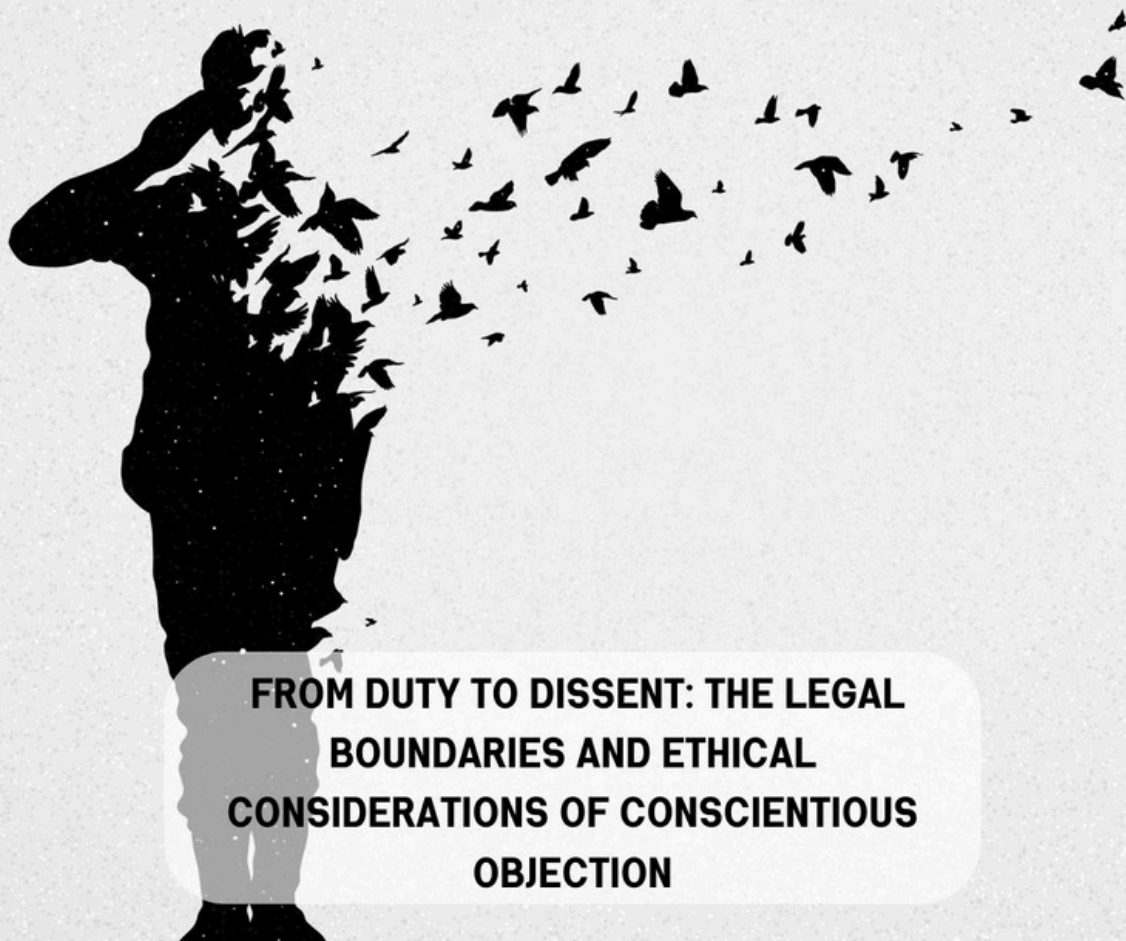


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**FROM DUTY TO DISSENT: THE LEGAL
BOUNDARIES AND ETHICAL
CONSIDERATIONS OF CONSCIENTIOUS
OBJECTION**

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Introduction

The right of conscientious objection to military service arises from a conflict between state-imposed duties and an individual's personal convictions, often based on religious, moral, or philosophical beliefs. Although not explicitly defined in international legal frameworks, conscientious objection is recognised in the European Convention on Human Rights (ECHR) and protected by the European Court of Human Rights (ECtHR). However, the enjoyment of this particular right is feeble and dependent on the security situation of the countries that grant it. In the context of European security, the current situation invokes the critical consideration of what this right entails for citizens, particularly in wartime.

The ECtHR's change in interpretation reflects a shift towards acknowledging individuals' right to preserve their beliefs and convictions over compulsory military obligations, especially when rooted in deeply held beliefs. This evolution, however, encounters significant limitations during times of war, when the principle of military necessity often prevails. This article examines the balance between conscientious objection and state-imposed military duty, especially in light of modern legal interpretations and the pressures of military necessity in times of conflict. The analysis showcases the fragility of human rights regimes in the face of the needs of war and invites to a reflection of what this means for the future of a society that strives for the protection of human rights and peace.

1. Conscientious objection – concept and case-law from the ECHR

Stemming from individual moral values, religious beliefs, and philosophies, conscientious objection is broadly defined as the refusal to participate in military service based upon an ideological opposition to war accordingly (Lippman, 1990). However, conscientious objection remains a controversial concept amongst the military. While there is no exact legal definition of conscientious objection, the European Court of Human Rights (herein ECtHR), which holds jurisdiction for the European case, follows the opinion of the United Nations Human Rights Committee (UNHRC) (ECtHR, 2024a). From a legal perspective, this concept refers to the refusal to perform military service based on the fact that the obligation to use lethal force — a foreseen duty in the military — may seriously conflict with the freedom of conscience and the right to manifest one's religion or beliefs. It is enshrined in comment No. 22 (1993) of the UNHRC, which declares that conscientious objection constitutes a right derived from Article 18 of the Universal Declaration of Human Rights, encompassing the right to freedom of thought, conscience and religion (ECtHR, 2024a). As such, conscientious objection is often incorporated in clauses of domestic instruments that refer to freedom of thought and beliefs. At the European level, it is recognised in the Charter of Fundamental Rights of the European Union (CFREU) and the ECHR (ECtHR, 2024a).

On the one hand, the right to conscientious objection is recognised in Article 10(2) of the CFREU under the right of freedom of thought, conscience and religion (CFREU, 2000). On the other hand, despite including a similar conceptualisation for the freedom of thought, conscience and religion in Article 9, the ECHR does not explicitly recognise conscientious objection (CFREU, 2000). As such, in principle, EU Member States and those countries that have this right enshrined in their constitutions must allow individual opposition to military service on the basis of conscientious objection. Nevertheless, those that are not part of the CFREU are not under this obligation, and its nationals are not able to bring up this right unless it is recognised in their Constitutions. Thus, this right is not recognised by all European countries; hence, the fundamental difference lies in the right of citizens to oppose being drafted.

As a secondary source, the case-law of the ECHR and its successor, the ECtHR, complements and, at times, supplements the ECHR. On this issue, from 1970, since entering into force, the interpretation of Article 9 in the light of conscientious objection was that “conscientious objectors did not have the right to exemption from military service”, leaving the choice of granting this right to their citizens to each Contracting State (*Grandrath v. Germany*, 1996). This entailed that the ECHR could not “prevent a State which had not recognised conscientious objectors from punishing those who refused to do military service” and therefore, permitted States like Austria to prosecute applicants who refused to serve compulsory military service (*G.Z v. Austria*, 1973).

This opinion changed in 2011, with a shift in interpretation starting with the case *Bayatyan v. Armenia* (ECtHR, 2024). It was considered that in light of the newer developments and ideas at the international and domestic level, the current interpretation of Article 9 was too restrictive, and the case-law needed to be updated to reflect the more recent opinion of the Court. In this case, the ECtHR declared 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 [...]. Whether and to what extent objection to military service falls within the ambit of that provision must be assessed in the light of the particular circumstances of the case” (*Bayatyan v. Armenia*, 2011, §110).

This case marked a shift in the interpretation of the ECHR, rectifying previous case-law. Previously, based on Article 4.3(b) of the Convention, which excluded “any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service exacted instead of compulsory military service”, from the notion of forced labour, and the choice of whether or not to recognise conscientious objectors was

to the Contracting States (ECHR, 1953). From then on, in similar cases like *Savda v. Turkey* or *Adyan and Others v. Armenia*, the applicants were considered conscientious objectors for their religious beliefs and were allowed to refuse to perform military service (ECtHR, 2024b).

Based on this case-law, the right to conscientious objection in this circumstance covers the opposition to military service as long as it is motivated by a serious, insuperable conflict between compulsory service in the army and conscience, sincere and deeply held religious or other individual convictions (ECtHR, 2014). In the case of mandatory military service instead, it is acceptable if the individual performs substitute civilian service and does not have the right to be exempted from it (*X. v. Germany*, 1977; *Grandrath v. Germany*, 1996; *Bayatyan v. Armenia*, 2011; *Teliatnikov v. Lithuania*, 2022), as long as this type of activity does not clash with any beliefs and it is sufficiently separated from the military system (*Adyan and Others v. Armenia*, 2017).

Therefore, at the European level, conscientious objection is recognised as the right not to act contrary to one's conscience and convictions and allows citizens to be exempt from the obligation to perform military service, considering that performing the duties of the military might force an individual to go against their beliefs. However, when examining most of the cases brought into Court, the common denominator that arises is that all of the applicants are members of a religious group, hence their objection on the basis of their religious beliefs (*G.Z v. Austria*, 1973; *X. v. Germany*, 1977; *Grandrath v. Germany*, 1996; *Thlimmenos v. Greece*; *Ercep v. Türkiye*, 2011; *Adyan and Others v. Armenia*, 2017; *Teliatnikov v. Lithuania*, 2022; or *Kanatlı v. Türkiye*, 2024). In this sense, the right to object has become linked to religious beliefs, as demonstrated in the Court case, and as such, it has not been successfully connected to ideological reasons to justify objection of conscience, such as pacifist beliefs (*N. v. Sweden*, 1984; *Ülke v. Türkiye*, 2006), or other moral arguments. Although the Court allegedly accounts for the "individual's conscience" and "deeply and genuinely held religious or other beliefs" (*Bayatyan v. Armenia*, 2011), there have been no real-life cases to support conscientious objection based on non-religious beliefs.

What also needs to be considered is the reality of an imminent war at the European borders. Besides Ukraine, there are currently nine countries with different military service models of compulsory conscription, including Cyprus, Greece, Austria, Lithuania, Latvia, Estonia, Finland, Sweden, and Denmark. Of these nine, six share a border with a neighbouring country that rises concerns over one's national security and territorial integrity, motivating in part this type of conscription. In several European countries in Europe, regardless of their current regime, military service during peacetime occurs on a voluntary basis yet becomes compulsory in the case of war. While this does not necessarily contradict or interfere with the right of citizens to be conscientious objectors, it begs the question of the intersection of

conscientious objection subject to the needs of war.

In fact, Ukraine poses a good example of the effects of this intersection since it has suspended the right to conscientious objection. First announced on 24 February 2022, martial law has been extended nine times and entails a general mobilisation (National Security and Defence Council of Ukraine, 2024). Cases of emergency, alarm and exception are constitutional measures that might suspend certain rights under certain circumstances, like the limitation on the freedom of movement during the COVID crisis, without these measurements being necessarily illegal. In the face of a bigger necessity — for example, in the mentioned COVID case, public health — certain public and societal needs outweigh the temporary enjoyment of individual rights. The next section will explore whether or not conscientious objection is included in those rights.

2. Limits and possibilities from a critical approach – from military necessity to moral considerations

As an internationally considered human right, in Europe, conscientious objectors enjoy the Court's protection from imprisonment and other punitive measures. However, most of the legal status and protection of human rights are not immune to the needs of military conflicts, and in fact, along with their safety, individual rights are one of the first things that citizens lose in times of emergency. By analysing the right to conscientious objection, this section will illustrate the fragility of individual rights regimes in the face of the needs of war.

One of the four main principles of IHL, the principle of military necessity, allows “measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by international humanitarian law” (ICRC, n.d.-a). Usually, the use of this principle refers to situations of armed conflict, and it is used to justify the use of armed force, means and methods of warfare, and weapons (ICRC, n.d-a).). It does not entail the suspension or the limitation of access to any rights. However, one of IHL's main functions is to rule the conduct of hostilities by limiting the means and methods of warfare (ICRC, n.d-a). In this case, the law (as an instrument to order and govern society), materialised in martial law, is the material' means to achieve military objectives, and warfare (the use of law as a weapon) serves as the method with which to achieve said military victory. In this sense, law and warfare, understood respectively as means and method, and the resulting limitations to human rights in times of conflict, are encompassed under the umbrella of the principle of military necessity. As such, the laws passed during wartime, as well as the contents that affect citizen's rights along with their consequences, are also influenced by and subject to 'military necessity'.

This principle is supported and balanced by the additional principles of humanity, distinction and proportionality. Some examples showcasing the limitations posed by the principle of humanity in mandatory conscription would be the prohibition on forced labour of prisoners of war (Article 49 of the III Geneva Convention, 1949) or the prohibition to recruit children, as prescribed by the Additional Protocols of the Geneva Conventions in Article 77(2), or Article 8(2)(b)(xxvi) and (e)(vii) of the Rome Statute, which considers it a crime of war (ICRC, n.d-b). This entails that the principle of military necessity does not permit the use of measures that would otherwise be prohibited under IHL, but one must note that conscientious objection is not regulated by IHL.

The intersection of military necessity and rights such as conscientious objection showcases the limited importance considerations for human rights have in the application of IHL. If it is conceptualised as a necessary measure to accomplish a legitimate military purpose, and insofar as it does not contradict the other three principles, alluding to military necessity may easily limit individual rights. As it is evident, individual rights weigh little against the right to live and the safety of citizens whose lives and physical integrity are at threat from the effects of war. Most legal debates consist of the balance between one right against another, one duty against another, and trade between ideas and ideals against practical matters. Considering the needs of war, it is law-abiding to temporarily limit citizen's rights to achieve a military goal.

In the case of Ukraine, the Decree of the President of Ukraine No. 64/2022 (martial law) temporarily restricts the inviolability of the home (Article 30), mail and secrecy of correspondence (Article 31); information (Article 32); freedom of movement (Article 33); of thought, speech and expression (Article 34), right to political participation (Article 38); assembly (Article 39); private property (Article 41); entrepreneurial activity (Article 42); labour (Article 43); strike (Article 44); and lastly, right to education (Article 53). While some of these rights are limited in part to the inability of the state to assure their access, like the right to labour or education, the limitation to certain rights and freedom also arises from military necessity. For example, private property might be needed for the war effort, and the inspection of mail and correspondence might be necessary for security reasons.

As showcased by this example, sovereign states can limit rights and enforce duties on their citizens in times of need. One of the rights that can be suspended or annulled is the right to conscientious objection, particularly in situations where the army is understaffed. Although this is the case for many European nations at the moment, Ukraine's case is different, given that the Constitution foresees the limitation of conscientious objection in Article 35(3) without the need for martial law that suspends other rights. "No one shall be relieved of his or her duties before the State or refuse to perform the laws for reasons of religious beliefs. In the event

that the performance of military duty is contrary to the religious beliefs of a citizen, the performance of this duty shall be replaced by alternative (non-military) service (Ukrainian Constitution, 1996)".

Considering that the obligation to defend the state is generally viewed as a fundamental obligation of the citizens (Lippman 1990), conscientious objection is conceptualised differently in the public sphere. From a political lens, it can be perceived as a threat to national security, whereas legally, it can raise questions about whether certain groups — based on their beliefs or gender — have more rights on conscientious objection than others. Socially, conscientious objection in times of war can be considered as a selfish unwillingness to risk oneself for the survival of the collective (Lippman, 1990). While currently part of the European framework of rights that citizens enjoy, a critical analysis reveals that the right of conscientious objection is a right enjoyed in peacetime, as the needs of war can motivate a legal, political and societal shift in ideas (Lippman, 1990). Subsequently, this can turn into a situation in which freedom of thought and belief are seen as a luxury and something the individual citizen must sacrifice for the well-being of society. In this sense, the Human Rights Committee “regrets” that the right to conscientious objection is acknowledged only in peacetime, especially considering that it is mainly connected to the recruitment of military staff (OHCHR, 2012). Instead, it shares the idea that conscientious objections should be a right preserved and guaranteed in both peacetime and wartime (OHCHR, 2012).

However, an alternative interpretation shifts the focus from individual rights to the collective right to peace, which is internationally recognised in the UN Charter prohibitions and limitations to the use of force. This point of view challenges traditional understanding and proposes that rather than being understood as an expression of the individual right to freedom of thought and belief, conscientious objection is an affirmation of the collective human right to peace (Lippman, 1990). Arguably, this more philosophical approach fails to account for the needs of war and the existing obligations of citizens, particularly in moments of national emergencies.

Nonetheless, it is worth serious consideration. The debates arising from conscientious objection to participation in certain conflicts have had repercussions, namely in the Vietnam War. In this case, conscientious objection was used as a “weapon of protest” (Levi & Detray, 1993), and it successfully affected the outcome of the conflict. A critical analysis of this obligation reveals that it is not completely unidirectional (Levi & Detray, 1993). While military service is one of the obligations that constitute the idea of citizenship, it is also an obligation of the government towards its citizens, particularly to make sure that conscription is only mandatory when the war is just (Levi & Detray, 1993). Demanding an individual not only to harm others but to put themselves in harm’s way (at the risk of their fundamental right to

live and physical integrity, among other rights) requires democratic governments to provide their citizens with enough reasons to support this war (Levi & Detray, 1993). Either by waging a 'just war' — despite the controversial nature of this concept — or convincing the citizens that the war itself serves the interest of the nation, when governments fail to do so, it is likely that 'refusing consent' grows amongst the population, resulting in conscientious objection (Levi & Detray, 1993). Underestimating the strengths of citizen's beliefs is a miscalculation of authorities and a necessary argument to bring out in debates about conscientious objection.

Moreover, conscientious objection does not operate only in the case of conscription but also allows for its use by soldiers who do not agree with certain orders. An example of this is the case *Germany v. N*, which prosecuted a German soldier for disobeying an order, considering this act to be a violation of his military duty of obedience (Baudish, 2006). This mayor based his refusal on his belief that the war (Iraqi War) was illegal and his constitutional right of freedom of conscience (Article 4 of the German Constitution) protected him (Baudish, 2006). Before his trial, the major had informed his superiors about his legal and moral reservations and his unwillingness to continue performing the tasks of his position if the outcome of his work would contribute to a war, which he believed to be illegal (Baudish, 2006). As illustrated by this example, conscientious objection extends beyond conscription, and it is not a tool to escape the duties of the citizen. There are many recorded cases in history in which individuals have gone to great lengths and endured severe punishments, even facing the cost of their lives, to uphold their values, which prevented them from joining military causes that they believed to be unjust (Levi & Detray, 1993, 432-433).

Part of the resistance from the military originates from the idea that it is impossible to distinguish an individual's 'true thoughts' on the matter, and as such, conscientious objectors are often dismissed as selfish and cowardly (Council of Europe, 1967, as cited in Lippman, 1990). However, records show the contrary, registering many cases in which individuals, at different points in history, have professed pacifist beliefs and refused to be even trained as soldiers and deal with the consequences of military punishments, physical abuses, being court-martialled and even sentenced to life imprisonment and death (Levi & Detray, 1993, 432-433). This evidence proves that even at the risk of physical harm, societal scorn and legal consequences, some people's morals and beliefs would prevent them from joining the military service because of conscientious objection.

The analysis of the case-law and changing interpretation of the right to conscientious objection, however, showcases how easily the opinion of courts can change, depending on the surrounding social and security environment than in the actual legal texts or previous considerations of 'humanity'. The legal principle of humanity requires that "those who have fallen into enemy hands be treated humanely at all times" (ICRC, 2023), yet it does not

account for what makes up 'human treatment' or what makes us human. Instead, it aims to limit the means and methods of warfare, it bears consideration if those who are sent to the enemy must be always treated humanely as well, and if soldiers, as humans, have the right to have their own individual beliefs.

Conclusion

Conscientious objection —defined as the refusal to participate in military service based upon an ideological opposition to war — showcases the legal limits of rights and obligations, existing in a complex intersection between human rights and the demands of state security, particularly in a precarious European landscape. ECHR case-law and human rights doctrines protect the right to conscientious objection under the consideration of the right to freedom of thought and belief. Nevertheless, these rights are often constrained or suspended during periods of national emergency or conflict, especially when weighed against the demands of military necessity. This power seesaw reflects the fragile nature of individual rights in the face of collective security needs.

Ultimately, while conscientious objection remains a significant expression of individual conscience and moral integrity, the enjoyment of this right is greatly influenced by the broader societal and legal context, particularly in wartime. Cases throughout history and different contexts have been influenced by this legal principle and have accounted for societal change, yet it remains feeble and non-negotiable in the case of wartime. This tension raises important ethical and legal questions about the limits of individual autonomy and the sacrifices expected from citizens for the welfare of the state. This article has analysed the evolution of the European case-law on this matter and provided different factors often unaccounted for in military debates regarding conscientious objection. It has aimed to invite the reader to the critical consideration of different angles that make up this right and duty and prompts considerations regarding whether the right to object could be perceived as an affirmation of the collective human right to peace rather than merely an exception from the duty to serve in war.

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