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CONSCIENTIOUS OBJECTION AS A FUNDAMENTAL HUMAN RIGHT

Abstract: Conscientious objection is a new institution of international law and national legislation. It is no longer considered to be exclusively a religious right, but a fundamental human right. Conscientious objection refers to the right of refusing compulsory military service for religious or other conscience related reasons.

The Federal Republic of Yugoslavia legally acknowledged conscientious objection by virtue of Article 137 of the 1992 Constitution. Precise regulation of conscientious objection was given by the federal Yugoslav Army Law (Article 296 - 300). However, analysis of the present legislation points to the discord between the legal regulation of conscientious objection prescribed by the Yugoslav Army Law and The Federal Constitution, as well as ratified international conventions that consider conscientious objection to be a fundamental human right.

Key words: Conscientious objection. Human rights. FR Yugoslavia. Yugoslav Army Law.

I. Conscientious objection is a new institution of international law and national legislation. Today it is considered not only a religious right¹, but a fundamental human right as well². This was formally acknowledged by the documents of several international organizations, including the United Nations. According to the The United Nations Commission on Human Rights: "...everybody has the right to refuse military service in accordance with the acknowledged right to freedom of opinion, conscience and religion, according to Article 18 of the Universal Declaration on Human Rights and Article 18 of the International Covenant on Civil and Political Rights"³.

¹ Cf.: *European Churches and Conscientious Objection to Military Service*, Proceedings, Loccum, 1989.

² Cf.: Sam Biesemans, *The Right to Conscientious Objection and The European Parliament*, EBCO, Bruxelles, 1994.

³ United Nations Economic and Social Council, *Commission on Human Rights*, 51st session, March 1995.

The ideological basis for conscientious objection lies in the idea of refusing to participate in the killing of other people.⁴ However, conscientious objection, in its narrow sense, is usually considered as refusing compulsory military service⁵, but there are other forms of conscientious objection which have not been legally regulated.

Conscientious objection in its broader sense encompasses, *inter alia*, cases related to persons working in companies producing or distributing products intended for military use, products that can damage environment, and persons refusing to pay taxes to the military budget.⁶ Apart from that, conscientious objection refers to *civilian service*, or in cases of armed conflicts, the possibility of compulsory military service without carrying or using weapons.

II. Conscientious objection as a *legal institution* originated at the turn of the century. After World War II it developed into a fundamental human right.

The first European institution which articulated an accurate political attitude regarding conscientious objection was The European Parliament. Resolution No. 337. of the Parliament Assembly of the Council of Europe (adopted in 1967) defined the range and specific basic principles of the legal regulation of conscientious objection. According to this Resolution, persons who are subject to military service, but refusing to serve it for reasons of conscience or other religious, ethical, moral, humanitarian, philosophical or other convictions, are recognized to be exempted from obligation of compulsory military service.⁷

The historical roots of today's conscientious objection are related to European religious communities, especially the Protestant movements in The Netherlands and England in the 16th and the 17th century. According to the latest studies in this field, countries with Protestant religious tradition (except for Switzerland), were the first countries to regulate conscientious objection legally. In 1549 and 1580 The Netherlands passed laws, which anticipated the possibility of exemption from compulsory military service on the basis of religious convictions. On November 21st 1660, the Quakers publicly announced to English King Charles that they did not want, neither in the name of Christ's kingdom nor in the name of an earthly kingdom, to take part in armed conflicts. Even Napoleon approved exemption from military service for Protestant Anabaptists.⁸ Countries with Roman-Catholic and Orthodox religious tradition acknowledged conscientious objection later.

⁴ Cf.: *The Right to Refuse to Kill*, Commission for Human Rights, United Nations, 49th session, December 4 1992, E/CN.4/1993/68.

⁵ Sam Biesemans, *The Right to Conscientious Objection and The European Parliament*, EBCO, Bruxelles, 1994, p. 6.

⁶ *Ibidem*.

⁷ *Ibidem*.

⁸ *Ibidem*.

⁹ *Ibidem*

The first European countries which legally regulated conscientious objection were Nordic countries of Protestant traditions, namely, Norway (1900), Denmark (1917) and Sweden (1920), as well as Great Britain (1916) and The Netherlands (1992). On the other hand, European countries with Roman-Catholic traditions - France (1963), Belgium (1964), Italy (1972), Portugal (1976) and Spain (1978) - regulated conscientious objection almost legally half a century later.

III. During the *communist regimes* in Central and Eastern European countries, conscientious objection was not legally acknowledged. Their denial of conscientious objection was supported by the argument that individual human rights and the ideas of citizens' free choice were incompatible with official ideological doctrines. However, there were two exceptions.

An ordinance of the Soviet Deputies (signed by Lenin in 1919) acknowledged conscientious objection on the basis of religious motifs, but from 1929-30 until the end of Stalin's rule it was not applied. On the other hand, contrary to the attitude of other communist countries and in spite of a strong Russian influence, The German Democratic Republic has recognized the possibility of a civilian service since September 1964. Presumably, this was due to the influence of the Protestant religious community in this country.⁹

IV. In recent times, the question of conscientious objection has become relevant from the legal and ethical point of view, especially in relation to the *conflicts in the former Yugoslavia*. According to the data of several NGO's, since the beginning of the hostilities in former Yugoslavia, at least 200,000 draftees refused to take part in the conflicts, seeking asylum in European countries.¹⁰

The *former Yugoslav state* (1945-1991), even though a signatory of numerous international declarations and conventions on human rights, never acknowledged or recognized conscientious objection, legally and in practice. According to the previous Yugoslav legislature, refusal of reception and use of arms, or refusal of military service was subject to stiff criminal punishment.

The Criminal Code of 1976 (still in legal force with numerous changes and amendments) has a separate chapter regulating in detail the *criminal offence against armed forces*. The two most characteristic offences are: the criminal offences of *refusal to receive and use of arms* sanctioned by imprisonment (Art. 202) and the criminal offence of *draft and military service evasion* sanctioned by fine and/or imprisonment. (Art. 214). These criminal offences are liable to special qualifications during war times or in case of direct threat of war (e.g. imprisonment up to ten years).¹¹

¹⁰ Cecilia de Rosa, *Conscientious Objectors, Draft Evaders and Deserters from Former Yugoslavia: An Undefined Status*, European Bureau for Conscientious Objection, Bruxelles 1995, p. 4.

¹¹ Criminal offences prescribed in Articles 202 and 214 remained unchanged in the existing Criminal Code of the Federal Republic of Yugoslavia.

Since the laws of Yugoslavia of that period did not recognize conscience objection even for religious convictions, members of several religious sects in Yugoslavia (e.g. *Jehovah's Witnesses*) were often subject to imprisonment for their refusal to receive and use of arms. There are examples of persons being prosecuted and sentenced for these criminal offences (e.g. refusal to receive and use of arms).

According to a report for the UN Commission on Human Rights prepared by the present Yugoslav Federal Government, in the past three years the Yugoslav courts have had 19 cases of refusal of carrying weapons and military service. In these cases, the following verdicts were rendered: two persons were sentenced to five months imprisonment, one person to six months of imprisonment, one to nine, one to ten months of imprisonment, one to one year of imprisonment, two to two years of imprisonment, and twelve persons were given suspended sentences.

Under the influence (and pressure) of new ideas on human rights, and in accordance with obligations deriving from the international documents that proclaim the freedom of conscience, numerous states, including the Federal Republic of Yugoslavia, have recognized conscientious objection and have introduced it in their constitutions and statutes.

However, in some cases (e.g. the present federal legislature in Yugoslavia), the right to conscientious objection proclaimed by The Federal Constitution is seriously limited, the main obstacle being the administrative procedure dealing with the right to conscientious objection in concrete cases.

V. Formally, The Federal Republic of Yugoslavia acknowledged the right to conscientious objection as a legal category by *The Federal Constitution of 27. April 1992*. According to Article 137. of the Federal Constitution: *Compulsory military service shall be universal and performed in the manner established by federal statute. A citizen who is a conscientious objector for religious or other reasons and does not wish to fulfill his military obligation under arms shall be permitted to serve in the Army of Yugoslavia without bearing arms or in civilian service, in accordance with federal law.*¹²

The Federal Constitution acknowledges and recognizes conscientious objection on the normative level. A legal analysis of this Constitutional provision (Art. 137, Para. 1) points to two grounds for conscientious objection: religious or other conscience-related reasons.

The Constitution, however, *does not* recognize the right to conscientious objection as a fundamental human right in light of the European and international standards. This derives from the fact that the Federal Constitution regulates conscientious objection in the chapter on the Yugoslav Army of Yugoslavia (Art. 137), as *a way of fulfilling military service*, and not in the chapter on rights and freedoms (Art. 35).

¹² *The Constitution of the Federal Republic of Yugoslavia (English version)*, Srboštampa, Belgrade, 1992.

This wording of the Federal Constitution implies that the right to conscientious objection does not have the same importance as a fundamental human right.

According to Paragraph 2 of Article 137 of the Federal Constitution all issues related to conscientious objection, especially those dealing with the conscientious objection procedure, are to be regulated by the appropriate **federal law**. In this context, the provisions of Articles 10. and 16. of the Federal Constitution are important. According to them, Yugoslavia recognizes and guarantees freedoms and rights recognized by international law, and recognizes and promises to fulfill internationally taken responsibilities and accepted rules of international law that are a constituent part of its internal legal order.

VI. In dealing with conscientious objection, the Federal Constitution refers to the federal **Yugoslav Army Law**, (enacted in May 1994). This Law specifies that military service includes draft obligation, military and reserve obligation (Art. 282); that all Yugoslav citizens are subject to military obligation (Art. 14); as well as that women are not subject to draft or military obligation (Art. 283).

In light of Paragraph 2 of Article 137 of the Federal Constitution, the institute of conscientious objection is more concretely regulated by the provisions of Articles 296 – 300 of the federal Yugoslav Army Law.

According to the provision of Article 296 of the Yugoslav Army Law, military service lasts 12 months (Art. 296, Para. 1). For those draftees refusing military service under weapons for religious or other conscience reasons or that want to serve a civilian service, military service lasts 24 months (Art. 296, Para. 2). A draftee who initially referred to conscientious objection but changed his attitude and later decided to take weapons during military service, continues his military service within the same program as soldiers carrying weapons, but not less than 12 months (Art. 296, Para. 3). Exceptionally, the President of the Republic can decide to discharge soldiers up to 60 days before the expiration of their military service, provided that needs of standing troops and combat readiness permit this exemption (Art. 296, Para. 4).

According to the provision of Article 297 of the Yugoslav Army Law, civilian military service is served in "*military-economic, health-care, general salvation organizations, organizations for rehabilitation of invalids and in other organizations and institutions of general interest*" (Art. 297, Para. 1). The organization or institution where civilian military service is served is obliged to provide accommodation, food, regular soldiers' personal income, and persons responsible for work control and civilian military service control (Art. 197, Para. 2). Persons performing their civilian military service have the same rights and obligations as soldiers serving military service in the Army (Art. 297, Para. 3).

According to the provision of Article 298 of the Yugoslav Army Law, the draftee who does not want to serve military service under arms must submit a **written request** to the military-district organ within 15 days as of the day of receiving the recruitment call. This request must state the reasons why the

draftee does not want to serve military service under arms, as well as the work places in the Army or the civilian service where he would like to perform his military service.

According to the provision of Article 199 of The federal Yugoslav Army Law, the Draft Board is obliged to reach a decision on the written request within 60 days (Art. 299, Para. 1). While deciding on the request, the Draft Board can consult social workers, pedagogues, representatives of religious communities, etc. (Art. 299, Para. 2).

According to Article 300 of the Yugoslav Army Law, the applicant can file an *appeal* to the decision of the Draft Board within 15 days after receiving it (Art. 300, Para. 1). This appeal is decided upon by the military-district organ which is the appellate instance of the military-district organ which adopts the first instance decision (Art. 300, Para. 2). This decision is final, and no administrative proceedings can be instituted after it (Art. 300, Para. 3).

VII. The analyses of the provisions of the federal Yugoslav Army Law regulating the implementation of the constitutional right to conscientious objection point to the fact that the constitutionally recognized right to conscientious objection *is restricted by the procedural provisions* of the Yugoslav Army Law. This can be confirmed by the following.

The Yugoslav Army Law provides that draftees referring to conscientious objection must submit a written request within 15 days, as of the date of receiving the recruitment call (Art. 298). The time limit regarding the expiration of the right to submit requests related to conscientious objection is *preclusive*. This means that in case the time limit is exceeded, the applicant loses the constitutional right to conscientious objection. In addition to this, in case of being submitted and rejected once, the request for conscientious objection cannot be presented again.

Proceedings for a judicial review of the constitutionality of the Yugoslav Army Law, have been instituted before The Federal Constitutional Court. The Court has ruled that persons who were in active military service or reservists before or at the time when the new Yugoslav Army Law was enacted, have no right to conscientious objection. The Yugoslav Army Law and this attitude of the Constitutional Court have placed all those who refused to take part in the armed conflicts in the former Yugoslavia in an unequal position with persons subject to the new legal situation.

The same applies to persons who have *changed* their religion or belief by using their fundamental human right to freedom of opinion, conscience and religion. This right is expressly formulated by the provision of Article 18 of the *Covenant on Civil and Political Rights* (1966). The Covenant states that the right to freedom of opinion, conscience or religion implies the freedom of accepting another religion or belief as one's own free choice. The Yugoslav Army Law and the decision of the Constitutional Court of Yugoslavia, however, are not in accordance with the previously mentioned attitude. This attitude *implicite* denies the right to converse religion or belief. The Provision of Article 4 of the

Covenant does not allow the signatories the possibility of exemption from the provision of Article 18 of the Covenant even in cases of a direct threat of war. Since the right to conscientious objection falls under those freedoms, it cannot be limited.

Subsequently, in the Yugoslav case, the mentioned attitudes imply that all who refused to take part in armed conflicts in the former Yugoslavia cannot refer to a conscientious objection to military and other governmental agencies. Besides that, such legal solutions mean that criminal charges *can* be brought against those who refused to take part in armed conflicts (e.g. the criminal offence of "the refusal to receive and use of arms", Art. 202 of the Criminal Code).

VIII. As a **general conclusion** it can be stated that the legal regulations of conscientious objection prescribed by the federal Yugoslav Army Law obstruct the right to conscientious objection as a fundamental human right guaranteed by international agreements.

Procedurally speaking, the right to conscientious objection is broadly restricted and is contrary to the principles of general procedural legislature. Besides that, a serious legal obstacle for accomplishing the right to conscientious objection can be found in the Criminal Code which has not been brought into accord with The Federal Constitution.