004, 3 November 2006, Para 8.3.
[21] According to General Comment No. 22.
[22] ECHR, *Bayatyan v. Armenia*, GC, no. 23459/03, Para. 110.

conscientious objection is a *manifestation* of freedom of conscience and religion, subject to limitation, and that interference with that right must be justified in light of the criteria laid down in Article 9, paragraph 2, of the Convention.

13. The Court also agreed, in recognising that Article 9 of the Convention contains a right of conscientious objection, with the position defended since 1967 by the Parliamentary Assembly of the Council of Europe (PACE)[23] and recalled in particular in a 2002 resolution that "The right of conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the Universal Declaration of Human Rights and the European Convention on Human Rights".[24] This is also the position of the Committee of Ministers of the Council of Europe[25] as well as almost all the Member States of that Council, since, at the date of the judgment, only two of them did not recognise conscientious objection to military service.

14. The Court's position of principle in the *Bayatyan* judgment soon proved to be unsuited to the social and political reality, however, as the Court had to judge whether an objection was well-founded based on the content of the conviction in question. Indeed, as early as 2016, the Court dismissed the application[26] of a Turkish Islamist objector refusing to serve in the army of a secular state, on the ground that the convictions giving rise to his objection "do not relate to a form of manifestation of a religion or belief in worship, teaching, practice or observance" (Para. 82) and cannot therefore avail themselves of the protection of Article 9 of the Convention. The Court also observed that the objector was not opposed, as a matter of principle, to military service, but only to rendering such service to a secular State.

15. This *Enver Aydemir* judgement poses a double problem. Firstly, because it considers that adherence to Sharia law and the resulting refusal to serve a secular state would not be religious beliefs, even though Islam's very characteristic is to confuse religion and politics. By thus excluding Islamist beliefs from the protection of Article 9, the judgment runs counter to the Court's well-established case law.[27] This judgment is also problematic because it reduces the protection of Article 9 to only the convictions which are manifested through worship, teaching, practice or observance, *i.e.* which are essentially religious or religious in nature. However, the scope of freedom of conscience is broader than that of religion, even if freedom of conscience and religion are guaranteed together.[28] One may want and have to object on non-religious grounds, on grounds of justice and simple humanity.[29]

[23] PACE, Resolution 337 (1967) on the right of conscientious objection. See also Recommendation 1518 (2001) of May 23, 2001, Exercise of the right of conscientious objection to military service in Council of Europe member states, in which PACE states that the right of conscientious objection is "a fundamental aspect of the right to freedom of thought, conscience and religion" recognized in the Convention.

[24] PACE, Recommendation 1518 (2001), Para. 2.

[25] Council of Europe Committee of Ministers, Recommendation R(87)8 of April 9, 1987, Regarding conscientious objection to compulsory military service, and Recommendation CM/Rec(2010)4 of February 24, 2010, of the Committee of Ministers to member states on human rights of members of the armed forces.

[26] ECHR, *Enver Aydemir v. Turkey*, no. 26012/11, 7 June 2016, Para. 68-84. (free translation)

[27] See in particular *Leyla Şahin v. Turkey*, no. 44774/98 of November 10, 2005 on the wearing of the Islamic veil, or *Gündüz v. Turkey*, no. 35071/97 of December 4, 2003, in which the Court ruled that it was contrary to freedom of expression the conviction of a Muslim religious leader for violently criticizing the secular regime in Turkey, calling for the establishment of Sharia law, and calling children born of unions consecrated only by the secular authorities "bastards."

[28] How then can we understand that in other cases the Court finds that opposition to same-sex marriage is a religious conviction? It could very well, on the basis of the *Enver Aydemir* judgment, deprive of protection all persons having an objection of a moral nature.

[29] ECHR, *Polednová v. The Czech Republic*, no. 2615/10, 21 June 2011. The case concerned the conviction of a woman for participating as a prosecutor in a sham trial that led to the sentencing to death of four opponents of the communist regime.

16. This decision is clearly very poorly argued. Eager to support the fight against Islamism, the judges probably found no other way of denying Islamists the status of objector than to exclude their beliefs from the scope of Article 9, to the detriment of freedom of conscience and religion. It would have been preferable to dismiss the application on the ground that the applicant's objection was not to perform military service but to serve a secular State. The appeal would then have been dismissed in the name of respect for the duty of loyalty of every citizen to their homeland, provided that their army did not commit gravely unjust acts. Only then does the objection become legitimate, and even mandatory; this was the case, for example, of the famous Franz Jägerstätter, who paid with his life for his refusal to serve in the German army, not out of pacifism, but out of obedience to his moral conscience, enlightened by his Catholic faith, which made him see the evil of the Nazi regime.

17. To date, the Court has only upheld objections to military service where the objections were not to the political use of the army, but to the military character of the service, whether the objectors be Jehovah's Witnesses[30] or pacifists.[31]

II. Elements for assessing the distance between the conviction and the act to which it is objected to.

18. In judging an objection, the distance between the object of (the act in question) and the reason for (the conviction) the objection should be considered. Being forced to hold a gun is not the same as being forced to use it. Cleaning up at an abortion clinic is not the same thing as performing an abortion. Every act engages the conscience of the perpetrator to varying degrees depending on circumstances that need to be assessed on a case-by-case basis.

19. The European Court formulates the need for a sufficiently close connection between the object and cause of the objection in clear terms: "Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1".[32] The Court specifies that "the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case".[33] For the objection to be serious, there must therefore be a sufficiently "close and direct" link between the reason for the objection and its object[34] so that the person is morally committed by the action. If the objector is summoned to perform the objected act themselves (e.g. the obstetrician when faced with an abortion), they are morally committed and the question of distance does not arise. If, on the other hand, they do not perform the wronged act themselves, but nevertheless intervene in the procedure (for example, by giving the name of a doctor likely to perform the abortion), then this distance should be assessed using the criteria, classic in moral philosophy, which have been developed to measure

[30] See *Bayatyan* (op. cit., Para. 111); *Erçep v. Turkey*, no. 43965/04, Para. 48, 22 November 2011; *Feti Demirtaş v. Turkey*, no. 5260/07, Para. 97, 17 January 2012; and *Buldu and others v. Turkey*, no. 14017/08, Para. 83, 3 June 2014.
[31] ECHR, *Savda v. Turkey*, no. 42730/05, 12 June 2012, Para. 96; *Tarhan v. Turkey*, no. 9078/06, 17 July 2012, Para. 58.
[32] ECHR, *Eweida and others v. The United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, Para. 82. See also *Skugar and others v. Russia* and, for example, *Arrowsmith v. The United Kingdom*, no. 7050/75, Commission Report of 12 October 1978, (DR) 19, p. 5, ECHR, *C. v. The United Kingdom*, no. 10358/83, Commission Report of 15 December 1983, DR 37, p. 142, and *Zaoui v. Switzerland*, dec., no. 41615/98, 18 January 2001.
[33] ECHR, *Eweida, op. cit.*, Para. 82.
[34] Eur. Com. HR, *Borre Arnold Knudsen v. Norway*, dec. no. 11045/84, 8 March 1985.

"cooperation with evil", and which distinguish according to whether the cooperation is direct or indirect, formal or material, near or distant.

A. The need for a direct link and the Principle of double effect

20. The existence of a "direct link" means that the person concerned would, if they carried out the act to which they objected, be led to collaborate directly with the evil that is conscientiously reproved of: "This collaboration is said to be direct when there can be no doubt about the determined intention of the main actor".[35] Thus, a pharmacist is directly morally committed when they deliver an abortifacient product to a client because this product admits for no doubt as to the use that will be made of it and the effects that will result from it. This is different for contraception, which may be prescribed for purposes other than contraceptive. Similarly, in normal circumstances, an arms dealer is not directly involved in the use of the arms he sells, as long as they can be used for good purposes, such as self-defence or leisure.

21. The need for a direct link between the ground for objection and its object makes it possible to take account of situations raising the problematic of the "double effect"[36], *i.e.*, those in which the same act produces both good and bad effects. Can a person object to an act if it is likely to produce harm? The answer, classic in moral philosophy,[37] consists in verifying, firstly, that the good effect is the only purpose of the act, secondly, that the bad effect is not desired for its own sake, thirdly, that the good effect results from the act and not from the bad effect, and, fourthly, that the bad effect is not disproportionate to the good effect.
Thus, according to this doctrine, an evil can only be tolerated as the price of a good at least equal, and on condition that the good sought be not the result of evil. The latter condition, which requires that the evil be a side effect of the action and not a means of the good sought, reiterates the moral rule that an evil cannot produce a good, otherwise the end would justify the means.

22. Under this double-effect theory, a physician who in principle objects to abortion would not be conscientiously prevented (and would even be required) from providing a pregnant woman whose life is in danger with a treatment likely to induce an abortion. In such a case, the aim of the treatment is not abortion but the safeguarding of the woman's life, and the value of the mother's life is proportionate to that of the unborn child, making the risk of abortion acceptable. The link between the act in question and its reprehensible effect is then indirect. In this case, a doctor cannot object without disrespecting his duty of care. The situation is different when a woman asks for an abortion for reasons of personal convenience, such as her economic situation: in this case, the good effect sought (the limitation of expenditure) is not proportionate to the value of the life sacrificed and is the result of the bad effect in itself.

B. The need for a close link

23. The required collaboration in the reprobated act must also be sufficiently close or proximate for the objection to be justified. However, if the collaboration of the objector, even at a distance, is necessary for the performance of the reprobated act, it is as morally binding as close collaboration, and the objection is then justified in this respect. This applies, for example, not only to the prescription, sale and administration of the abortion pill, but also to its manufacture. Similarly, a

[35] Jacques Suaudeau, *L'objection de conscience. Son application dans le domaine de la santé*; online.
[36] Also referred to as "indirect voluntary" act.
[37] St. Thomas Aquinas, Summa Theologica, II-II, Qu. 64, Art.7.

doctor who gives the contact details of one of his colleagues who carries out abortions would be morally committed by this act, because his indication contributes to its realisation. It is therefore legitimate that his possible objection to abortion should also apply to the refusal to designate a practitioner who could perform the reproved act.[38] The pharmacist who provides the abortion pill is no less committed than the nurse who administers it or the doctor who performs a surgical abortion: the method of abortion has no impact. The same applies to the person who assists a suicide by preparing the poison.

24. The European Court considers the need for this "close link" and has held, by way of illustration, that this condition is not met when the refusal to pay the tax is simply motivated by opposition to abortion[39] or to the army,[40] or when this opposition to abortion is invoked by a pastor to justify the refusal to carry out the duties of civil registrar incumbent upon him.[41] Similarly, the former European Commission of Human Rights held that a taxpayer cannot object to the payment of the tax on the sole ground that the state is financing a cult to which they do not belong.[42]

25. This is also the position of the Human Rights Committee, which declared inadmissible a complaint from an individual who had refused to pay the percentage of his taxes corresponding to the percentage of the amount of Canada's federal budget devoted to military spending.[43]
In the case of the Turkish Islamist conscientious objector, referred to above,[44] the European Court could also have ruled on the distance between the reason for the objection (the rejection of secularism) and its object (military service), rather than wrongly excluding the conviction in question from the benefit of Article 9.

26. The European Court has also taken into account the distance between the cause and the object of the objection, but in reverse: when it requires States to ensure that any civilian service required as an alternative to military service is "sufficiently separated (…) from the military system".[45] In this case, it ensured that the distance is made sufficiently wide by the authorities to ensure that the service requested does not offend the objector's conscience.

[38] In this case, as Jean Pierre Schouppe notes, "it might seem reasonable that the burden of information would then be based on the state, which took the responsibility of decriminalising these practices which, moreover, remain strictly limited exceptions to the prohibition to kill. No doctor can be forced to perform such acts. It is thus to the State, which decriminalised the act, that should fall the task of organizing an information mechanism on physicians available to care for patients." "The Institutional Dimension of Conscientious Objection," in Law and Prevention of Abortion in Europe, published by Grégor Puppinck, Sallux publisher, 2018, p. 251.
[38] ECHR, *Fernandez-Martinez v Spain*, GC, no. 56030/07, 12 June 2014, Para. 127.
[39] Com. EDH, *Bouessel du Bourg v. France*, n° 20747/92, dec., 18 February 1993.
[40] Com. EDH, *C. v. The United Kingdom*, no. 10358/83, dec. 15 December 1983. See also HRC, *J P v. Canada*, Communication No. 446/1991.
[41] *Borre Arnold Knudsen v. Norway*, *op. cit.*
[42] ECHR, *Darby v. Sweden*, No. 11581/85, May 9, 1989; *Iglesia Bautista 'El Salvador' and José Aquilino Ortega Moratilla v. Spain*, No. 17522/90, December 22, 1992.
[43] *J. P. v. Canada*, *op. cit.*, para. 4.2. The Committee noted that "[a]lthough article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures, the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article."
[44] ECHR, *Enver Aydemir v. Turkey*, no. 26012/11, 7 June 2016, Para. 68-84.
[45] ECHR, *Adyan and others v. Armenia*, no. 75604/11, 12 October 2017, Para. 69.

III. The obligations of the State in the presence of an objection expressing a religious or philosophical conviction

27. Unlike an objection resulting from the immoral nature of the act to which it is objected (moral objection), an objection having an exclusively religious motive and relating to an act whose morality is accepted is based on the right to *personal* freedom of religion and on the ideal of democratic *society*. Here public authorities must seek to reconcile the rights and interests at stake, but as the objection can no longer claim to be fair in itself, its acceptance will be limited by the respect of society's fundamental values.

28. The cultural transformation of Western society is changing the basis for freedom of conscience and religion. A new (collective) foundation is emerging that tends to replace the (personal) foundation of dignity: the ideal of a democratic, pluralistic, and liberal society. However, as soon as one's conception of society dictates the attitude towards conscientious objection, the source of the right to freedom of religion and conscience, which is absolute when it draws on human dignity, becomes relative and contingent when it derives from the ideal of democratic society, because this ideal is based not so much on an ontology as on the will to coexist, which is essentially practical.

29. The European Court has developed its doctrine concerning the practical consideration of religious objection in the perspective of the ideal of democratic society. According to the European Court, a "democratic society" is characterised by "pluralism, tolerance and broadmindedness."[46] In practice, while the European Court was perfectly consistent with its own principles, it is in the light of these criteria that it should judge whether a sanction against a conscientious objector on religious grounds is justified. In practice, this attention to individuals and minority groups takes the form of a search for a compromise close to the notion of reasonable accommodation. In terms of the relationship between reason and justice, such accommodations should not go so far as to create injustices, but on the contrary aim to avoid them by ensuring that fairness is established. The Court gives as an example the introduction of civil service that allows the convictions of the minority of objectors to be respected without creating inequality between conscripts.

A. Reconciling rights, not opposing them

30. Here, it is important to ensure that a higher degree of protection is afforded to the negative expression than to the positive manifestation of freedom of conscience and religion. Indeed, a positive manifestation of freedom of conscience and religion can always be modulated, and thus restricted on legitimate grounds, unless it reaches its core. The task of the judge is then to investigate whether the restriction on this positive exercise was justified in the light of other competing rights and interests. Competing rights and interests are then *weighed in the balance*, which in practice results in the prevalence of one over the other depending on the circumstances. However, the approach to conscientious objection must be different because it is not possible to restrict negative freedom of conscience (not being forced to act against one's beliefs) without at the same time destroying it. Consequently, the State may not in any case compel the objector to act positively against their beliefs.

31. The State's obligation is then to *reconcile* competing rights so that they can coexist and be fully respected, rather than to ensure that one prevail over the other. The requirement of conciliation goes beyond the requirements of strict commutative justice, in that it aims to ensure

[46] ECHR, *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976, Para. 49.

that everyone can benefit from concrete and effective rights.[47] This more distributive approach is based not only on freedom of conscience and religion, but also on the principle of equality, which states that a person or group, simply because they are a minority, should not be treated unequally in the effective enjoyment of their human rights. The corollary of this approach is the principle of non-discrimination. It is to ensure that minorities are not indirectly discriminated against by the choices of the majority that the State must adopt measures to preserve the minority. Thus, when the Court finds that the State has a positive obligation to respect a right: "The verb "respect" means more than "acknowledge" or "take into account". In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State."[48] It is a way for society to self-limit its collective hold on individuals and remain liberal. An approach by the state to reconcile competing rights, rather than to make one prevail over the other, "ensure cohesive and stable pluralism and promote religious harmony and tolerance in society".[49] More generally, and as noted by Judges Tulkens, Popović and Keller in an opinion in a case involving a court's refusal to postpone a hearing scheduled on a Shabbat day, this positive obligation on the state is to provide "reasonable accommodation," even if it means granting "a few concessions," as this is also the "price to be paid in order to ensure respect for freedom of religion in a multicultural society".[50]

32. It is the responsibility of the State to ensure that the respect for the objector's freedom of conscience is reconciled with other competing rights and interests, and the task of the court is, first of all, to ascertain whether the authorities have positively taken proportionate measures to that end. Failure to propose a method of conciliation is sufficient to constitute a violation of freedom of conscience and religion. Thus, for example, with regard to dietary rules of a religious nature, the Court found that there was a positive obligation on the State to provide a diet compatible with the religion of the detained persons.[51] The State not only cannot *de facto* compel a prisoner to eat food contrary to their religious beliefs but must adjust the diet as far as possible so that the prisoner can feed without violating their beliefs. Regarding military service, the Court held in *Bayatyan* that respect for the freedom of religion and conscience of objectors implies a positive obligation on the State to organise the operation of this service in such a way as to respect the rights of objectors, which amounts to saying that the State is obliged to offer an alternative to armed service. For the Court, the absence of an alternative (*i.e.*, an offer of conciliation) establishes in itself the violation of the objector's freedom of conscience and religion.

33. However, it is not enough to propose a conciliation, it must be sincere and fair. It must respect the objector's convictions and not constitute a disguised sanction. United Nations bodies have specified the qualities that such a substitute system should have: any service imposed as an alternative to military service must be compatible with the reasons for conscientious objection, must not be in the nature of a sanction, and must be of a nature that is not a form of punishment, and must be in keeping with the objectors' convictions,[52] "be a real service to the community and compatible with respect for human rights."[53] *Mutatis mutandis*, these characteristics may be required for any conciliation and alternative service to any legitimate religious objection.

[47] ECHR, *Artico v. Italy*, no. 6694/74, 13 May 1980, Para. 33.
[48] ECHR, *Folgerø and Others v. Norway*, GC, no. 15472/02, 29 June 2007, Para. 84c).
[49] ECHR, *Bayatyan v. Armenia*, *op. cit*., Para. 126.
[50] ECHR, *Francesco Sessa v. Italy*, no. 28790/08, 3 April 2012, joint dissenting opinion.
[51] ECHR, *Vartic v. Romania* (No. 2), no. 14150/08, 17 December 2013.
[52] Commission on Human Rights, Resolution 1998/77, OP4; CHR, *Yeo-Bum Yoon and Myung-Jin Choi Choi v. Republic of Korea*, *op. cit.*
[53] HRC, *Cenk Atasoy and Arda Sarkut v. Turkey*, *op. cit*., Para. 10.4; HRC, *Jeong et al. v. Republic of Korea*, *op. cit.*

B. A possible sanction in case of failure of conciliation

34. It is only if the authorities did indeed propose satisfactory conciliation measures, but these were rejected by the objector, that the question arises as to the legitimacy of the sanction. Indeed, where the objection expresses a religious conviction, it does not call into question the justice of the act to which it is objected; it is therefore not necessarily unjust to punish the person who refuses to perform it, but there must be serious grounds for doing so.

35. This is the reasoning followed in the case *Osmanoğlu and Kocabaş v. Switzerland* by the ECHR. It noted that the Swiss authorities had proposed a conciliation measure to parents to allow their daughters to participate in mixed swimming lessons in accordance with their Muslim beliefs, namely the wearing of a "burkini". It was only after the refusal of this conciliation offer that the parents were sanctioned on the basis of the children's interest in their own social integration. However, the girls were not forced to participate in swimming lessons. The same was true, for example, in the case of ECHR, *Dojan et al. v. Germany*, in a similar context.[54]

This said, the question remains of the necessity of imposing a sanction on objectors in a "democratic society."

[54] ECHR, *Dojan and others v. Germany*, No. 319/08, September 13, 2011, regarding proposed alternative measures to participation in a carnival.

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