THE RIGHT TO CONSCIENTIOUS OBJECTION UNDER EUROPEAN REGIME OF HUMAN RIGHTS, WITH SPECIAL REFERENCE TO TURKISH PRACTICE

A THESIS SUBMITTED TO
THE GRADUATE SCHOOL OF SOCIAL SCIENCES
OF
MIDDLE EAST TECHNICAL UNIVERSITY

BY

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IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR
THE DEGREE OF MASTER OF SCIENCE
IN
THE DEPARTMENT OF INTERNATIONAL RELATIONS

AUGUST 2019

Approval of the Graduate School of Social Sciences

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ABSTRACT

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July 2019, 134 pages

This master's thesis examines the right to conscientious objection to military service, a long-discussed right in international human rights law. Besides the legal and practical initiatives on the conscientious objection of international authorities—primarily the United Nations at the global level and the Council of Europe at the regional level—, the thesis primarily addresses the case-law of the European Court of Human Rights on conscientious objection. The European Court of Human Rights, the monitoring organ of the European human rights system recognized the right to the conscientious objection in 2011. Accordingly, now the member states of the Council of Europe need to incorporate the right to conscientious objection and make the necessary arrangements in their domestic law. This study seeks to answer also the following question: As one of the member states of the Council of Europe, what really expects Turkey in this regard?

Keywords: Conscientious Objection, Council of Europe, European Convention on Human Rights, European Court of Human Rights, Turkey.

ÖZ

AVRUPA İNSAN HAKLARI REJİMİ KAPSAMINDA VİCDANİ RET HAKKI, TÜRKİYE'YE ÖZEL BİR ATIFLA

Kılıç, Cerenmelis
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Tez Yöneticisi: Prof. Dr. Necati Polat

Temmuz 2019, 134 sayfa

Bu yüksek lisans tezinde, uluslararası insan hakları hukuku alanında uzun süredir tartışılan bir hak olan askerlik hizmetine karşı vicdani ret hakkı incelenmektedir. Bu bağlamda, uluslararası otoritelerin—küresel düzeyde Birleşmiş Milletler ve bölgesel düzeyde Avrupa Konseyi başta olmak üzere—vicdani redde ilişkin yasal ve pratik girişimlerinin yanı sıra özellikle Avrupa İnsan Hakları Mahkemesi'nin vicdani ret ile ilgili içtihat hukuku analiz edilmiştir. Avrupa İnsan Hakları Mahkemesi 2011 yılında vicdani ret hakkını Avrupa İnsan Hakları Sözleşmesi'ne dayanan insan hakları sistemi içinde tanımıştır. Buna bağlı olarak, artık Avrupa Konseyi'ne üye devletlerin vicdani ret hakkını tanımaları ve iç hukuklarında gerekli düzenlemeleri yapmaları gerekmektedir. Buna bağlı olarak çalışmada ayrıca şu soruya cevap aranmaktadır: Avrupa Konseyi üyesi devletlerden biri olarak bu konuda Türkiye'nin önünde nasıl bir süreç bulunmaktadır?

Anahtar Kelimeler: Vicdani Ret, Avrupa Konseyi, Avrupa İnsan Hakları Sözleşmesi, Avrupa İnsan Hakları Mahkemesi, Türkiye.

ACKNOWLEDGMENTS

I would like to express my sincere gratitude to my supervisor Prof. Dr. Necati Polat for his encouraging support, advice, criticism, and inspiring guidance during this process. It was a unique chance for me to work with him.

I owe thanks to my family for always believing me. I would like to thank Emre Tan who provided me with unconditional support at every stage of my life and Yeliz Özşen who was with me whenever I needed.

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LIST OF ABBREVIATIONS

CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
NATO	North Atlantic Treaty Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
PACE	Parliamentary Assembly of the Council of Europe
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
USSR	Union of Soviet Socialist Republics
Turkey	Republic of Turkey

CHAPTER 1

INTRODUCTION

The history of humanity is a history of violence. Much of this violence has been inflicted through organized political power. While well-organized territorial polities have had armies ever since ancient times, military service in most modern settings has typically taken the form of mandatory but temporary enlistment of male citizens in national armies. However, transitions in the history and forms of organized violence under public authority have not always been smooth and linear. On the contrary, there has always been resistance, which can be traced back as far as Sophocles' classic play *Antigone*. The eponymous hero places the law of the gods above the law of man by burying her rebel brother's body. Although Antigone's defiance does not seem to have extended to an objection of military service in general, the initial objections to military service itself can be observed in early Christian theology.

According to Tertullian, a famous early Christian theologian, it was unacceptable for a Christian to take part in a worldly war. This was because, Tertullian asserted, a Christian "soldier" had only to fight evil, and the only means by which he could wage this war were his spiritual weapons. This specific understanding of service to God, which was drawn from the commandment of Jesus to Peter and from the Sermon on the Mount[1], banned men from serving emperors or kings in a military context. In the year AD 295, a 21-year-old Roman named Maximilian, later sainted as Maximilian of Tebessa, was tried in court for refusing to serve in the Roman army. Maximilian based his defense on the ideas of Tertullian. The greatest sin of the military, he

[1] Peter Brock, "Why Did St Maximilian Refuse to Serve in the Roman Army?" *The Journal of Ecclesiastical History* 45, no. 2 (1994): 195-209, doi: 10.1017/S0022046900012987. Hereinafter: Brock, *Why Did St Maximilian Refuse.*

argued, was to take human life, meaning that Christianity and military service were incompatible. According to this line of thought, a believer participating in the army of Christ was not supposed to fulfill pagan practices such as carrying a military medallion with the name of an emperor on it. Wholly accepting the consequences of his objections, young Maximilian was eventually executed as a martyr. He could not likely have imagined his legacy, which would become a significant topic of discussion for centuries: the concept of *conscientious objection to military service*.[2]

Today, it is widely accepted that conscientious objection is the refusal to fulfill the requirements of an order which contradict one's own profound convictions arising from religious, conscientious, political, moral, ethical, philosophical, humanitarian or similar motives. Of course, the adaptation of this concept has not been a smooth one. Since Maximilian's example, conscientious objection was for most of its history associated with Christian pacifism, and hence with religion. Later, the concept of conscientious objection would extend beyond these religious connotations. World War I would prove to be a turning point in this development when conscientious objection became a significant political issue. However, due to the significance attached to national security under the pressures of the two world wars during the first half of the 1900s, conscientious objection was initially seen as a problem that belonged to the private sphere of individual states. It was only after World War II that transformations in international relations and the increase in the importance given to human rights brought an awareness of conscientious objection to international attention. Furthermore, after the Cold War and the resultant developments in weapons technology, the international realm witnessed a decrease in the need for traditional mass armies, and the system of compulsory military service was gradually abandoned in Western Europe and in North America. Lastly, for various cultural reasons, it became less easy to convince educated young men to enlist for military service during one of the most important and fruitful periods of their lives. Meanwhile, as a result of increasing interaction among conscientious objectors from various parts of the

[2] Brock, *Why Did St Maximilian Refuse,* 202-209.

world, the concept of conscientious objection has spread as an important tool of political struggle.

The existing literature categorizes conscientious objectors in a number of ways: religious and secular conscientious objectors; universal, selective, and discretionary conscientious objectors; noncombatant, alternativists, and total/absolutist conscientious objectors. The common characteristic of these diverse categories of conscientious objectors is the abstention from armed struggle due to personal conviction. Conscientious objection as such does not pose a problem for the state as long as it is an individual stance. Yet, because the common denominator of conscientious objection declarations is the idea that state power is limited where people's lives are concerned, conscientious objection turns into a problem for states precisely at the moment it enters the public sphere. Therefore, while states have to respect, protect, and strengthen individual rights, including the right to conscientious objection, they also try to make sure that conscientious objection, which exposes the limits of the power of the state, does not weaken their authority.

This thesis examines the issue of conscientious objection in Turkey in light of the Council of Europe's human rights system. It focuses particularly on the practices of the Council of Europe as one of the principal institutions of the region, and sets the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the Convention") and the case-law of the European Court of Human Rights (ECtHR) as the main sources of reference. The fact that the European Convention is a living instrument makes it a vital legal document for the development of future policy. Therefore, the Convention is the most important source for future formal steps to be taken towards conscientious objection in Turkey. In addition to the Convention and the case-law of the ECtHR, this thesis draws on diverse sources including books, articles, journals, handbooks, regional and international human rights instruments, as well as case laws, decisions, resolutions, recommendations, guidelines, reports, protocols, and conventions adopted by leading international organizations outside the Council of Europe.

A key feature of the modern international system is the growing significance of international law. Today, the right to conscientious objection is increasingly accepted as a fundamental aspect of the right to freedom of thought, conscience, and religion. This consensus in the international arena imposes a range of human rights obligations for states. Not surprisingly, a large number of states have recognized the existence of this right, and have made various accommodations in their domestic regulations. In light of all these developments, this thesis asserts that states remaining unresponsive to the right to conscientious objection to military service are violating a fundamental human right. That is, states that have not recognized the right to conscientious objection have failed to fulfill their legal obligations under international human rights law. According to the dictates of the Council of Europe, forcing a person to act in contravention of personal beliefs, or to punish a person for refusing to perform that act constitutes a violation of an individual's rights as protected by the Convention. Therefore, this study demonstrates and discusses the reasons why Turkey is obliged to adopt the right to conscientious objection, as required by international treaties and international organizations towards which Turkey has commitments.

All member states of the Council of Europe having the compulsory military system, except Turkey, have either recognized conscientious objection to military service, or at least expressed their intention to provide alternative services.[3] One of the objectives of this thesis is to outline the approach of Turkey's domestic law to conscientious objection, and to suggest proposals for the harmonization of domestic legislations with international human rights standards binding on Turkey. The current laws and regulations suggest that there is no constitutional obstacle to the recognition of conscientious objection in Turkey. On the contrary, Article 90 of the Turkish Constitution rules that international agreements are superior to domestic law in regulating the matters pertaining to fundamental rights and freedoms, and prominent international law instruments such as the Universal Declaration of Human Rights, the

[3] European Bureau for Conscientious Objection, "Annual Report: Conscientious Objection to military service in Europe 2018," May, 2019. http://ebco-beoc.org/sites/ebco-beoc.org/files/attachments/EBCOreport2018fin.pdf.

International Covenant on Civil and Political Rights, and the European Convention on Human Rights all urge conscientious objection as a right derived from the right to freedom of thought, conscience, and religion. Furthermore, the right to freedom of thought, conscience, and religion is itself protected by Articles 24 and 25 of the Turkish Constitution. Even more so, Article 72 of the Constitution concerning "national service" also states that “national service” can be fulfilled with either alternative public service or the armed forces. The Military Service Act No. 1111, on the other hand, interprets “national service” specifically as military duty served by male citizens, narrowing the scope of the Constitution. This is no judicial obstacle preventing Turkey from recognizing conscientious objection as a right. A new, broader interpretation of the laws and regulations can suffice for such recognition and regulation of alternative forms of national service.

With respect to these points, the second chapter of this thesis constructs a conceptual framework for the right to conscientious objection. Building on the relevant literature, the chapter first asks and rehearses answers to the question “Why would a human being become a conscientious objector?” Next, the chapter compares and contrasts the concepts of conscientious objection and civil disobedience, and explains differences and convergences among the two notions.

The third chapter focuses on the history of conscientious objection. In addition to religious arguments and the processes of secularization and politicization, this chapter explains some transformations in the approaches of international institutions regarding conscientious objection. For the latter, the United Nations' initiatives regarding conscientious objection, the agreements it has adopted and the reports it publishes are among the instruments to be presented and analyzed.

The fourth chapter addresses the debate on the obligatory nature of conscientious objection. In addition to the approaches that support or oppose the obligatory nature of the right to objection, a third approach, which finds the whole issue paradoxical in legal theory, is also described.

The fifth chapter focuses on the gradual recognition of the right to conscientious objection within the human rights system of the Council of Europe. The process started with the drafting of the Convention and lasted until the full recognition of it by the ECtHR. The discussion details the approaches of the three main organs of the Council of Europe — the Parliamentary Assembly of the Council of Europe (PACE), the Committee of Ministers, and the ECtHR.

The following chapter, Chapter 6, describes actual cases of conscientious objection brought before and decided by the organs of the Council of Europe human rights regime. The purpose of this analysis is to demonstrate the ECtHR's slow but constantly evolving interpretation of conscientious objection. By referring to the Article 4 of the Convention, which seems to make the right to conscientious objection no more than merely optional for state parties, the regime long refused to recognize the right as a dictate of Article 9, freedom of thought, conscience, and religion. However, in 2011, the ECtHR would come to reverse this approach that prevailed for more than forty years.

The final chapter, Chapter 7, includes an analysis of formal domestic regulations and practice with regard to the ECtHR's most recent evaluations of Turkish policies. The discussion also makes some tentative suggestions for future steps to be taken by Turkey in order to meet its legal obligations to the European Convention.

CHAPTER 2

CONCEPTUALIZATION OF CONSCIENTIOUS OBJECTION

The aim of this chapter is to present a description of the right to conscientious objection to military service by explaining significant concepts within conscientious objection literature. The first part of the chapter provides the main reasons for conscientious objection. After discussing the criteria by which conscientious objectors are categorized, the second part of the chapter compares conscientious objection and civil disobedience in order to further clarify the definition of conscientious objection.

2.1 Conscientious Objection: Definition

The word "conscience" is generally regarded as the foundation of conscientious objection. Conscience is often assumed to be the basis of human subjectivity. As a value, conscience reflects the unique "integrity of the self."[4] It is the source of an individual's private beliefs and an intuitive force that distinguishes between good and evil. According to Immanuel Kant, it is an obligation for individuals to follow their own consciences.[5] The conscience defines actions which contribute to self-accomplishment as good, and actions which damage self-accomplishment as evil. Human beings are not automatons, meant to obey rules without question; humans examine the purpose of rules with regard to intention and outcome. Thus, conscience

[4] Nilgün Toker Kılınç, "The Morals and Politics of Conscientious Objection, Civil Disobedience and Anti-militarism," in *Conscientious Objection: Resisting Militarized Society,* eds. Özgür Heval Çınar and Coşkun Üsterci (London: Zed Books, 2009): 61. Hereinafter: Kılınç, *The Morals and Politics of Conscientious Objection.*

[5] Özgür Heval Çınar, *Conscientious Objection to Military Service in International Human Rights Law* (New York: Palgrave Macmillan, 2013), 12. Hereinafter: Çınar, *Conscientious Objection to Military Service.*

is a process of internal examination. Individuals declare conscientious objection to be a result of an ethical inquiry to protect their own selves.[6] Conscience goes beyond social and religious norms. From a legal point of view, in the simplest sense, laws, rules, and norms show people what is right or wrong, and a person who obeys these norms is considered "good." However, if an individual evaluates a standard as "bad," and is still forced to obey this standard, it signifies a violation.[7]

If there is a conflict between a legal duty and moral prohibition, and if the individual is forced to fulfill this legal duty, there is a violation of the freedom of conscience.[8] It is generally accepted that freedom of conscience has two dimensions, which are *forum internum* and *forum externum*. The origin of the distinction between these two concepts is found in John Locke's ideas.[9] According to Locke, there is a difference between the freedom to maintain or to change religion or belief, and the freedom to manifest religion or belief. Locke argues that the freedom to maintain or to change religion or belief should not be restricted by the state. Thus, it is associated with the concept of forum internum. Forum internum is an inner process of adopting a conviction. There cannot be any restrictions on forum internum; it is related to the very essence of an individual. Therefore, to force a person to adopt, change or not change an opinion is a direct violation of forum internum. The individual forum internum has absolute protection under Article 8 (2) of the International Covenant on Civil and Political Rights (ICCPR), which states that "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." Similarly, The European Convention on Human Rights (ECHR or "the

[6] Hülya Üçpınar, "The Criminality of Conscientious Objection in Turkey and Its Consequences," in *Conscientious Objection: Resisting Militarized Society.* eds. Özgür Heval Çınar and Coşkun Üsterci (London: Zed Books, 2009): 242.

[7] Grégor Puppinck, "Conscientious Objection and Human Rights: A Systematic Analysis," *Brill Research Perspectives in Law and Religion* 1, no. 1 (2017): 8. Hereinafter: Puppinck, *Conscientious Objection and Human Rights.*

[8] Michele Saporiti, "For a General Legal Theory of Conscientious Objection," *Ratio Juris* 28, no. 3 (2015): 420. Hereinafter: Saporiti, *For a General Theory of Conscientious Objection.*

[9] Çınar, *Conscientious Objection to Military Service*, 11.

Convention") recognizes the freedom to change a person's religion or belief as absolute under Article 9 (2). Conversely, Locke claims that the freedom to manifest religion and belief may be limited by the state. This is related to the forum externum, which is concerned with the public practice and effects of one's convictions. The Convention Article 9 (1) states that "Manifestation can be done either alone or in community with others and in public or private." Unlike forum internum, the restriction of forum externum is commonly accepted. In pursuance of Article 9 (2) of the Convention, these restrictions are "prescribed by law and are necessary in a democratic society in the interests of public safety for the protection of public order, wealth or morals, or for the protection of the rights and freedoms of others."[10]

In a similar manner, Saporiti argues that freedom of conscience is a two-dimensional concept. Within this framework, the "negative dimension" of freedom of conscience is about a passive "immunity" from any enforcement that may occur in the forum internum. Namely, refusing to fulfill a legal duty due to conscientious reasons is relevant to the negative dimension. However, Saporiti associates the right to conscientious objection with the active protection of the "positive dimension" of freedom of conscience which means "the *faculty* or *power* of self-determination" in forum externum. Accordingly, the state cannot force its citizens to fulfill a duty that conflicts their consciences.[11]

The concepts of forum internum and forum externum are also examined by Puppinck with a similar point of view. Puppinck has suggested that freedom of conscience has two aspects. The first aspect is "the positive manifestation of freedom of conscience," which means manifesting conscientious convictions by actions. These actions may be limited under certain circumstances pursuant to Article 9 of the Convention. This is due to the fact that these actions can affect public safety, moral rights or the rights of others. Conversely, "negative manifestation of freedom of conscience" cannot be

[10] Puppinck, *Conscientious Objection and Human Rights,* 11.

[11] Saporiti, *For a General Theory of Conscientious Objection*, 418.

restricted. It means to protect someone from being forced to do something that is against their conscience. Forcing a person to adopt a particular belief or to change particular ideas can be given as examples of restriction to the negative manifestation of freedom of conscience. In exercising their freedom to not adopt a religion or belief, various groups such as atheists, skeptics, and agnostics have based their ideas upon this negative dimension. Any restriction on positive manifestation is related to the act of manifestation, not to the belief itself. But a restriction on the negative manifestation implies strictly restraint of the belief itself. Any restriction on the negative manifestation of freedom of conscience affects the forum internum. In other words, it constitutes a violation of Article 9 of the Convention and Article 18 of the ICCPR.[12]

Conscientious objection arises in the event of a conflict between the rules of society and individual values. Where there is a conflict between the rules of society and individual values, the individual may reject the rules of society in order to protect his or her own selfhood, personality, moral integrity, and personal values. This reflects an individual stance by definition. If a rule which is laid down for the common good of society requires what is considered to be a morally compromising act by a particular individual, then that individual may conscientiously refuse to obey this rule.[13] Through conscientious objection, individuals protect the freedom to act according to their own conscience's orders. M.F. Major defines conscientious beliefs as a person's inner convictions which help to draw a distinction between what is morally right and what is morally wrong. The person reaches these convictions through an internal thinking process about a particular topic.[14] Although conscientious objection can be developed on many subjects, this work will discuss conscientious objection to military service. Hence, the concept of "conscientious

[12] Puppinck, *Conscientious Objection and Human Rights,* 31.

[13] Kılınç, *The Morals and Politics of Conscientious Objection,* 63.

[14] Emily N. Marcus, "Conscientious Objection as an Emerging Human Right," *Virginia Journal of International Law* 38, no. 3 (1997): 508. Hereinafter: Marcus, *Conscientious Objection as an Emerging Human Right.*

objection" has been used in the rest of the study to refer to "conscientious objection to military service."

Conscientious objection to military service ensues when there is a strong confrontation between compulsory military service and the conviction that one cannot fulfill this service. According to Wales, an individual can claim conscientious objection for diverse reasons, such as the belief in the sanctity of human life, a conviction that morality is superior to physical force, opposition to coercion, and avoidance of immoral actions.[15] In addition, the belief that killing is evil no matter what its purpose is commonly put forward by conscientious objectors.[16] In the opinion of Lippmann, conscientious objection is the refusal to join the military because of opposition to war.[17] Therefore, a conscientious objector is a person who refuses to perform military service.

In literature, conscientious objectors have been categorized separately by their distinct intents and motivations. One of the most widely used methods is to classify conscientious objectors according to their "degree of willingness to cooperate with the state."[18] In order to examine the degree of cooperation in detail, scholars such as Çınar, Schroeder, Moskos, and Chambers identified three specific categories of objectors.[19] The first category is noncombatant objectors, who do not object to the

[15] Julia Grace Wales, "The "Conscientious Objector" and the Principle of International Defense," *The Advocate of Peace* 80, no. 11 (1918): 342.

[16] Kılınç, *The Morals and Politics of Conscientious Objection,* 63.

[17] Matthew Lippman, "The Recognition of Conscientious Objection to Military Service as an International Human Right," *California Western International Law Journal* 21, no. 1 (1990): 31. Hereinafter: Lippman, *The Recognition of Conscientious Objection.*

[18] Charles C. Moskos and John Whiteclay Chambers, eds., *The New Conscientious Objection: From Sacred to Secular Resistance* (Oxford: Oxford University Press, 1993), 5. Hereinafter: Moskos and Chambers, *The new Conscientious Objection.*

[19] See Judah B. Schroeder, "The Role of Jehovah's Witnesses in the emergent Right of Conscientious Objection to Military Service in International Law," *Kirchliche Zeitgeschichte* 24, no. 1 (2011): 169-206, Hereinafter: Schroeder, *The Role of Jehovah's Witnesses;* Özgür Heval Çınar and Coşkun Üsterci, eds. *Conscientious Objection: Resisting Militarized Society*, (London: Zed Books, 2009), Hereinafter:

entirety of the military system but may agree to join the military, provided they are placed in non-violent roles. The second subset is that of the "alternativists," who may willingly serve under a civilian authority rather than a military authority. They assert that the purpose of their alternative service is the collective good of society.[20] In those countries where the declaration of conscientious objection is subject to an official examination, to provide "alternative service" is regarded as a sign of sincerity.[21] The last category is that of the total objectors, or "absolutists." Objectors in this category oppose the very idea of the existence of the military system and war in their entireties. Absolutists refuse to participate in or recognize any kind of substitute civilian service.[22]

A different criterion used in the classification of conscientious objectors looks at whether the motives of the objectors are religious or secular.[23] The motive of religious objectors is based on the idea that taking human life is immoral and unacceptable under all circumstances. Most religious conscientious objectors have adopted pacifist ideas of Christianity. As mentioned above, Maximilian, the first widely-recognized conscientious objector, based his ideas on Christian theology. Some will argue that pre-Christian religions such as Buddhism and Hinduism also have non-violent and pacifist ideas. For example, Gandhi has described military service as "a symptom of a disease." However, what separates these religious beliefs from Christian pacifism is their idea that conscientious objection is an ineffective method of resistance. According to these religious perspectives, the best solution to the problem of conflict is to rearrange society in a new, non-violent framework. Conversely, other Abrahamic religions differ from Christian principles of non-violence. Even though

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Çınar and Üsterci, *Resisting Militarized Society*; Moskos and Chambers, *The new Conscientious Objection.*

[20] Schroeder, *The Role of Jehovah's Witnesses*, 170.

[21] Moskos and Chambers, *The new Conscientious Objection*, 4-6.

[22] Schroeder, *The Role of Jehovah's Witnesses*, 170.

[23] Moskos and Chambers, *The New Conscientious Objection*, 5.

the sixth commandment of the Torah is "Thou shall not kill," the Torah also contains a great deal of commentary on war and its legitimization. As an additional example, according to the Koran, to kill is forbidden, because only Allah can take the life that he has given. However, jihadist wars which aim to spread Islam are sanctioned within the Koran. To clarify, war and violence are allowed for specific reasons in both the Torah and the Koran.[24] Therefore, to reiterate, religious conscientious objectors are typically and uniquely members of Christian denominations, historic peace sects, or mainstream churches that have adopted a pacifist worldview.[25]

In contrast to religious motivation, secular conscientious objectors are those who refuse military service because of an attitude they have adopted based on political, ethical, philosophical or other private convictions. Secular conscientious objection is most often based on antimilitarism. Militarism is the system in which military practices influence every aspect of daily life, and the military branch of government is defined as the main pillar of sovereignty. The state uses the concept of fear to maintain such a system, and makes the demand for security permanent by constantly creating an enemy. In such case, the army is regarded as the guardian of the country. Antimilitarism criticizes this system and rejects the modern state which has a monopoly on force and violence. In brief, antimilitarism is the refusal of the concept of power.[26] According to Tanıl Bora, various issues have been criticized by anti-militarists. First of all, antimilitarists are opposed to the effects of army rules such as command-order, hierarchy, and discipline in all areas of society. Second, antimilitarists claim that they criticize the male-dominated system by criticizing the military, which is an institution where men are exalted. Another criticism refers to the reproduction of capitalism because of the weapons industry. Moreover, such

[24] Çınar, *Conscientious Objection to Military Service*, 20-21.

[25] Moskos and Chambers, *The New Conscientious Objection,* 5.

[26] Nilgün Toker Kılınç, "Anti-Militarizm Sorumluluktur," *Birikim Dergisi*, no. 207 (2006).

criticisms also involve objections to the damage of nature by weapons industries.[27] The antimilitarists reject military service based on these and context-specific reasons not mentioned here. The main objective of antimilitarism is the wholesale abolishment of the army and the re-design of a community in an antimilitarist framework.

The difference between antimilitarism and pacifism is that the former's philosophical motivations look beyond the practice of war to examine and critique relationships of power. According to antimilitarists, these relationships are the progenitors of war and violence. Antimilitarists also oppose alternative services and professional armies because they consider these regulations to be part of a government strategy.

Another, somewhat different organization of conscientious objection made by Moskos and Chambers is based on the scope of objectors' beliefs. According to this perspective, conscientious objectors are divided into three categories. The first category is identified as the "universalistic" conscientious objectors, who are against all types of wars and conflicts. The second group consists of "selective" conscientious objectors, who oppose specific wars or conflicts and thus refuse to participate in them. The third category includes "discretionary" objectors who refuse to employ certain weapons, such as nuclear weapons and weapons of mass destruction.[28] Conscientious objectors who are pacifist or anti-militarist are examples of universalistic objectors. Selective conscientious objection is less definitive and more complex. Selective conscientious objectors are not opposed to the concept of armed forces, but in some circumstances, they question particular military actions or policies. Selective conscientious objectors do not question the states' right to recruit its citizens, but they

[27] Tanıl Bora, "Anti-Militarizm, Ordu/Askeriye Eleşirisi ve Orduların Demokratik Gözetimi," *Birikim Dergisi*, no. 207 (2006).

[28] Moskos and Chambers, *The new Conscientious Objection*, 5.

do criticize it in some cases.[29] They may participate in the military in the presence of distinct conditions of which they approve. Some selective objectors participate in military roles if they approve a particular military action; some join the army in non-combatant roles, which means they do not fight or bear arms; some of them want to work under civilian authority instead of military authority for the good of the community. In general, selective conscientious objection is politically based and directed towards specific weapons or conflicts. Most states are reluctant to accept this category because they consider selective conscientious objection to be a threat to domestic stabilization and external integrity.[30]

There are, however, some selective conscientious objectors who form their objections on the basis of religious reasons rather than political reasons. For example, some selective conscientious objectors have founded their ideas on the "just war doctrine" developed by St. Augustine some 1600 years ago. According to this doctrine, which has undergone various transformations after St. Augustine, some criteria are necessary for a war to be a just war. A Christian can only take part in a battle where these criteria exist. Some of these criteria are as follows: the initiator of the war should be a legitimate authority; the war should be based on a just cause; the warriors should be well-intentioned; and war should be the last resort to solve a problem.[31] If an individual believes that a war does not meet these criteria — that is, if he or she believes that the war is an unjust war — then that individual may refuse to fight. The difference between religiously-based selective objectors and politically-based selective objectors is the intent of political protest. Major has argued that the refusal of an individual to participate in a particular war is, in fact, a refusal of the purpose, means, and methods of the state in that war. However, it is a fact that states do not

[29] Noam Lubell, "Selective Conscientious Objection in International Law: Refusing to Participate in a Specific Armed Conflict," *Netherlands Quarterly of Human Rights* 20, no. 4 (2002): 412. Hereinafter: Lubell, *Selective Conscientious Objection in International Law.*

[30] Matti Wiberg, "Grounds for Recognition of Conscientious Objection to Military Service: The Deontological-Teleological Distinction Considered," *Journal of Peace Research* 22, no. 4 (1985): 359.

[31] Kenneth W. Kemp, "Conscientious Objection," *Public Affairs Quarterly* 7, no. 4 (1993): 306.

wish to give credit to any claim of illegality without regard to the importance of the matter.[32] Therefore, in comparison with total objectors, states have always taken a more distant approach towards the selective conscientious objectors.

There is almost no direct provision for selective objection in international law. Selective conscientious objection is generally based on principles set forth in the Nuremberg tribunals. Accordingly, it is the duty of the individual to not participate in an illegal war. However, Lubell argues that if it is an individual's duty to avoid illegal war, conscientious objection as such is not necessary. Therefore, it is not reasonable to support selective conscientious objection based on the Nuremberg principles.[33] One of the references to the issue is the resolution of the UN General Assembly in 1978, which recognizes the right to refuse to serve in a military or policing body that enforces apartheid. Another one is the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, which gives an individual the right to claim refugee status if he or she refuses to participate in a military action which is condemned by the international community.[34]

Since selective conscientious objection is regarded as an act of civil disobedience, it has frequently been neglected by both international organizations and states. This is mainly because selective conscientious objectors can threaten the legitimacy of the state by criticizing a policy of the state. However, states believe that total objection comes from religious, ethical, philosophical or similar individual convictions outside the political sphere. Therefore, a refusal based on personal convictions does not pose a threat to the state authority.[35] This difference is most clear in the comparison of conscientious objection and civil disobedience.

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[32] Marie-France Major, "Conscientious Objection and International Law: A Human Right," *Case Western Reserve Journal of International Law* 24, no. 2 (1992): 353.

[33] Lubell, *Selective Conscientious Objection in International Law,* 418-419.

[34] Lubell, *Selective Conscientious Objection in International Law,* 411.

[35] Lubell, *Selective Conscientious Objection in International Law,* 412.

2.2 Conscientious Objection vs. Civil Disobedience

While defining conscientious objection, scholars have made several comparisons or categorizations, or they have defined the concept by comparing it with other concepts. The most commonly used method is comparing conscientious objection to civil disobedience. The former is seen as a relatively private issue, while the latter is regarded as broader political and social statement.

The concept of civil disobedience, which is based on the ideas of Henry David Thoreau,[36] has been defined in various ways by different authors. According to Sagi and Shapira, "civil disobedience is an act contrary to law done for political reasons, with the aim of directly bringing about a change in the law or government policy, or to express dissent and disassociation from a particular law or government policy."[37] Habermas advocates that civil disobedience is not a denial of an entire legal system, but rather it aims to breach particular rules.[38] The purpose is to bring a change to a certain law, policy, or procedure that is considered unjust. Civil disobedience is usually a collective action with public participation. The recognition and acceptance of legal consequences is indicative of its sincere intention. In contrast, the purpose of conscientious objection is the protection of the conscience of the individual. Rawls asserts that:

> an objector refuses to comply with orders which are incompatible with his religious, moral, or personal values. The purpose of his objection is not to change the order or the law but to preserve his own innocence and moral integrity which means a pursuit of a life consistent with his or her own conscience and ethics. Accordingly, the

[36] Çınar, *Conscientious Objection to Military Service*, 14.

[37] Avi Sagi and Ron Shapira, "Civil Disobedience and Conscientious Objection," *Israel Law Review* 36, no. 3 (2002): 182-183. Hereinafter: Sagi and Shapira, *Civil disobedience and conscientious objection.*

[38] Jürgen Habermas, "Sivil İtaatsizlik: Demokratik Hukuk Devletinin Denek Taşı. Almanya'da Otoriter Legalizm Karşıtlığı," in *Kamu Vicdanına Çağrı: Sivil İtaatsizlik,* Hannah Arendt et al., Translated by Yakup Coşar (Istanbul: Ayrıntı Yayınları, 1997), 121.

> objection is not an act indicated by the individual, but a passive response to the circumstances.[39]

To clarify, conscientious objection's purpose is not that of systemic change; nor must it occur in the public sphere. Arendt offers a similar explanation. While conscientious objection is an individual stance, civil disobedience arises from a conflict with the system in general.[40] Conscientious objection is resistance to a rule which a person thinks is incompatible with basic moral arguments. It is a non-violent, subjective and apolitical attitude that can be shared with others.[41] In Rawls' words, civil disobedience is an act that aspires to change laws, and it is based on political motives. An act of civil disobedience is ideally performed in a non-violent manner and often performed openly to the public. Rawls argues that, on the contrary, conscientious objection is a private matter.[42] Cohen emphasizes that the conscientious objector does not demand any change in the system. An objector refuses to obey the rules merely in order to protect his/her own moral self. In contrast, an act of civil disobedience intends to change a rule which concerns the public. The person performing the act of civil disobedience is aware of the consequences of the act and concedes to them, and therefore, accepts the legitimacy of the laws.[43] Conscientious objection is the refusal to comply with a legal order for moral or religious reasons. The difference between conscientious objection and civil disobedience is that a conscientious objector does not intend to persuade others to follow their conscience.

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[39] Sagi and Shapira, *Civil disobedience and conscientious objection*, 184.

[40] Hannah Arendt, *Crises of the Republic: Lying in Politics, Civil Disobedience, On Violence, Thoughts on Politics and Revolution,* (New York: Harcourt Brace & Company, 1972), 55-66.

[41] Saporiti, *For a General Theory of Conscientious Objection*, 416.

[42] Kati Nieminen, "Rebels without a Cause? Civil disobedience, Conscientious Objection and the Art of Argumentation in the Case Law of the European Court of Human Rights," *Oñati Socio-legal Series* 5, no. 5 (2015): 1295. Hereinafter: Nieminen, *Rebels without a Cause?*, http://ssrn.com/abstract=2691949.

[43] Carl Cohen, "Civil Disobedience and the Law," *Rutgers Law Review* 21, no. 1 (1966): 18.

According to Raz, civil disobedience arises from political motivations. This is because the purpose of civil disobedience is to make a change in the rules or policies. On the other hand, the conscientious objector has no such purpose. The aim of the conscientious objector is to preserve his/her own self by avoiding an act which is morally wrong.[44] It does not have a universalistic claim. However, Walzer maintains the opposite view, claiming that conscientious objection is based on universalist conscientious principles. These principles have a greater power than the laws of the state.[45]

Schinkel opposes these definitions and asserts that conscientious objection is a practice which emerges in the political domain. Hence, it has a critical aspect. According to Schinkel, "conscience is critical of the individual."[46] This is because conscience restricts our acts. Conscientious objection emerges when this restriction occurs at a social level. Simplifying conscientious objection as an individual stance is, in fact, a strategy for making it harmless. This strategy gives a non-revolutionary character to conscientious objection. With this strategy, states dissolve its critical aspect and hinder it from becoming a greater social force. States absorb the critical dimension of conscientious objection by setting up rules for it. Thus, rather than being ostracized, conscientious objectors become the exception to the rule. In other words, it becomes the verification of the rule. The existing rules concerning conscientious objection do not mean questioning a state's right to recruitment.[47]

[44] Lubell, *Selective Conscientious Objection in International Law,* 410.

[45] Sagi and Shapira, *Civil disobedience and conscientious objection*, 184.

[46] Anders Schinkel, *Conscience and conscientious objections* (Amsterdam: Amsterdam University Press, 2007), 532. Hereinafter: Schinkel, *Conscience and conscientious objectors*.

[47] Schinkel, *Conscience and conscientious objectors*, 543.

2.3 Concluding Remarks

What enables people to distinguish between good and evil is conscience. Conscience is related to individuals' own judgments, and it transcends all social norms. As a reflection of freedom of conscience, if a norm adopted by society is in opposition to the subjectivity of the individual, then the individual may oppose this norm by listening to the voice of his or her own conscience. In this respect, a person who considers military service, a particular war, or a specific weapon against his own conscience may declare conscientious objection to military service. Conscientious objectors are categorized in various ways: willingness to cooperate with the state; religious or secular convictions; and scope of their beliefs, among others. In this chapter, these and other categorizations have been examined. In addition, concepts of civil disobedience and conscientious objection are compared. While the former is seen as a political action, the latter, which is the main subject of this thesis, is generally accepted as a more individualized stance.

CHAPTER 3

HISTORICAL DEVELOPMENT OF CONSCIENTIOUS OBJECTION

This chapter offers a basic history of the concept of conscientious objection. The discussion starts with (a) the secularization of the concept, which happened largely through the practice of compulsory military service; and (b) the politicization of the concept via organized campaigns by anti-war movements during World War I. The next critical step in the development of the concept appears to have been (c) the strong public awareness of the highly questionable uses of military power, mostly brought about by the widespread abuse of basic human rights during World War II. The discussion ends with (d) a description of the concrete steps taken by various international initiatives, concomitant with the rising awareness in international public opinion, as reflected in references to the concept in a number of legal instruments, resolutions and reports under international organizations, chiefly the United Nations.

3.1 The Secularization of the Concept

For years, many Christian denominations practicing pacifist beliefs, such as Quakers, Puritans, Seventh-day Adventists, Mennonites, and Jehovah's Witnesses refused to bear arms and provide military service on the basis of Christian doctrine. It is appropriate to highlight two of these denominations for their efforts to promote the right to conscientious objection. Quakers — pacifists who had emigrated from Europe to America in hopes of religious freedom — paved the way for the first anti-violence demonstrations in America. In the 1600s, Quakers refused to join military units formed against Native Americans, and later they refused to join the French and Indian Wars. In 1775, they played a major role in lobbying for Congress's decision to

exempt conscientious objectors from military service.[48] The other important sect is the Jehovah's Witnesses, which emerged in the United States in the 1870s. Jehovah's Witnesses claim that all their beliefs are based on the Bible. They refuse to join the army because they choose to live a life separate from political affairs, a life that they believe mirrors Christ's teachings. Because of their refusal to serve in the army of any nation, they have been hounded by authorities, imprisoned and even sentenced to death in many countries.[49] Jehovah's Witnesses continued to demand that the exemption given to ministers of well-known religions should be given to them as well. Conscientious objections from both religious communities were based on theology. They refused to obey the state law in favor of obedience to Divine law. They consented to the state's persecution rather than defy their religion. By following the Bible's commandment of non-violence, they refused to participate in earthly wars. However, the idea that wars could actually be prevented by a lack of participation was beyond their horizons.[50]

Until the French Revolution, conscientious objection, as mentioned above, emerged as a reflection of deep commitment to a religious community. After the establishment of the compulsory military system, conscientious objection emerged as a significant problem. Citizens typically see the state as the sole authority for the elimination of violence in society. Thus, they give the monopoly of violence to the state.[51] The nation-state, possessing this monopoly on violence, is thus in need of disciplined organization. This was achieved through the formation of mass armies based on

[48] Joseph B. Mackey, "Reclaiming the In-Service Conscientious Objection Program: Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection," *The Army Lawyer* (2008): 31-32.

[49] Schroeder, *The Role of Jehovah's Witnesses*, 171-172.

[50] Ulrich Bröckling, "Sand in the Wheels? Conscientious Objection at the Turn of the Twenty-first Century," in *Conscientious Objection: Resisting Militarized Society*, eds. Özgür Heval Çınar and Coşkun Üsterci (London: Zed Books, 2009): 54. Hereinafter: Bröckling, *Sand in the Wheels?*

[51] Mithat Sancar, "Şiddet, Şiddet Tekeli ve Demokratik Hukuk Devleti," *Doğu Batı Düşünce Dergisi* 13, no. 4 (2000): 26.

conscription.[52] According to the conventional contract between state and citizens, the state typically imposes specific duties upon its citizens in order to protect the interests of the nation. Military duty is one such responsibility. This relationship is one of the basic pillars of the compulsory military system. Prior to the French Revolution, military service was a privilege granted only to the nobility and not to the masses. After the French Revolution, the populace was regarded as the source of sovereignty, and, as a result, in 1798 military service was promoted as the right and the duty of every male citizen of France. Thus, the right to carry weapons was no longer a privilege of the nobility, and military service was no longer a status bought with money. This mass army of the nation-state was a means to create a citizenry. However, military service was not as beneficial for the individual after the Revolution as before. Therefore, the nation-state encouraged an ideology of nationalism. As a result, the members of the army were defined as missionaries who encouraged the progress of the revolution through a shared national consciousness. In other words, the religious missionaries turned into "secular missionaries."[53] Soldiers who had previously fought for religion-referenced sacred values were, for the first time, fighting for secular values in the Napoleonic period. Citizenship and state-based discourses were the basis of Napoleon's ideal and invincible army. Furthermore, according to Alfred Vagts, if every person in a nation is to be made a soldier, they must be filled with military spirit even in peacetime. Hence, in the Napoleonic period, nation-states began to identify "enemies," both external and internal, in order to legitimize the compulsory military system.[54]

The success of Napoleonic policies led to the adoption of conscription systems across Europe in the late 18th century. This Napoleonic military system was further

[52] Çınar and Üsterci, *Resisting Militarized Society*, 3-4.

[53] Suavi Aydın, "The Militarization of Society: Conscription and National Armies in the Process of Citizen Creation," in *Conscientious Objection: Resisting Militarized Society,* eds. Özgür Heval Çınar and Coşkun Üsterci (London: Zed Books, 2009): 17-18. Hereinafter: Aydın, *The militarization of society.*

[54] Aydın, *The militarization of society,* 18-19.

developed by Prussia and has since become a model for the modern military system. Prussian influence in Europe was so extensive that many European countries have facilitated compulsory military service as a defense measure even in times of peace. The Prussian martial model is based on the militarization of an enormous proportion of the population. In the 19th century, conscription became one of the fundamental characteristics of European nation-states. As a consequence, military mobilization was inexpensive, and the number of soldiers increased.

3.2 The Politicization of the Concept

In the late 19th century, the bond between conscientious objection and religion had loosened. During this era, movements of individualization and secularization gained greater acceptance, and secular objections to state-sanctioned violence became more numerous. Antimilitarist and pacifist groups led to the politicization of conscientious objection. The nature of armed conflict changed and it was far from Clausewitz's vision of war, where noble soldiers met on the battlefield and fought as gentlemen. The conscription system and the widespread adoption of the mass army brought a new kind of war, namely "total war," the effects of which were far more reaching. States focused on mobilizing the whole nation to gather the human resources needed for total war.[55] For this new war, all resources had to be mobilized in absolute terms, and this was accomplished with appeals to patriotism. The military was ideologically placed in a sacred position to do so. Those who did not comply with the call to mobilization were charged with treason.[56]

Although previously the term "conscientious objection" had operated on more theological and philosophical axes, the development of conscientious objection as an organized movement happened after World War I. Even as World War I dragged the entire world to the brink of destruction, it was accompanied by a significant

[55] Aydın, *The militarization of society,* 17-18.

[56] Bröckling, *Sand in the Wheels?,* 54.

resistance. Some soldiers and some conscripted to become soldiers went to great lengths such as rebellion, disobedience to orders, self-injury, suicide, desertion, and conscientious objection in order to resist organized conflict. Many public figures were opposed to the spread of compulsory military service as well. Both academics, as well as artists in various fields such as literature, painting, or music, took a stand against the war in their works. The story titled "Compulsion" by Stefan Zweig, published in 1920, is a clear manifestation of the author's profound anti-war views. The theme of the story is the inner conflict of a painter who must flee the war in his country, even as he feels a sense of responsibility towards his country. The painter has written a declaration of conscientious objection stating he will never carry a gun. Zweig expressed striking ideas for the time, including the notion that the army is a "machine" that kills people; that the state cannot force a person to kill; and that military medical treatment is damaging to human dignity. He describes forcing a man to serve the state against his own belief as a terrible phenomenon. He also touches upon the issue of alternative service. What is important for him is not that the service is difficult or easy, but it is compulsory despite of his disapproval of the war. At the end of the book, the painter, who has witnessed the destruction created by war, has torn up his draft card and feels that there is no other law on earth for mankind than man's own law.

Conscientious objectors obtained some concessions by defying state power and by convincing the authorities that they were sincere in their convictions.[57] The biggest step taken in this direction was the establishment in 1921 of the first international anti-war organization: War Resisters International. The countries where the first conscientious objector statuses were granted were Switzerland, Norway, and Denmark during World War I. At the beginning of the 1900s, the peace movement received significant support from Quakers and socialists in Norway. In response to this, the Norwegian Department of Defense made administrative accommodations, such as assigning conscientious objectors to non-combatant roles and giving

[57] Jeremy K. Kessler, "A War for Liberty: On the Law of Conscientious Objection," *The Cambridge History of World War II 3 (Michael Geyer & Adam Tooze eds. 2015)*: 450.

exemption to pacifists. Thereafter in 1921, Denmark recognized conscientious objection as a legal right.[58]

In the years between the two world wars, conscientious objection emerged as a means of political struggle. This was because a person who demands a right to conscientious objection effectively questions the state's authority, and implies that international law and individual morality are superior to state interests. At the time, states were considered to be the main actors in international relations, and compulsory military service was considered necessary for a state to protect its territory. Therefore, as has been stated, problems between the individual and the state, such as conscientious objection, belonged to the domestic sphere.[59]

3.3 Rising Public Awareness

After World War II, the notion of conscientious objection emerged as a factor in international human rights law, because respect for human rights became an important component of the legitimacy of states.[60] The reasons for these developments were the frequent human rights violations perpetrated during the war. For example, Germany introduced the compulsory military system in 1935. Those who refused military service were tried in military courts. After the first execution of a conscientious objector in a concentration camp in 1939, execution of conscientious objectors was normalized in Germany.[61] Such human rights violations have led to rising public awareness about conscientious objection. People who work in the field of human rights consider the freedom of conscience as sine qua non for the existence of other freedoms. Freedom of conscience is the basis of protecting personal

[58] Jeremy K. Kessler, "A War for Liberty: On the Law of Conscientious Objection," *The Cambridge History of World War II 3 (Michael Geyer & Adam Tooze eds. 2015)*: 450-452.

[59] Marcus, *Conscientious Objection as an Emerging Human Right*, 510-512.

[60] Marie-France Major, "Conscientious Objection and International Law: A Human Right," *Case Western Reserve Journal of International Law* 24, no. 2 (1992): 349.

[61] Schroeder, *The Role of Jehovah's Witnesses*, 184.

identity.[62] In order to achieve such protection, all states must recognize human rights, and all states must refrain from war crimes and crimes against humanity. These principles first emerged in the Nuremberg tribunals.[63] Pursuant to the Nuremberg principles, an individual has to refuse to participate in war crimes, and taking orders from superiors does not remove this responsibility. It is a principle on which many conscientious objections are based.

3.4 Formal International Initiatives

One principal human rights document is the Universal Declaration of Human Rights (UDHR), proclaimed in 1948. The aim of the UDHR is to put forth universal human rights standards that are valid for all people and all nations. However, it does not contain a direct reference to conscientious objection. By the time the UDHR was written, compulsory military service was seen as a critical component by most member states of the UN.[64]

The other crucial international legal instrument adopted in this period is the International Covenant on Civil and Political Rights (the ICCPR). Article 8 (3) (c) (ii) of the ICCPR states that forced or compulsory labor shall not include "any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors." Thus, the concept of conscientious objection has been referred to, but it is not recognized as a right.

With Resolution 33/165 in 1978, the UN General Assembly recognized "the right of all persons to refuse service in military or police forces which are used to enforce

[62] Saporiti, *For a General Theory of Conscientious Objection*, 417-418.

[63] Staughton Lynd, "Someday They'll Have a War and Nobody Will Come," *Peace & Change* 36, no. 2 (2011): 159-161.

[64] Schroeder, *The Role of Jehovah's Witnesses*, 175.

apartheid." [65] For the first time, the UN General Assembly addressed the question of conscientious objection in a limited and indirect context with this resolution.

Asbjern Eide and Chama Mubanga-Chipoya, members at that time of the Commission on Human Rights' Sub-Commission on Discrimination and Protection of Minorities, wrote a report which became a milestone for recognizing conscientious objection as a right. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities requested the preparation of a report that develops principles related to conscientious objection. The authors used a wide range of data obtained from specialized agencies, governments, regional intergovernmental organizations, and non-governmental organizations. In this detailed study, besides the examination of the concept itself, the grounds considered as valid for conscientious objection, the procedures to be followed in order to obtain the status of conscientious objection, and alternative service were addressed.[66] They have defined the concept as follows, and this definition has become a foundation for research on conscientious objection:

> By "conscience" is meant genuine ethical convictions, which may be of religious or humanist inspiration, and supported by a variety of sources, such as the Charter of the United Nations, declarations and resolutions of the United Nations itself or declarations of religious or secular non-governmental organizations. Two major categories of convictions stand out: one that it is wrong under all circumstances to kill (the pacifist objection), and the other that the use of force is justified in some circumstances but not in others, and that therefore it is necessary to object in those other cases (partial objection to military service).[67]

With the adoption of Resolution 1987/46, the UN Commission on Human Rights recognized that "conscientious objection to military service derives from principles

[65] United Nations General Assembly, Resolution 33/165, "Status of Persons Refusing Service in Military or Police Forces Used to Enforce Apartheid," Dec. 20, 1978, https://www.un.org/documents/ga/res/33/ares33r165.pdf.

[66] United Nations, E/CN.4/Sub.2/1983/30/Rev.1, "*Conscientious Objection to Military Service,"* 1985.
https://www.refworld.org/docid/5107cd132.html.

[67] United Nations, E/CN.4/Sub.2/1983/30/Rev.1, "*Conscientious Objection to Military Service,"* 1985.
https://www.refworld.org/docid/5107cd132.html.

and reasons of conscience, including profound convictions, arising from religious, ethical, moral or similar motives."[68] That is, non-religious motives are also accepted as valid reason for objection. Furthermore, the Commission on Human Rights appealed to states "to recognize that conscientious objection to military service should be considered a legitimate exercise of the right to freedom of thought, conscience and religion recognized by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights."[69] The Commission also recommended that states in which compulsory military service is currently enforced make arrangements for alternative services. However, this is only a recommendation; the final decision is made by the state. With Resolution 1989/59 the Commission itself has recognized the right to conscientious objection.[70]

Although these events represented progress for the cause of conscientious objection, compulsory military service during the Cold War remained standard practice in many countries. Nonetheless, after the Cold War, conscientious objection came to be widely accepted as a human right, and alternative civil service was adapted in several countries.[71] According to Moskos, the reason for such developments in the post-Cold War era is that states are no longer seen as autonomous actors; rather, political interdependency has emerged among states. Their responsibilities to other states have restricted their domestic decisions and actions to some degree. One of the most significant responsibilities of a state is to respect and participate in international human rights treaties. Therefore, the tasks of the new postmodern armies are

[68] United Nations Commission on Human Rights, E/CN.4/RES/1987/46, "Conscientious Objection to Military Service," Mar. 10, 1987. https://www.refworld.org/docid/3b00f0ce50.html.

[69] United Nations Commission on Human Rights, E/CN.4/RES/1987/46, "Conscientious Objection to Military Service," Mar. 10, 1987. https://www.refworld.org/docid/3b00f0ce50.html.

[70] Office of the United Nations High Commissioner for Human Rights, Resolution 1989/59, "Conscientious Objection to Military Service," Mar. 8, 1989. https://www.ohchr.org/Documents/Issues/RuleOfLaw/ConscientiousObjection/E-CN_4-RES-1989-59.pdf

[71] Bröckling, *Sand in the Wheels?*, 57.

primarily those of national security and humanitarian missions. Considering that many states do not need mass armies any longer due to current cooperative aspects of international politics, citizens are required to serve their nations outside the parameters of military service. As a result, postmodern armies now consist of volunteers.[72]

In addition to state practices, international law documents that are binding to states, such as the UDHR and ICCPR, have a strong influence on the recognition of the right to conscientious objection. The most important development regarding the right to conscientious objection in the post-Cold War era is the General Comment No. 22 on Article 18 of the United Nations Human Rights Committee (HRC), which is the monitoring body of the ICCPR. The year 1984 saw the L.T.K. v. Finland case, the first official approach of the United Nations Human Rights Committee to assess the right to conscientious objection under the ICCPR. L.T.K.'s reasoning as a conscientious objector was his "serious moral considerations based on his ethical convictions." He wished to refrain from military service regardless of whether the service was armed or unarmed. He offered to do alternative service instead. The state did not admit his request, and L.T.K. was sentenced to nine months' imprisonment. L.T.K. claimed that Finland's refusal to recognize his conscientious objector status and its consequent criminal prosecution had violated Articles 18 and 19 of the ICCPR. However, according to the Human Rights Committee, L.T.K. was sentenced to imprisonment for refusing to perform military service, not for his beliefs or opinions. Neither Article 18 nor Article 19 contains any provisions on military service. Moreover, taking into consideration paragraph 3 (c) (ii) of Article 8, the Committee decided that there was no violation as alleged by the applicant. Therefore, according to the Committee, the applicant's allegations did not comply with the Covenant, and the Committee decided that the case was inadmissible.[73] In the

[72] Marcus, *Conscientious Objection as an Emerging Human Right*, 511.

[73] United Nations, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol. 2, (New York: United Nations Publication, 1990), 61-62. https://www.ohchr.org/Documents/Publications/SelDec_2_en.pdf.

nineties, the attitude of the Committee changed, especially with regards to General Comment No. 22. The reason for this change in attitude can be said to be the recognition that conscientious convictions of persons are too valuable to be left to state initiatives. With General Comment No. 22, the HRC adopted a positive approach stating that "The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that 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."[74] With the case of Yoon and Choi v. Korea in 2006, for the first time, the UN Human Rights Committee declared that there has been a violation of Article 18 in a conscientious objection case. Two Jehovah's Witnesses, Mr. Yoon and Mr. Choi, refused to be drafted for military service because of their religious beliefs and consciences. Hence, they were arrested and imprisoned, and then released on bail. Mr. Choi and Mr. Yoon asserted that the absence of an alternative service and their eventual imprisonment constituted a violation of Article 18 of the ICCPR. According to the Committee, conscientious objection to military service is a form of manifestation of religious belief under Article 18 (1).[75] The Committee reiterated General Comment 22. The refusal of the applicants, in this case, was due to their religious beliefs. Hence, their sentence amounted to restriction of their freedom to manifest their religion. The Committee also rejected the allegation that the government's intervention was based on justified reasons, and ruled that the Republic of Korea had violated Article 18 of the ICCPR. With this decision, the HRC explicitly acknowledged that the right to conscientious objection derives from Article 18 of the ICCPR.[76]

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[74] UN Human Rights Committee (HRC), UN Doc. CCPR/C/21/Rev.1/Add.4, "General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion," July 30, 1993. https://www.refworld.org/docid/453883fb22.html.

[75] *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, UN Human Rights Committee (HRC), CCPR/C/88/D/1321-1322/2004 (Jan. 23, 2007). https://www.refworld.org/cases,HRC,48abd57dd.html.

[76] Jeremy K. Kessler, "The Invention of a Human Right: Conscientious Objection at the United Nations, 1947-2011," *Columbia Human Rights Law Review* 44, no. 753 (2012): 783.

Additionally, with the 1995/83 Resolution on conscientious objection to military service, the Commission on Human Rights adopted the approach that professional soldiers may also develop conscientious objection. The Commission urged states that no discrimination should be made between conscientious objectors because of the origin of their objection.[77]

The Charter of Fundamental Rights of the European Union has seven chapters, titled "Dignity," "Freedoms," "Equality," "Solidarity," "Citizen's rights," "Justice," and "General Provisions," which govern the interpretation and application of the Charter. In the chapter "Freedoms," the freedom of thought, conscience, and religion is guaranteed by Article 10. Although the first paragraph of Article 10 of the Charter and the first paragraph of Article 9 of the Convention are the same, the second paragraphs are different. Paragraph 2 of Article 10 contains the following: "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right." This statement in the second paragraph shows that the right to conscientious objection is explicitly recognized. Also, there is no statement about any limits, as is the case in the second paragraph of Article 9 of the Convention, but this does not definitively mean that there is no limit. The Charter is distinguishable from other documents as it is the first binding human rights treaty to clearly recognize the right to conscientious objection. On February 7, 1983, with the Macciocchi Resolution on conscientious objection, the European Parliament "notes that protection of freedom of conscience implies the right to refuse to carry out armed military service and to withdraw from such service on grounds of conscience."[78]

[77] Özgür Heval Çınar, *The Right to Conscientious Objection to Military Service and Turkey's Obligations under International Human Rights Law* (New York: Palgrave Macmillan, 2014), 12. Hereinafter: Çınar, *Turkey's Obligation*.

[78] The European Parliament, "The Macciocchi Resolution," Feb. 7, 1983. http://www.ebco-beoc.org/sites/ebco-beoc.org/files/attachments/1983-02-07-Macciocchi.pdf.

The other document that directly recognizes the right to conscientious objection is the Ibero-American Convention.[79] The direct and explicit recognition of the right to conscientious objection by these two documents should not imply that the right to conscientious objection is not recognized by other documents. Prominent texts such as the UDHR, the ICCPR, and the Convention recognize the right of conscientious objection as a reflection of freedom of thought, conscience, and religion. The norm-defining mechanisms in both the United Nations and in Europe have adopted the idea that conscientious objection originates from religious, moral, ethical, philosophical, humanitarian or similar convictions. These mechanisms call upon states to recognize the right to conscientious objection for all citizens, regardless of conditions of war or peace.[80] The government should furthermore ensure that all citizens have easy access to information on the right to conscientious objection. The reasons for conscientious objection should not be subjected to inquiry by any state authority.[81] Therefore, the right to conscientious objection can be seen as a universally recognized right, because the freedom of thought, conscience and religion is now considered a cornerstone of a democratic society and international human rights law.[82]

3.5 Concluding Remarks

Historically, religion has provided the main stimulus towards conscientious objection, exemplified by the example of Maximilian in the previous chapter. Compulsory military service emerged roughly towards the end of the 18th century

[79] Çınar, *Conscientious Objection to Military Service*, 157.

[80] See, for example, Committee of Ministers, Recommendation no. (2010)4, "Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces," Feb. 24, 2010 (1077th Meeting of the Ministers' Deputies). https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cf8ef.
See also PACE, Recommendation 1518, "Exercise of the Right of Conscientious Objection to Military Service in Council of Europe Member States," May 23, 2001. https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16909&lang=en.

[81] The European Parliament, "The Macciocchi Resolution," Feb. 7, 1983. http://www.ebco-beoc.org/sites/ebco-beoc.org/files/attachments/1983-02-07-Macciocchi.pdf.

[82] Çınar, *Conscientious Objection to Military Service*, 159.

with the rise of nation-states, and around the ideology of nationalism. This proved to be greatly instrumental in bringing about a gradual secularization of conscientious objection, therefore minimizing its religious connotations. The process was aided with the birth individualism as reflected in the European Enlightenment, rendering a human person into an autonomous and self-sufficient entity at a conceptual level. The politicization of the concept occurred during the first quarter of the 20th century, when conscientious objectors were rapidly transformed into an organized movement questioning the very authority of the state. The state's resistance to such demands soon fractured, induced particularly by a certain awareness of the tolls in the losses of human lives, hitherto unseen, and by brazen violations of basic rights by the military operations of states during World War II. Inroads made by the concept of conscientious objection reached their peak in the United Nations era in formal legal instruments and in political commitments through various international initiatives, as described above. The end of the Cold War from the late 1980s saw a further erosion of individual states' authorities, and an emphasis on states' interdependence rather than violent autonomy. This shift in political relationships among states served to consolidate the right to conscientious objection, historically so long in the making.

CHAPTER 4

THEORETICAL FRAMEWORK OF THE CONCEPT OF CONSCIENTIOUS OBJECTION

This chapter presents an account of the debate on conscientious objection, from the denial of the right to the defense of the right. This discussion also includes views which locate a paradox within the debate.

4.1 Debates over Conscientious Objection

The recognition of the right to conscientious objection has been preceded by serious debate. While some scholars argue that the right to conscientious objection should be recognized, some oppose the idea. Conscientious objection has not been historically recognized because of various factors: state perception, the effects of the recognition of the right on individuals, and public opinion. All of these factors have been effective in either supporting or opposing the recognition of the right to conscientious objection to military service.

The debate on conscientious objection has been so complex that even the most passionate advocates of individual freedom assert that states can make demands from their citizens regarding important issues such as military and national security.[83] For example, the Cold War conflict is considered to be one of the most important issues affecting decision-makers regarding conscientious objection. In the era of the Cold War, states frequently determined military policy in direct reaction to other states' policies. Taking into account that communist countries denied their citizens the status

[83] Collin Mellors and John McKean, "Confronting the State: Conscientious Objection in Western Europe," *Bulletin of Peace Proposals 13*, no. 3 (1982): 227. Hereinafter: Mellors and McKean, *Confronting the State*.

of conscientious objector, it is not surprising that European countries denied their citizens the right to object in their turn. It was widely accepted that the recognition of the right to conscientious objection weakened states' defenses against communist countries.[84] There was a considerable mass of people who thought that if the right to conscientious objection were to be recognized, people who evaded military service could pose a major threat to national security. Namely, the increase in the number of people who wished to be exempted would have resulted in the state being deprived of the human resources it needed to ensure national security. This argument has prevented states from recognizing the right for a long time.[85] However, Noam Lubell refutes this claim, arguing that in comparison to those amenable to military service, the number of conscientious objectors constitutes a very small percentage.[86] Russell Wolff is also among those to think that the argument is misleading. According to Wolff, the proportion of people who were exempted from military service during the Vietnam War was approximately only one percent.[87] This figure is very low when considering the strength of public opinion against the Vietnam War.

An important issue that delayed the recognition of the right to conscientious objection has been the disagreement over valid grounds for exemption. Over a long period of time, the majority of states have recognized only religious-based conscientious objectors who are members of a predominant religious group; for example, members of conventional branches of Christianity.[88] In this context, the sincerity of the objector's religious belief has been a key issue.[89] Historically, religious-based conscientious objectors faced less questioning than those objections based on

[84] Lippman, *The Recognition of Conscientious Objection,* 34.

[85] Marcus, *Conscientious Objection as an Emerging Human Right*, 511.

[86] Lubell, *Selective Conscientious Objection in International Law*, 413.

[87] Russell Wolff, "Conscientious Objection: Time for Recognition as a Fundamental Human Right," *ASILS International Law Journal* 6, no. 65 (1982): 83.

[88] Hannah Arendt, *Crises of the Republic: Lying in Politics, Civil Disobedience, On Violence, Thoughts on Politics and Revolution,* (New York: Harcourt Brace & Company, 1972), 66.

[89] Lippman, *The Recognition of Conscientious Objection,* 33.

political or moral grounds. This was because membership in a pacifist religious group was considered to be proof of sincerity.[90] This determination leads to discrimination of conscientious objectors on the basis of their grounds of conviction. Furthermore, doubting the sincerity of an individual's convictions damages the principle of respect for diversity, which is essential to a democratic society. The questioning of sincere principles and convictions may lead to discrimination not only within Christianity itself, but also between Christianity and other religions. Greenawalt mentions an equally interesting idea: that the recognition of conscientious objection can create an ethical quandary in society.[91] It is intrinsically unfair to exempt a portion of society from an obligation imposed by the state on the whole of society. As a consequence, this exemption may quite logically inspire soldiers to question their government's recruitment policy.

Some have argued that recognition of conscientious objector status may impugn the morality of those who serve in the military.[92] To be precise, moral-based conscientious objection may strongly imply that conscripted soldiers or military professionals are immoral persons. Lubell suggests another problematic possibility: that when conscientious objectors enter the army, their influence may inspire soldiers to question their own commitment to military service.[93] An argument that Lubell dismantles is the notion that people would try to violate other civic responsibilities when they see that they can be exempted from military service.[94] The fear that demands for exemption may affect related policies, such as taxes collected for military expenditure, has prevented states from recognizing the right. Lubell finds

[90] Nieminen, *Rebels without a Cause*, 1296.

[91] Kent Greenawalt, "All or Nothing at All: The Defeat of Selective Conscientious Objection," *The Supreme Court Review* 1971 (1971): 48. Hereinafter: Greenawalt, *All or Nothing at All*.

[92] Lubell, *Selective Conscientious Objection in International Law*, 413.

[93] Lubell, *Selective Conscientious Objection in International Law*, 413.

[94] Lippman, *The Recognition of Conscientious Objection,* 34-35.

this argument dubious and alleges that experience does not show that conscientious objection to military service causes other related forms of conscientious objection.[95] The pressure to recognize the right to conscientious objection increased after World War II. According to advocates of conscientious objection at that time, the existence of a compulsory military system was not necessary during peacetime, thus conscientious objection ought to have been legally recognized. Colin Mellors and John McKean have written that during periods of relative peace, compulsory military service is no longer perceived as a necessity for national security, and thus it becomes more difficult for states to recruit young men into the military.[96] It is also noteworthy that the recruitment of young men during peacetime – young men who constitute a significant part of the workforce – may create unnecessary costs to a state's budget. Therefore, a more moderate approach to conscientious objection appeared to be sensible during post-war periods.

In an article from 1971, Kent Greenawalt set out the pro- and counter-arguments for the exemption of conscientious objectors from military service. He argued that conscientious objectors should be exempt from military service because states should not force citizens to perform acts which are strongly contradictory to their consciences and religious beliefs.[97] To press religious-based conscientious objectors into military service, and furthermore, compel them to kill another person, would be a distinct violation of religious freedom. According to another argument posited by Greenawalt, it is reasonable to presume that conscientious objectors make bad soldiers when coerced into service.[98] Therefore, it is much more economically sound to mobilize conscientious objectors — whose faith in the military and whose effectiveness are already in doubt — to alternative service, rather than to imprison them. Conscientious objectors may also adversely affect the inclinations and resolve

[95] Lubell, *Selective Conscientious Objection in International Law,* 413.

[96] Mellors and McKean, *Confronting the State,* 238.

[97] Greenawalt, *All or Nothing at All,* 47.

[98] Greenawalt, *All or Nothing at All,* 47.

of their fellow-soldiers. No state wants "alienated" soldiers who could cause disruption in the order of their armies.[99] Concomitantly, the recognition of conscientious objection shows that the state does attach importance to moral and social views.[100] In most western countries, the greater the tolerance of the state to differing views, the greater the legitimacy that is attributed to the state by its citizens. According to Mellors and McKean, the recognition of conscientious objection is important in demonstrating a tolerance to dissenting opinions in society, as well as the depth of that tolerance.[101] Douglas Sturm, another writer who supports the right to conscientious objection, asserts that conscientious objection is valuable for civil society.[102] Specifically, it reminds citizens that they have the right to make their own decisions, even if those decision contradict general opinion. It also shows that moral convictions do not always have the same meaning for governments and for individuals. And last, Sturm asserts that conscientious objection implies that the aim of the civil society is not war, but the establishment of a peaceful life.[103] Similarly, Carl Cohen claims that conscientious objection refers to "sophistication in political society."[104] He states that conscientious objection is an indicator of public awareness about differing moral perspectives. The acceptance of different ideas enriches social life and is necessary for the development of a healthy society.[105] To summarize, a state allowing conscientious objectors an exemption from military service could both reinforce its legitimacy by acknowledging a variety of moral convictions, and also, turn this exemption into a potentially fruitful economic opportunity.

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[99] Lubell, *Selective Conscientious Objection in International Law,* 413.

[100] Lubell, *Selective Conscientious Objection in International Law,* 413.

[101] Mellors and McKean, *Confronting the State,* 238.

[102] Douglas Sturm, "Constitutionalism and Conscientiousness: The Dignity of Objection to Military Service," *Journal of Law and Religion* 1, no. 2 (1983): 277. Hereinafter: Sturm, *Constitutionalism and Conscientiousness*.

[103] Sturm, *Constitutionalism and Conscientiousness*, 277.

[104] Carl Cohen, "Conscientious Objection," *Ethics* 78, no. 4 (1968): 269. Hereinafter: Cohen, *Conscientious Objection.*

[105] Cohen, *Conscientious Objection,* 269-270.

Carl Cohen considers legal regulations on conscientious objection to be a "legal pressure valve."[106] When an individual objecting to military service is forced to perform it, it is inevitable that conflict evolves within both the state and society. According to Cohen, conscientious objection is a tool to alleviate this conflict. He argues that the regulation of conscientious objection alleviates potential conflicts in society and prevents members of a society from experiencing a moral dilemma.[107] Similarly, Anders Schinkel argues that a clear, legal arrangement can lessen the effect of this conflict. With this arrangement, conscientious objection becomes "institutionalized" and becomes an "exception to the rule."[108] Therefore, recognition of conscientious objection is a means of stabilizing the social system.

There are also those who have advocated that the recognition of the right to conscientious objection is, in fact, a paradox. Grégor Puppinck asserts that in recognizing the right to conscientious objection, the law dictates an order, even as it offers an exception to this order.[109] Ulrich Bröckling identifies a similar contradiction. That is, the authority for the protection of the conscientious objector is at the same time the authority which necessitates the objection.[110] Conscientious objector status protects an individual from consequences that would arise if he had not complied with an obligation – an obligation which requires criminal proceedings if not fulfilled. By granting this status, the state protects conscientious objectors from the state's own rules. Another clear paradox regards individuals who refuse military service on the basis of antimilitarism: to wit, the recognition of conscientious objection by states is not a commensurate response to the specific goals of antimilitarism. That is to say, even if states recognize the right to conscientious objection, they do not waive the right to exercise war. Since all conscientious objectors are not antimilitarists, many

[106] Cohen, *Conscientious Objection,* 269.

[107] Cohen, *Conscientious Objection,* 269.

[108] Schinkel, *Conscience and conscientious objectors*, 544-545.

[109] Puppinck, *Conscientious Objection and Human Rights,* 15-16.

[110] Bröckling, *Sand in the Wheels?,* 59.

consider the recognition of this right to be a victory. For example, to citizens in Israel who are not anti-militarist, but who think that the war against Palestine is unjust, the recognition of the right to conscientious objection is a triumph. If states recognize the right, they may appear to admit the illegality of their military actions. In addition, if the right to conscientious objection is recognized, it is the individual who shall decide whether or not to fulfill a duty imposed by the state. In other words, the decision mechanism is now with the individual rather than the state. This is obviously an undesirable outcome for sovereign states. These and similar reasons have prevented states from recognizing the right to conscientious objection for years.

4.2 Concluding Remarks

It would not be an exaggeration to say that the issue of recognition of the right to conscientious objection has prompted great controversy in virtually every country of the world. Indeed, states cannot be expected to make casual concessions on an issue that they regard as closely related to national security. Although strict measures related to national security were replaced by a more moderate state approach in the post-World War II period, modern western countries, ardent advocates of individual freedoms, chose to repudiate the right to conscientious objection on the grounds that communist countries had not recognized the right. Furthermore, the question of conscientious objectors' sincerity, and the unrest and inequality that could result from the recognition of the right to conscientious objection continued to be subjects of debate. Further questions have been raised: Is compulsory military service still essential in a system dominated by relative peace? In an era where economic power is more decisive than physical power, can we contribute to the economy by granting conscientious objectors an alternative service? How does a democratic state convince its citizens to act in contradiction to their thoughts, conscience, and religion? The debates explored in this chapter have deeply influenced formal attitudes towards the right to conscientious objection to military service. The next chapter will focus specifically on the regulation of the right to conscientious objection in the European context of human rights.

CHAPTER 5

TOWARDS A NEW HUMAN RIGHT: THE RIGHT TO CONSCIENTIOUS OBJECTION IN THE COUNCIL OF EUROPE

Under the human rights law of the Council of Europe (CoE), the right to conscientious objection has evolved in relation to the interpretation of two specific rights protected by the European Convention on Human Rights (ECHR), regulated in Articles 4 and 9. The first article prohibits forced labour; yet military service appears to be an exception, thus ostensibly limiting the right to conscientious objection. In the second article, the freedom of thought, conscience, and religion protects the manifestations of religious belief, moral conviction and intellectual thought, including the spirit of pacifism that is largely behind the right to conscientious objection. Interpretations of these two articles in the context of the right to conscientious objection by the former European Commission of Human Rights (defunct from 1998) and the European Court of Human Rights (ECtHR, the Court) has evolved over time. According to the Court, since 2011, the right to conscientious objection has been protected under Article 9, and Article 4 is not necessarily relevant in the matter. Before moving on to the case-law of the Court in the following chapter, this chapter probes the genesis of the two articles in the Convention from the drafting stage, seeking to evaluate the possible relevance of either provision to the right to conscientious objection over time.7

5.1 Raising the Issue of Conscientious Objection During the Preparation Process of the Convention

The Council of Europe (CoE) was the first European institution to address the issue of conscientious objection. It was established with the hope of creating a peaceful political system, characterized by close relations based on justice and international cooperation among European states. In order to achieve this goal, and to ensure

economic and social progress, it adopted the basic values of genuine democracies such as individual freedoms, political freedom and the rule of law. The Statute of the Council of Europe, adopted in 1949, indicates that there are two statutory organs of the CoE: the Committee of Ministers and the Consultative Assembly.[111] In February 1994, with the decision of the Committee of Ministers, the Consultative Assembly was renamed the "Parliamentary Assembly" (PACE).[112] The PACE is the first statutory organ of the CoE recognizing the right to conscientious objection. It consists of the representatives of each Member State. It is the deliberative organ that presents its recommendations to the Committee of Ministers on matters within its jurisdiction.[113] The Committee of Ministers is the other statutory organ and the decision-making body of the CoE. It consists of the Ministers of Foreign Affairs of the Member States. In accordance with Article 15 of the Statute of the Council of Europe, the Committee of Ministers, both on the recommendation of the PACE and on its own initiative, can take steps to further the aim of the CoE. These steps include the termination of conventions or agreements and the adoption of new policies.[114] The Committee of Ministers may make recommendations to Member States and may ask for information on their actions in accordance with these recommendations.[115]

As mentioned above, sensitivity to human rights issues increased after World War II. The emerging importance ascribed to human rights called for regulation and the creation of an infrastructure for this field. In addition to these political and theoretical dimensions, from a greater practical standpoint, Europe was in urgent need of institutionalization and common rules adopted by all member states in order to

[111] Statute of the Council of Europe, (May 5, 1949), Article 10. https://rm.coe.int/1680306052. Hereinafter: The Statute of the CoE.

[112] In this study, the concepts of "Consultative Assembly" and "Parliamentary Assembly" were used alternately in order to be appropriate for the historical context.

[113] The Statute of the CoE, Article 22.

[114] The Statute of the CoE, Article 15 (a).

[115] The Statute of the CoE, Article 15 (b).

establish a functioning European system.[116] To establish this system, it was necessary to construct a European identity with common economic, political, social and cultural norms. Since the issue of human rights had a major role in the construction of this European identity, in 1949 the Consultative Assembly adopted a recommendation as follows:

> Art. 1. – The Consultative Assembly of the Council of Europe recommends the Committee of Ministers to cause a draft Convention to be drawn up as early as possible, providing a collective guarantee, and designed to ensure the effective enjoyment of all persons residing within their territories of the rights and fundamental freedoms referred to in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations, and set forth in Article 2 below.
> Art. 2. – In this Convention, the Member States shall undertake to ensure to all persons residing within their territories:
> 1. Security of person, in accordance with Articles 3, 5 and 8 of the United Nations Declaration;
> 2. Exemption from slavery and servitude, in accordance with Article 4 of the United Nations Declaration;
> 3. Freedom from arbitrary arrest, detention, exile, and other measures, in accordance with Articles 9, 10 and 11 of the United Nations Declaration;
> 4. Freedom from arbitrary interference in private and family life, home and correspondence, in accordance with Article 12 of the United Nations Declaration;
> 5. Freedom of thought, conscience and religion, in accordance with Article 18 of the United Nations Declaration;
> 6. Freedom of opinion and expression, in accordance with Article 19 of the United Nations Declaration;
> 7. Freedom of assembly, in accordance with Article 20 of the United Nations Declaration;
> 8. Freedom of association, in accordance with Article 20 (paragraphs 1 and 2) of the United Nations Declaration;
> 9. Freedom to unite in trade unions, in accordance with paragraph 4 of Article 23 of the United Nations Declaration;
> 10. The right to marry and found a family, in accordance with Article 16 of the United Nations Declaration.[117]

The Consultative Assembly made it clear in this recommendation that the need for a human rights convention was urgent. The Assembly was close to the idea of writing

[116] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, (Cambridge: Cambridge University Press, 2006), 17. Hereinafter: Greer, *European Convention.*

[117] PACE, Recommendation 38, "Human Rights and Fundamental Freedoms," Sept. 8, 1949. http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14035&lang=en.

a convention, taking the UDHR as a model. However, there was great debate among the member states and within the CoE itself on how the final version of the convention should read. There were profound differences of opinion on fundamental issues such as the definition of rights, their scope, and limits.[118] At first, the approach of the Consultative Assembly was to refrain from precisely defining particular rights. Instead, the Assembly preferred to create a convention that was formed and expanded according to the Court's case-law.[119] With this approach, generalized descriptions seemed sufficient. Belgium, Italy, and France had supported this approach, and they argued that the responsibilities of the states were already certain, and that individual states were responsible for implementing detailed mechanisms required by broadly defined rights.[120] However, the second group argued that it was more logical to define the rights and limits in a detailed way.[121] According to the representative of the United Kingdom, states would not know what their obligations were if rights were not fully defined in the Convention; states, therefore, would avoid recognizing these ambiguous rights.[122] In order to reach a settlement, the Committee of Ministers asked the Secretary-General to call on the Member States to send experts to formulate the convention.[123] The Committee of Experts began with the draft prepared by the Consultative Assembly. A similar debate occurred among the Committee of Experts, as expressed in a letter from the Secretary-General.[124] This letter states that there were

[118] Greer, *European Convention*, 18-19.

[119] D. Christopher Decker and Lucia Fresa, "The Status of Conscientious Objection under Article 4 of the European Convention on Human Rights," *NYU Journal of International Law and Politics* 33 (2001): 383. Hereinafter: Decker and Fresa, *The Status of Conscientious Objection.*

[120] Decker and Fresa, *The Status of Conscientious Objection*, 384.

[121] Greer, *European Convention*, 18-19.

[122] Hitomi Takemura, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders, (*Berlin: Springer-Verlag, 2009), 86. Hereinafter: Takemura, *International Human Right.*

[123] Decker and Fresa, *The Status of Conscientious Objection*, 385.

[124] Council of Europe, Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights, vol. 4, (The Hague: Martinus Nijhoff, 1977), 82.

"two main schools of thought" in the Committee of Experts. There were those who defended the first view and supported the approach of the Consultative Assembly: that it would be more accurate to adopt a convention built upon case-law. Therefore, a commission and a court had to be established without wasting time. The latter group argued that before the establishment of a court and a commission, rights and their limits had to be determined.[125] In addition, discussions on the formulation of rights continued. On March 6, 1950, experts from the United Kingdom submitted a text intended to amend Articles 1, 2, 4, 5, 6, 8, and 9 of the draft Convention.[126] These amendments differed significantly from the UDHR text. As seen in Article 2 of the Recommendation No. 38, the Assembly was of the opinion that it was appropriate for the Convention to have content similar to the UDHR.[127] Accordingly, in the Consultative Assembly's draft, Article 4 on the Prohibition of slavery and forced labor, so vital in terms of the issue of conscientious objection, was treated in the same way as the UDHR.[128] Article 4 of the UDHR is as follows: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."[129] Article 4 of the UDHR did not address a matter related to conscientious objection. Thanks to the amendments from the UK representatives, conscientious objection was mentioned for the first time. The amendment was as follows:

> 1. No one shall be held in slavery or servitude.
> 2. No one shall be required to perform forced or compulsory labour.
> 3. For the purpose of this article, the term "forced or compulsory labour" shall not include:
> a. any work required to be done in the ordinary course of detention imposed by the lawful order of a court;

[125] Council of Europe, Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights, vol. 4, (The Hague: Martinus Nijhoff, 1977), 82.

[126] Decker and Fresa, *The Status of Conscientious Objection*, 9.

[127] Takemura, *International Human Right*, 85.

[128] PACE, Recommendation 38, "Human Rights and Fundamental Freedoms," Sept. 8, 1949. http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14035&lang=en.

[129] United Nations General Assembly, Universal Declaration of Human Rights, adopted on Dec. 10, 1948, Article 4.
https://www.un.org/en/universal-declaration-human-rights/.

b. any service of a military character or service in the case of conscientious objectors exacted in virtue of compulsory military service laws;
c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
d. any work or service which forms part of normal civic obligations.[130]

The UK amendment was the first example of the Court's willingness to associate conscientious objection cases with Article 4. Service requested from conscientious objectors was not seen as forced or compulsory labor in this amendment. This approach seems reasonable from a state-centric viewpoint. Not surprisingly, countries that did not recognize the right to conscientious objection, or did not regulate any aspects of this issue did not want to consider military service as forced or compulsory labor. The states that had regulations on the issue of conscientious objection opposed alternative service as forced or compulsory labor. Namely, if the alternative service was considered as forced or compulsory labor, the states would not have received any benefit in allowing conscientious objection. Nonetheless, it should be indicated that this amendment does not contain any wording denying a prospective right to conscientious objection.

In line with these negotiations, the Committee of Experts prepared two draft conventions. The first was based on the draft prepared by the Assembly, and the second was based on the amendments proposed by the UK and submitted to the Committee of Ministers.[131] In order to find a common ground and decide which draft to choose, the Conference of the Senior Officials was held in 1950.[132] In this conference, there was an attempt to reconcile the two drafts; however, the final draft was based primarily on the changes proposed by the UK.[133] Article 4 (3) (b) in the draft, which was approved by the Senior Officials, was written as follows:

[130] Decker and Fresa, *The Status of Conscientious Objection*, 387.

[131] Decker and Fresa, *The Status of Conscientious Objection*, 388-389.

[132] Decker and Fresa, *The Status of Conscientious Objection*, 391.

[133] Decker and Fresa, *The Status of Conscientious Objection*, 391.

> b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; [134]

Although later the Committee of Ministers made several changes on the senior officials' draft, Article 4 (3) (b) remained the same.[135] By adding the wording "in countries where they are recognized," the option of recognizing the right to conscientious objection was left to the discretion of member states. Conscientious objection has been linked to slavery under Article 4.

It is an indisputable fact that this right is most associated with Article 9 on freedom of thought, conscience, and religion, since the concept of conscience lies at the heart of the right to conscientious objection. In spite of this fact, the drafters examined the issue in accordance with Article 4 and ignored association with Article 9. However, the reason for this was not the opposition of the drafters or their intent to exclude this right from the convention. One of the main reasons was that in the early days when the convention was being written, there was no general attitude that recognized conscientious objection as a human right. Conscientious objection was considered a political issue. Therefore, the authors of the convention wrote Article 9 (1) in the same way as Article 18 of the UDHR. They did not give any detailed explanation about the meaning of the concepts of thought, conscience, and religion and how these concepts were interpreted. In fact, this can be seen as an advantage from a different perspective. Since the concepts of thought, conscience, and religion are not defined to cover only certain world views, Article 9 can involve a multitude of different approaches regarding world, religion or society. The case-law of the Court states that the freedom of thought, conscience, and religion is equally valuable for atheists, agnostics, skeptics, and the unconcerned.[136] Certainly, it was not reasonable to claim

[134] Decker and Fresa, *The Status of Conscientious Objection*, 392-393.

[135] Decker and Fresa, *The Status of Conscientious Objection*, 393.

[136] See *Adyan and Others v. Armenia*, The European Court of Human Rights, no. 75604/11 (Oct. 12, 2017). https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22adyan%20and%20others%22],%22documentc

that all views or beliefs are protected under Article 9. For this reason, the Council of Europe brought some limitations to Article 9. With the addition of the second paragraph, Article 9 took its final form. According to this second paragraph, which creates a significant difference from the UDHR, states cannot intervene with the forum internum but can interfere with the forum externum. Since this intervention could not be arbitrary, some conditions were set for the intervention to be legitimate. As the freedom of thought, conscience, and religion is recognized as one of the foundations of a democratic society, any interference with this right must be "necessary in a democratic society."[137] This is because pluralism, which is the pillar of democracy, can exist as long as this freedom exists. Thus, in accordance with Article 9, the intervention must be "prescribed by law" to pursue a legitimate aim, such as protection of public order and the rights and freedoms of others.[138] The Court uses these conditions to test the sincerity of the belief of a conscientious objector who demands exemption from military service. The applicant has to prove that there has been an "interference with the enjoyment of his right" and that this intervention is not necessary in a democratic society.[139]

The Convention for the Protection of Human Rights and Fundamental Freedoms, which is commonly referred to as European Convention on Human Rights (the Convention), was opened for signature in Rome on the fourth of November 1950 and came into force in 1953. The Convention is the first regional instrument to recognize human rights. With the adoption of the Convention, The European Commission of Human Rights and the European Court of Human Rights were established. In the majority of cases regarding conscientious objection, applicants have alleged the

ollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-177429%22]}.

[137] European Convention on Human Rights, (adopted on Nov. 4, 1950; entered into force on Sept. 3, 1953), Article 9.
https://www.echr.coe.int/Documents/Convention_ENG.pdf. Hereinafter: The Convention.

[138] The Convention, Article 9.

[139] Çınar, *Conscientious Objection to Military Service*, 101.

violation of Article 4 and Article 9 of the Convention. In the final version of the Convention, these articles are as follows:

> Article 4 on Prohibition of slavery and forced labour:
> 1. No one shall be held in slavery or servitude.
> 2. No one shall be required to perform forced or compulsory labour.
> 3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
> (a) Any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
> (b) 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;
> (c) Any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
> (d) Any work or service which forms part of normal civic obligations.[140]
>
> Article 9 on Freedom of thought, conscience and religion:
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[141]

Prior to 1998, there was a Commission that assessed the applications and referred them to the Court. In 1998, Protocol no. 11 replaced the existing European Commission and Court of Human Rights with a new permanent Court. In accordance with Article 46 (2) of Protocol no. 11, the Committee of Ministers now supervises the execution of the decisions of the European Court of Human Rights.[142] The Committee of Ministers publishes a final resolution at the end of each case in order

[140] The Convention, Article 4.

[141] The Convention, Article 9.

[142] The Council of Europe, *Protocol No. 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms: Restructing the Control Machinery Established Thereby*, (Strasbourg, 1994), Article 46 (2).
https://www.echr.coe.int/Documents/Library_Collection_P11_ETS155E_ENG.pdf.

for the respondent States to make the necessary arrangements in their domestic law, and if states do not comply with the Court's decisions, they may be subject to serious sanctions imposed by the Committee of Ministers.[143] States that do not comply with the decisions of the CoE may lose their representation rights, or the Committee of Ministers may request these states to withdraw from the membership of the CoE.[144] Before establishing the new permanent Court, the Commission examined five cases concerning conscientious objection. In the first one, the Commission decided there had been no violation of the Convention, and in four others it declared that the cases were inadmissible. However, not all bodies of the Council of Europe have shared the Commission's approach. The next sub-section examines different attitudes of the PACE, the Ministers and the Court on conscientious objection.

5.2 One Organization – Three Perspectives: Disagreements in the Council of Europe

The PACE pioneered other bodies of the Council of Europe by taking many groundbreaking steps on the recognition of the right to conscientious objection. The first official step taken to recognize conscientious objection as a specific universal right is Resolution No. 337, adopted by the Consultative Assembly in 1967. In part 'a' of this resolution the Assembly declared as follows:

1. Persons liable to conscription for military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from the obligation to perform such service.
2. This right shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9 of the European Convention on Human Rights.[145]

[143] Çınar, *Conscientious Objection to Military Service*, 108.

[144] The Statute of the CoE, Article 8.

[145] Parliamentary Assembly of the Council of Europe (PACE), Resolution 337, "Right of Conscientious Objection," Jan. 26, 1967 (22nd Sitting). http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15752&lang=en.

In part 'b' of this decision, the procedure regarding the right to conscientious objection was determined. According to the principles set forth, persons under obligation of military service should be informed about the rights they are entitled to exercise. The decision-making authority on the recognition of the right to conscientious objection should be independent of military authorities and be impartial. The decision of this impartial authority must also be controlled by at least one administrative body subject to the control of at least one other independent judicial body. In addition, the PACE addressed the issue of alternative service. It stated that the duration of the alternative service would be at least as long as the regular military service period; conscientious objectors and ordinary conscripts would have the same social and financial equality; conscientious objectors would be employed in work of national importance. These statements have become the basic principles repeated in many decisions, recommendations and resolutions of institutions such as the CoE and the European Parliament. Thus, the right to conscientious objection was recognized as a fundamental human right which derives from Article 9 of the Convention. Accepting philosophical motivations as valid reasons for conscientious objection in this resolution distinguishes the PACE from other CoE bodies and the UN.[146]

With Recommendation 478 in 1967, the PACE recommended the Committee of Ministers to instruct the Committee of Experts to produce Resolution 337-based formulations and ensure that all member states of the CoE recognized the right to conscientious objection.[147] The Committee of Ministers declined to act upon this recommendation because governments already dealt with the issue of conscientious objection in their domestic law, and others did not want to change their law for various reasons.[148]

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[146] Çınar, *Turkey's Obligation,* 31.

[147] PACE, Recommendation 478, "Right of Conscientious Objection," Jan. 26, 1967 (22nd Sitting). http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14515&lang=en.

[148] Lippman, *The Recognition of Conscientious Objection,* 47.

In 1977, the PACE reasserted the approach in Resolution 337 with Recommendation 816. In Recommendation 816, the PACE recommends the Committee of Ministers to:

> a. urge the governments of member states, in so far as they have not already done so, to bring their legislation in line with the principles adopted by the Assembly ; b. introduce the right of conscientious objection to military service into the European Convention on Human Rights.[149]

The Committee of Ministers again declined to act upon this recommendation. However, in 1987, the Ministers adopted Recommendation 87(8) based on the recommendations of the PACE. With this decision, the Ministers invited member states to recognize the right to conscientious objection, and called upon those member states which had not yet made legal arrangements for conscientious objection to harmonize their national legislation with the basic principles of conscientious objection. With this recommendation, the Ministers recognized the right to conscientious objection but did not attribute the right to Article 9.[150] In this respect, the attitude of the Committee of Ministers differs from that of the PACE. This recommendation does not contain a detailed description of the justifications accepted for conscientious objection and contains only the "compelling reasons" statement.[151] In other words, selective conscientious objectors were excluded.

In 2001, the PACE adopted Recommendation 1518 which recalls Resolution 337, Recommendation 816, and Recommendation No. R (87) 8. Recommendation 1518 recognized the right to conscientious objection for members of the armed forces. It states that alternative service must neither be punitive nor deterrent. Also, it

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[149] PACE, Recommendation 816, "Right of Conscientious Objection to Military Service," Oct. 7, 1977 (10th Sitting). http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=14850&lang=en.

[150] Marcus, *Conscientious Objection as an Emerging Human Right*, 535.

[151] Committee of Ministers, Recommendation no. R (87) 8, "Recommendation no. R (87) 8 of the Committee of Ministers to Member States Regarding Conscientious Objection to Compulsory Military Service," Apr. 9, 1987 (406th meeting of the Ministers' Deputies). https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e6689.

emphasizes that alternative service should be in civilian character.[152] It indicates that, as of 2001, although only five member states refrained from recognizing the right to conscientious objection, the arrangements in countries that did recognize the right to conscientious objection were unsatisfactory and quite different from each other. The most important part of this document is the PACE's recommendation to the Committee of Ministers to include the right to conscientious objection to the Convention with an additional protocol amending Article 4 (3) (b) and Article 9.

In Recommendation 1742 on the "Human Rights of Members of the Armed Forces" adopted in 2006, the PACE reiterated that members of the armed forces may obtain conscientious objector status.[153] With the adoption of the Recommendation on "Human Rights of the Members of the Armed Forces" in 2010, the Committee of Ministers recognized the right to conscientious objection for professional soldiers.[154]

The progress made in the recognition of the right to conscientious objection initiated by the PACE was followed by the Committee of Ministers, albeit late. However, the Court did not follow these developments and continued to insist on associating the conscientious objection cases with Article 4 until 2011. At first, even if an applicant alleged a violation of Article 9, the Commission used Article 4. Although Article 9 is the article most relevant to conscientious objection, the Commission examined conscientious objection cases under Article 4. Namely, the Commission was of the opinion that the Convention does not oblige Member States to exempt conscientious objectors from military service. As a proof of this, the Commission referred to the "in

[152] PACE, Recommendation 1518, "Exercise of the Right of Conscientious Objection to Military Service in Council of Europe Member States," May 23, 2001. https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16909&lang=en.

[153] PACE, Recommendation 1742, "Human Rights of Members of the Armed Forces," Apr. 11, 2006, (11th Sitting). http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17424&lang=en.

[154] Committee of Ministers, Recommendation no. (2010)4, "Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces," Feb. 24, 2010 (1077th Meeting of the Ministers' Deputies). https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cf8ef.

countries where they are recognized" expression in Article 4. This expression indicates that the option of recognizing or not recognizing the right is left to the states' discretion. The Convention does not grant conscientious objectors exemption from military service. The sanctions imposed on those who refuse to do military service do not constitute a violation of Article 9. In fact, Article 4 neither recognizes nor excludes the right to conscientious objection to military service, but because of the limited interpretation of the Commission, the right to conscientious objection was limited too.[155]

The case of Grandrath v. the Federal Republic of Germany has been a precedent for the Court's long-standing attitude towards conscientious objection. In this trial, dated from 1966, the Commission decided that there was no violation of Article 9 on the grounds that this article does not guarantee the right to conscientious objection to military service. However, Commissioner Liddy argued that the right to conscientious objection is a fundamental part of the right to freedom of thought, conscience, and religion in compliance with the objectives of the Convention. She stated that Article 4 is related to the right to personal freedom, not freedom of conscience.[156] Although Commissioner Liddy expressed opposition to the association of Article 4 with Article 9, the Court maintained this approach until the Bayatyan case. Nevertheless, her opposition left the door open for future debates on conscientious objection. These two cases will be examined in detail in the next chapter.

Initially, the Convention was neutral about the issue of conscientious objection. But after the Grandrath case, the right to conscientious objection was denied. Nevertheless, the PACE and the Committee of Ministers, two statutory bodies within the CoE, had already recognized the right to conscientious objection. In addition, the United Nations, various non-governmental organizations, and the majority of

[155] Decker and Fresa, *The Status of Conscientious Objection*, 403.

[156] Decker and Fresa, *The Status of Conscientious Objection*, 410.

member states of the CoE had also recognized the right to conscientious objection. They issued reports, resolutions, and recommendations on the topic. Hence, public opinion was strongly in favor of the Court's recognition of conscientious objection as well. The acceptance of the Convention as a living instrument has made it possible for the Court to make progressive interpretations and strengthen rights. In the Bayatyan v. Armenia case, the Chamber maintained the same approach as in the Grandrath case. In this instance, the applicant asked the Grand Chamber to examine the case. The Grand Chamber changed its former approach by recalling the living instrument doctrine; that is, as the European Convention on Human Rights is a living instrument, present-day conditions would be taken into consideration when interpreting the Convention. There was no need for the Convention to be rewritten or the Court to instigate judicial activism[157] for recognition of the right to conscientious objection. Re-evaluation of the Convention in the light of current norms was enough to recognize the right.[158] As a result of this re-evaluation, the Grand Chamber decided that Article 9 should no longer be applied in conjunction with Article 4. As a justification of this, the Grand Chamber indicated that rejecting the military service is a manifestation of a person's religious beliefs. Also, the majority of the member states of the CoE had recognized the right to conscientious objection. Therefore, it was accepted that forcing a person to do military service is an interference with the freedom to manifest one's religion.

[157] Although there is no absolute consensus on the definition of the term "judicial activism," it is commonly understood to be the act of a judicial body which interprets the relevant legislation beyond its existing authority. For further information on this subject see, for example, Bradley C. Canon, "Defining the Dimensions of Judicial Activism," *Judicature* 66, no. 6 (1983): 236; Craig Green, "An Intellectual History of Judicial Activism," *Emory Law Journal* 58, no. 5 (2009): 1195; Ernest A. Young, "Judicial Activism and Conservative Politics," *University of Colorado Law Review* 73, no. 4 (2002): 1139; Keenan D. Kmiec, "The Origin and Current Meanings of Judicial Activism," *California Law Review* 92, no. 5 (2004): 1441.

[158] Petr Muzny, "Bayatyan v. Armenia: The Grand Chamber Renders a Grand Judgment," *Human Rights Law Review* 12, no. 1 (2012): 137-138.

5.3 Concluding Remarks

One of the crucial steps taken to ensure that European states would establish a unifying set of values after World War II was the adoption of the European Convention on Human Rights. It can be concluded from the first part of this chapter that the purpose of the authors of the Convention was neither to recognize nor to exclude the right to conscientious objection. Instead, they intended to exclude military service and alternative service from the definitions of forced or compulsory labor. Therefore, conscientious objection cases have long been associated with Article 4 of the Convention. However, later, the CoE's attitude on conscientious objection changed under the leadership of the PACE and with the effect of other developments in the world. The PACE and the Committee of Ministers recognized the right to conscientious objection as a fundamental human right derived from Article 9 of the Convention. Prior to the Bayatyan case, bodies of the CoE were not in accord regarding the right to conscientious objection. Although the PACE and the Committee of Ministers called on member states to recognize the right, the Commission and the Court still applied Article 4 in cases of conscientious objectors. With the Bayatyan case, the Court recognized the right to conscientious objection to military service, and this established a consensus among all mechanisms of the CoE. The next chapter will examine the cases of conscientious objection one by one to show the evolution of the Court's attitude prior to this consensus.

CHAPTER 6

CONSCIENTIOUS OBJECTION IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

This chapter examines the case-law of the monitoring and enforcement organs of the human rights protection system under the Council of Europe, from 1965 to 2011, as related to conscientious objection. In the case Bayatyan v. Armenia (2011), the system recognized a right to conscientious objection, reversing its established findings of almost half a century. Accordingly, the right in question was protected under Article 9 of the European Convention on Human Rights, namely the freedom of thought, conscience and religion, and also under Article 4 on forced labour, which seemed to render the right merely optional in the previous cases rather than compulsory, and was therefore no longer relevant. The cases detailed below in chronological order, starting with those decided by the now-defunct European Commission of Human Rights, are of utmost importance for revealing the change of attitude in the matter in making sense of the Convention over time.

6.1 Grandrath v. The Federal Republic of Germany (1966)

Albert Grandrath was a German citizen and a Jehovah's Witness. He refused to perform military service due to conscientious and religious reasons. In 1960, he was recognized as a conscientious objector by the German Examination Board for Conscientious Objectors to War Service, and was requested to perform substitute civilian service. He wished to abstain from this substituted service, but his request was denied. Following this, criminal proceedings were instituted against him, and Grandrath was sentenced to eight months imprisonment on charges of desertion. He appealed his punishment, but his appeal was also rejected as being manifestly ill-founded, thus, he served his sentence.

Grandrath applied to the Commission in 1964, claiming that his right to freedom of conscience and religion as guaranteed by Article 9 of the European Convention on Human Rights had been violated. He had several arguments for this claim. First, and most generally, he had been asked to discharge a duty that was against his conscience as a Jehovah's Witness, and he had been consequently imprisoned for not fulfilling this duty. He furthermore suggested that he was a minister. This complicated the case; to ensure free practice of religion, members of the clergy were exempt from service as an integral part of the freedom of religion. Grandrath asserted that it was discriminatory not to afford him the same exemptions as Protestant ministers and Catholic priests. And lastly, he argued that if he were forced to enact some substitute service for the state, that he would be unable to carry out his ministerial duties.

The application was ultimately declared admissible by the Commission in 1965. The Commission examined the possible violation of Article 9 in two particular respects. First, the Commission examined the argument that substitute civilian service restricted Grandrath's right to manifest religion. The Commission concluded that the substitute civilian service would not imply any interference with Grandrath's freedom to manifest his religion under Article 9. Second, the Commission examined the conflict between obligatory military service and Grandath's professed religion and conscience. The Court then made an historic decision that constituted a precedent for subsequent cases of conscientious objection. Grandrath based his application on Article 9 of the Convention, and there was no doubt about his genuine religious convictions. However, while Article 9 sets out a general framework for the right to freedom of thought, conscience, and religion, Article 4 specifically contains a provision about compulsory military service in the case of conscientious objectors. Thus, the Commission decided to examine the application primarily in the context of Article 4. According to Article 4, conscientious objectors may indeed be required to perform substitute service; this service is not defined as forced labor; and therefore, conscientious objection does not ensure an exemption from this service. The Commission thus unanimously decided that there was no violation of Article 9 of the Convention. As for the applicant's allegation of discrimination, the Commission

reached the conclusion that Article 14, in conjunction with Article 4, had not been violated. Further, according to specific points in Article 11 of the German Act, clergy of different religions may be treated differently in relation to the exemption from compulsory service. This different treatment does not constitute discrimination within the meaning of Article 14 of the Convention. Finally, the Commission decided that there was no violation of Article 14 in conjunction with Article 9. That is to say, the substitute civilian service did not imply interference with Grandrath's religion and did not restrict his freedom to manifest his religion. The allegation of discrimination was denied, as there was not any different treatment compared to the ministers of other religions. In conclusion, the Commission did not find any violation of the Convention. In accordance with Article 4, the decision to grant the right to be exempted from military service was left to the states. Even if a state recognizes the right to conscientious objection, it may request conscientious objectors to perform substitute civilian service.

From the case of Grandrath v. the Federal Republic of Germany in 1964, and until the case of Bayatyan v. Armenia in 2011, the European Commission of Human Rights and the European Court of Human Rights retained the same approach to conscientious objection related cases. For these 47 years, the right to conscientious objection was neither recognized by the Commission nor by the Court. The Commission ruled the four application cases following Grandath to be "inadmissible."[159] Nonetheless, it is possible to assert that there have been some positive developments after the establishment of the new single permanent Court. These developments, of course, did not take the form of rapid recognition of the right to conscientious objection. Rather, the Court indirectly ruled that some rights under the Convention had been violated.

[159] See *G.Z. v. Autriche*, The European Commission of Human Rights, no. 5591/72 (Apr. 2, 1973); *X. v. Federal Republic of Germany*, The European Commission of Human Rights, no. 7705/76 (July 5, 1977); *N. v. Sweden*, The European Commission of Human Rights, no. 10410/83 (Oct. 11, 1984); *Peters v. the Netherlands*, The European Commission of Human Rights, (Nov. 30, 1994).

6.2 Thlimmenos v. Greece (2000)

Thlimmenos v. Greece case is one of the cases in which the Court indirectly decided that there had been a violation of Article 14 (prohibition of discrimination) in conjunction with Article 9. In 1983, Thlimmenos, a Jehovah's Witness, was sentenced to four years in prison for refusing to wear a military uniform in a period of general mobilization. According to Article 70 of the Military Criminal Code of Greece, which was in operation until 1995, if a person refuses his commander's order during a general mobilization period, he shall be punished. Thlimmenos was released after completing two years of his sentence. In 1988, he took the chartered accountant exam and earned second place among the six applicants. However, the Executive Board of the Greek Institute of Chartered Accountants did not appoint him because of his previous conviction of a "serious" crime. Article 22 of the Civil Servant's Code of Greece states that "no person convicted of a serious crime can be appointed to the civil service." The concept of serious crime is defined in the Military Criminal Code, and it states that offenses punishable by up to five years are considered misdemeanors. Offenses punishable for more than five years are considered serious crimes.

In his application to the Court, Thlimmenos asserted that the authorities' refusal to recognize him as a chartered accountant was linked to his right to manifest his religious beliefs; therefore, it implies a violation of his rights under Articles 9 and 14 of the Convention. The Greek government objected to this allegation. When Thlimmenos had been indicted, conscientious objectors were punished with imprisonment for less than five years. However, a new law adopted in 1997 recognized the right of conscientious objectors to civilian service. People who had earlier been convicted for insubordination were, retroactively, given the right to be recognized as conscientious objectors. With this recognition, it was then possible to expunge the previous "crime" from one's record. With this in mind, the Government argued that Thlimmenos could have used this procedure to avoid the consequences of his conviction. Thlimmenos counter-argued, asserting that these provisions were

obscure, that he had missed the three-month time limit, and that only the criminal records of a few conscientious objectors were revised.

The Court examined the case under Article 14, taken in conjunction with Article 9 of the Convention. It may be reasonable for states to choose not to appoint some offenders to the accounting profession. Yet, Thlimmenos's situation involved refusing to wear a military uniform for religious or philosophical reasons, and such reasons could not prevent a person from exercising this profession. Furthermore, he had already served his prison sentence for refusing to wear a military uniform. Therefore, banning Thlimmenos from the profession implied a second punishment, which was a disproportionate intervention. Consequently, the Court stated that there had been a violation of Article 14 of the Convention taken in conjunction with Article 9.

The most important point of this case was the allegation of violation of Article 9 of the Convention. In order to support his allegation, the applicant argued that the Commission's approach regarding conscientious objection should be reviewed in the light of present-day conditions. Moreover, he submitted that his non-appointment could not be seen as a justifiable intervention in a democratic society. Nevertheless, the Court held that since it had already found a violation of Article 14 taken in conjunction with Article 9, there was no need to examine Article 9 separately. As seen here, the Court refrained from direct examination of Article 9 until the Bayatyan case.

6.3 Ülke v. Turkey (2006)

The Ülke case is of capital importance in the Court's case-law. Prior to this case, the Court had already begun to consider that actions arising from motivations such as anti-war or pacifism are within the scope of Article 9. However, this case was the

first time that the issue was addressed directly by the Court.[160] A second reason for the serious importance attributed to this case is that the Court, for the first time, found a violation of Article 3 on the issue of conscientious objection.

Osman Murat Ülke was a member of the İzmir Association of Opponents of War and chairman of the Association from 1994 to 1998. When he was conscripted for service in 1995, because of his pacifist convictions he refused to perform military service, and publically declared his refusal in a press conference. In accordance with Article 155 of the Turkish Penal Code, he was arrested on a charge of inciting conscripts to evade military service. Ülke was tried in the Ankara Military Court and punished with six months' imprisonment and a fine. Later, he was sent to the Bilecik gendarmerie command, where he refused to wear a military uniform and carry out orders. He was sentenced to five months' imprisonment on a charge of persistent disobedience. This cycle of disobedience and criminal proceedings was repeated many times. Ülke served a total of 701 days in prison. After the last case against him, he went into hiding and had no official address for contact purposes. He was not able to benefit from any legal arrangements, such as marrying his fiancé or legally recognizing his son's birth.

Osman Murat Ülke was subjected to a series of criminal proceedings and convictions for demanding the status of conscientious objection. For this reason, he appealed to the Commission in 1997 for alleged violations of his rights under Articles 3 (prohibition of torture), 5 (right to liberty and security), 8 (right to respect for private and family life), and 9 (freedom of thought, conscience and religion) of the Convention. By the time Protocol No. 11 was enacted, the case was transferred to the Court. In 2004, the Chamber declared the application admissible. Ülke stated that the series of multiple convictions for the same reason was an interference with his rights under Article 9 of the Convention. His repeated convictions for the same crime is

[160] Çınar and Üsterci, *Resisting Militarized Society*, 217.

contrary to the principle of *ne bis in idem*.[161] In its General Comment No. 32, the United Nations Human Rights Committee states that: "Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience."[162] These repeated penalties may cause a change in one's beliefs, which means that there has been a violation of Article 18 of the ICCPR.[163] He also claimed that recent developments in Europe show that the right to conscientious objection is increasingly recognized as a fundamental human right. He referred to the practices of member states of the Council of Europe and The European Union's Charter of Fundamental Rights to support his arguments. He also noted that Turkey was the only Council of Europe member state which did not recognize the right to conscientious objection. The Turkish government's response was to claim that Article 9 did not guarantee the right to conscientious objection. The government pointed out that exemption from military service was not allowed for any conscientious reason under domestic law. Also, the government claimed that Article 9 did not guarantee the right to conscientious objection in light of Article 4 of the Convention.

The Court's decision was to examine the case using only Article 3. According to the Court, as the case was more relevant to Article 3, it was not necessary to examine the allegations related to Articles 5, 8 and 9. Article 3 of the Convention was as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." According to the Court, Ülke's interminable punishments constituted a humiliating or debasing treatment. Moreover, during his punishment processes, he had been subjected to degrading treatment. The Court noted that there was no special provision in Turkish law regarding penalties for persons refusing to wear a military

[161] Çınar, *Turkey's Obligation,* 21.

[162] UN Human Rights Committee (HRC), CCPR/C/GC/32, "*General Comment No. 32, Article 14, Right to Equality before Courts and Tribunals and to Fair Trial,"* Aug. 23, 2007. https://www.refworld.org/docid/478b2b2f2.html

[163] Çınar, *Turkey's Obligation,* 21.

uniform based on religious or conscientious reasons. Thus, the current Turkish legislation was insufficient. Since the law at that time considered refusal to wear a uniform an act of disobedience to the superior order, the objector found himself in a cycle of punishment. Therefore, the Court suggested that the Turkish state should immediately adjust domestic laws to account for conscientious objection.

According to Rumelili and Keyman, Ülke did not only complain about inhuman treatment by the Turkish state. He also argued that the right to conscientious objection should be established as a fundamental human right in Europe. From this perspective, he wanted to influence European legal interpretations by acting as a European citizen, not only as a Turkish citizen. [164]

The most significant point in the Ülke case is that the Court declared this infinite punishment cycle to be a "civil death." Although he had served his sentence, his obligation to military service persisted. Therefore, he was caught in an interminable cycle. According to the Court, the purpose of this punitive cycle was to suppress his personality, to intimidate him, and to break his resistance. He was forced to lead a clandestine existence because of the continued risk of prosecution for the rest of his life. This cycle of prosecution, which condemned him to civil death, cannot be accepted in a democratic society. Consequently, in its judgment of January 24, 2006, the Court held that there had been a violation of Article 3 of the Convention. However, it decided not to examine the case under Articles 5, 8 and 9 separately. The Court's final decision in 2006 can be read as a sign of new development in the case-law of the Court because, for the first time, a decision was made concerning the violation of Article 3 in a case of conscientious objection.

[164] Bahar Rumelili, Fuat Keyman, and Bora Isyar, "Turkey's Conscientious Objectors and the Contestation of European Citizenship," (working paper, 2010): 11.

6.4 Bayatyan v. Armenia (2011)

The Bayatyan case is an historical milestone with regard to conscientious objection because, with this case, the Court began to use Article 9 to evaluate cases of conscientious objection.

At the outset of the draft period for military service, Vahan Bayatyan sent a letter to the General Prosecutor of Armenia, explaining that his conscience, in accordance with Biblical instruction, did not allow him to participate in military service, but that he could instead participate in a form of alternative service. The authorities' refutation of this letter was to insist that every male Armenian citizen must complete military service. Furthermore, since there was no law related to alternative services, citizens must comply with the existing law. In 2001, a prosecutor instituted criminal proceedings against him because he did not self-surrender in order to perform his military service. Authorities then determined to arrest Bayatyan, but he was not notified of this decision. In 2002, Bayatyan was arrested and sentenced to six months' imprisonment. The sentence was further increased thanks to the prosecutor's persistence. Bayatyan lodged an appeal, stating that it would be more beneficial for society if he participated in a form of alternative service rather than remaining in jail for two and a half years. In 2003, he was released after ten and a half months imprisonment.

Bayatyan applied to the Court, alleging that punishment for refusing to perform military service was a violation of his freedom of thought, conscience, and religion. The application was examined by the Third Section of the Court, which concluded that Article 9 had not been violated. Although the six judges stated that there had been no violation of Article 9, Judge Ann Power stated a dissenting opinion referring to the living instrument doctrine and proportionality of interference. The applicant requested that the case be referred to the Grand Chamber, and this request was granted by the Grand Chamber.

The Court underlined some important details which would shed light on future cases. First and foremost, the Court noted that almost all member states of the Council of Europe had recognized the right to conscientious objection. Only two members had not incorporated the concept into domestic law. Azerbaijan, one of these two member states, recognized the right to conscientious objection, but the law on the implementation of the right had not yet been adopted. The other member state was Turkey, which had not recognized the right to conscientious objection. In many countries, religious beliefs alongside non-religious beliefs are accepted as valid grounds for conscientious objection. Furthermore, in order to become a member of the Council of Europe, the Armenian government has committed to fulfilling certain conditions such as adoption of a law on alternative services within the next three years of accession, and forgiveness of conscientious objectors who have already received punishment.

The recognition of the right to conscientious objection could mean creating new rights and obligations that are not included in the Convention, i.e. judicial activism. For this reason, ever since Grandrath v. The Federal Republic of Germany case, the Court has used Article 4 to examine cases of conscientious objection, and it has been suggested that the Convention does not recognize the right to conscientious objection. However, as explained above, any wording written in the Convention does not prevent the recognition of the right to conscientious objection. Associating Article 4 with cases of conscientious objection has led to a limited interpretation of the Convention. Article 4 contains only words of "conscientious objection." Based on Article 4, no comment can be made on the recognition or prevention of the right to conscientious objection. Hence, Article 4 does not have a restrictive effect on Article 9 on the right to conscientious objection.

Even though previously the Court had examined the Thlimmenos and Ülke cases respectively in Articles 14 and 3 and had not examined them in Article 9, it is crucial to remember that the Convention is a living instrument that must be interpreted in the light of present-day conditions. International legal documents and dominant ideas in

democratic states must be taken into consideration when interpreting the Convention. In this respect, the Court has referred to vital documents such as Resolution 337, Recommendation 478, Recommendation 816, and Recommendation 1518 adopted by the PACE. Also, the Court has referred to Recommendation No. R (87) 8 adopted by the Committee of Ministers. It has also been reiterated that the right to conscientious objection is recognized both by the European Union and the United Nations.

In the Bayatyan case, Amnesty International, Conscience and Peace Tax International, the Friends World Committee for Consultation (Quakers), the International Commission of Jurists, and War Resisters' International jointly submitted their observations and stated that the right to conscientious objection has gradually become recognized in the international arena. They stated that the right to conscientious objection should be protected under Article 9, providing examples from the EU, the CoE, and the UN. The European Association of Jehovah's Christian Witnesses also made a comment calling upon the Grand Chamber to implement the living instrument doctrine and to bring the case-law of the Court in line with present conditions.

As a result of the above-mentioned developments, the Court concluded that Article 9 should no longer be read in conjunction with Article 4, and decided that the Bayatyan case should be examined only under Article 9. The Court ruled that Bayatyan's imprisonment constituted an unnecessary interference in a democratic society. According to the Court, as Bayatyan was a member of the Jehovah's Witnesses, there was no doubt that his refusal of military service was due to his religious beliefs. Punishment of a sincere conscientious objector is unacceptable in a democratic society. Therefore, the Court ruled that there had been a violation of Article 9 of the Convention.

As seen in the previous chapter, prior to the Bayatyan case there was disharmony among the bodies of the Council of Europe regarding the approach to the issue of

conscientious objection. Although the PACE and the Committee of Ministers called on the Member States to recognize the right to conscientious objection, the Court continued to examine Article 9 in conjunction with Article 4 until the Bayatyan case. However, the living instrument doctrine, international developments, and the recognition of the right of conscientious objection by the majority of the member states of the CoE have demonstrated that the Court should no longer examine Article 9 in conjunction with Article 4. The Court finally accepted that the right to conscientious objection was protected under the scope of Article 9. However, it should be noted that the Court did not recognize unconditionally the right to conscientious objection. The Court stated that Article 9 does not explicitly refer to a right to conscientious objection and that there must be certain conditions in place for the application of Article 9. The Court stated 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.

Nonetheless, it is an indisputable fact that the Court's final decision regarding the Bayatyan case was a turning point for the conscientious objectors around the world.

6.5 Erçep v. Turkey (2011)

The applicant, Yunus Erçep, a baptized Jehovah's Witness, had refused to perform military service and indicated that he was open to alternative service. At every call-up period after 1998, he had been faced with criminal proceedings on the grounds that he was a fugitive. The Trabzon Military Court combined the punishments from different cases for a total of seven months and fifteen days. After five months of his sentence, Erçep was released on parole. With a law passed in 2006, the authorization of military courts to judge civilians was abolished. Therefore, Erçep's cases were transferred to the criminal courts. Since 1998, more than twenty-five cases have been filed against the applicant.

The applicant applied to the Court on the grounds that the repeated prosecutions and convictions against him had violated Article 5, 6, 7, 9 and 13 of the Convention. The Court referred to the Ülke case while evaluating the Erçep case, and stated that being sentenced to imprisonment for the refusal of military service constitutes degrading treatment. The Court noted that, due to possible continuous renewal of these criminal proceedings, conscientious objectors risked civil death. The Court stated that any government action which condemns conscientious objectors to civil death was not appropriate in a democratic society, just as in the case of Ülke v. Turkey. The most important reminder by the Court was that state parties are obliged to comply with the decisions of the Court pursuant to Article 46 of the Convention. However, the Court also noted that there was still no special legal regulation in Turkish law to be applied to those who refuse to perform military service on religious and conscientious grounds. Moreover, according to the Court, compulsory military service, which still exists in Turkey, lays a heavy burden on its citizens. As it still has no regulations regarding conscientious objection, Turkey has only a limited margin of appreciation. According to the Court, the repeated punishment of a person who refuses to perform military service due to religious beliefs constitutes a contravention of the freedom of religion guaranteed under Article 9 of the Convention. It was therefore determined that there had been a violation of Article 9. The prosecution of a civilian in a military court makes the independence and impartiality of the process suspicious. Thus, the prosecution of the applicant in the military court also showed that Article 6 of the Convention had been violated.

6.6 Feti Demirtaş v. Turkey (2012)

Feti Demirtaş had sent three letters to the Ministry of Defense, indicating that he refused to do military service because he was a Jehovah's Witness, but that he was prepared to perform alternative public service instead. He was arrested and sent to Balıkesir to fulfill his military service. As he refused to wear a military uniform there, nine criminal prosecutions were instituted against him in military court. As a result, he was detained numerous times in military prison. In 2007, the applicant was

diagnosed with maladjustment; psychiatrists determined that he was unsuitable for military service. When his cases were tried in military court, Feti Demirtaş frequently referred to Article 9 of the Convention and claimed that the court was neither independent nor impartial. In 2005, he had filed a criminal complaint alleging that he had been subjected to ill-treatment and threats by two officers in military prison. Military authorities came to the conclusion that these claims were manifestly ill-founded. In another criminal complaint, Demirtaş stated that he had been handcuffed to a bed and beaten for his refusal to wear a military uniform in the military prison. The Izmir Military Court ruled that there had been ill-treatment.

Feti Demirtaş appealed to the Court in 2007 alleging that Article 3 of the Convention had been violated because of the humiliating and inhuman treatment he faced due to his refusal to wear a military uniform. According to the Court, these treatments had been aimed at breaking the physical and spiritual resistance of the person. These inhuman and degrading treatments indicated that Article 3 of the Convention had been violated. He also alleged that there had been a violation of Article 6 of the Convention because he had been tried in a court composed of military judges as a civilian. In the Court's opinion, it could not be assumed that Demirtaş's situation was the same as regular soldiers, because he was forced to do military service and never accepted the title of a soldier. Therefore, his trial by the military judges was a violation of Article 6.

In addition to the violations of Articles 3 and 9, Demirtaş also alleged that his repeated convictions for refusing to serve in the military led to the violation of Article 9 of the Convention. The Court ruled that there had been interference with his freedom to manifest his religion. The Court examined the legitimacy of this intervention. The Court then reiterated that freedom of thought, conscience, and religion, guaranteed under Article 9 of the Convention, was one of the foundations of a democratic society. According to the Court, the lack of legal framework in Turkey creates a context of civil death for those who refuse to perform military service due to their beliefs. These circumstances are dissimilar to the penalties and outcomes in effective democratic

societies. As there is no regulation on alternative services, the state has a limited margin of appreciation and has to prove the legitimacy of its punitive actions. Demirtaş's discharge, due to psychological damage incurred by his compulsory military service, revealed the consequences of his punishment. As a result, the conviction of Feti Demirtaş was not considered to be a viable or legitimate outcome of a democratic society. In short, the Court ruled that there had been a violation of Article 9 of the Convention.

6.7 Savda v. Turkey (2012)

The most important point that distinguishes this case from others is that Savda was not a Jehovah's Witness and he declared conscientious objection on the basis of pacifist and antimilitarist views. Halil Savda declared himself a conscientious objector and a leading member of the conscientious objection movement in Turkey. He received a prison sentence on the grounds that he had aided and abetted the PKK[165] in 1994. After having served his sentence, in 1996 he was drafted and conscripted into a regiment. He then deserted but was later arrested in possession of a weapon. He was charged with actively assisting the PKK and was sentenced to 14 years and 7 months in prison. He then faced a series of criminal proceedings. In 2004, he was taken to the gendarmerie station for performing his military service while refusing to wear a military uniform. The military hospital doctors decided that he was unfit for military service because of an antisocial personality disorder. As a result, he was exempted from military service.

Savda appealed to the Court, alleging that his repeated convictions stemming from his demand for conscientious objector status constituted violations of the rights protected under Articles 9 and 10 of the Convention. He argued that these consecutive punishments were humiliating and debasing. Moreover, he claimed that his trial by a

[165] PKK is recognized as a terrorist organization by various international organizations and states including the Republic of Turkey, the European Union, and the United States. At the establishment stage, the organization adopted the name "Kurdistan Workers' Party".

military court was a violation of Article 6. The Court decided to examine the case in the context of Articles 3, 6, and 9 of the Convention.

In the Savda v. Turkey case, it has been emphasized that the lack of legal regulations related to conscientious objection leads to heavy criminal sanctions on conscientious objectors. Although Turkey still has a compulsory military system, no substitute civilian service is offered, which is why conscientious objectors have no other choice but to directly refuse to be drafted into the army. Conscientious objectors who refuse to do military service are subjected to countless criminal proceedings due to lack of legal regulations. Previously, in the Ülke case, the Court referred to this situation as "civil death." The Court decided that there had been a violation of Article 3 because Savda was repeatedly imprisoned and placed in solitary confinement. The Court found that Savda's objection to trial by a military court was justified, and determined that there had been a violation of Article 6 of the Convention.

The Court had maintained its position in the Bayatyan case. In his case, Savda complained of the lack of a law on conscientious objection. The Turkish government could not offer any explanation to justify the absence of such a law. According to the Court, the outstanding issue of the Savda v. Turkey case was the lack of a procedure to examine his request for conscientious objector status. The State failed to construct a balance between the general interest of society and that of conscientious objectors. Therefore, the Court decided that Turkey had violated Article 9 of the Convention.

6.8 Buldu and Others v. Turkey (2014)

Four Jehovah Witnesses — Çağlar Buldu, Barış Görmez, Ersin Ölgün, and Nevzat Umdu — applied to the Court in 2008 with allegations that the prosecutions they faced in their efforts to gain conscientious objector status and the punishments they received were a violation of the Convention. They complained of the treatment they had suffered in the processes of their prosecutions based on Article 3 of the Convention. The Court stated that the situation of civil death in the Ülke case applied

to this case as well. As reported by the Court, repeated and severe criminal prosecutions and punishments that the applicants were subjected to are of humiliating and inhuman nature. Hence, the Court ruled that there had been a violation of Article 3 of the Convention. Another claim by the applicants was that their punishment for refusing military service constituted a violation of Article 9 of the Convention. While examining this allegation, the Court referred to the Bayatyan case. As the applicants were Jehovah's Witnesses, their refusal to perform military service was due to their sincere religious beliefs. They were thus at the risk of endless criminal prosecution. This situation led to violation of freedom to manifest their religion, which is guaranteed under Article 9 of the Convention.

Görmez alleged that his trial as a civilian citizen at a court composed of military officials had violated Article 6 of the Convention. According to the Court, his concerns about the independence and impartiality of the military court were justified. Thus, there had been a violation of Article 6 (1) of the Convention.

In this case, the Court again highlighted the inadequacy of the legal framework in Turkey and added that the measures taken against these four people were incompatible with the necessities of a democratic society. The lack of an alternative service to military service was considered an internal structural problem. It was also taken into account by the Court that the Turkish state had not yet taken any measures to solve this problem.

6.9 Enver Aydemir v. Turkey (2016)

The 2016 case of Enver Aydemir brought a new dimension to the question of conscientious objection in Turkey. Prior to this case, conscientious objectors in Turkey based their ideas on antimilitarist, antiwar, and Christian pacifist philosophies. For the first time in Turkey, a Muslim person raised a religious objection to war. According to Aydemir, the Republic of Turkey was a secular state, and the army protects this secular state. As a Muslim, he refused to serve in this army

which protected the secular state and opposed this army's use of the concept of jihad.[166]

After joining the army in 2007, Aydemir declared his conscientious objection to military service. He was charged with persistent disobedience for not wearing a military uniform and for disobeying the orders of his superiors. He was released provisionally. However, he did not return to his unit, thus becoming a fugitive. Aydemir was arrested on his way to a conference on conscientious objection and placed in a military prison. He claimed in his application to the Court that he was threatened and battered by the guards because he refused to wear a military uniform in the prison. He also stated that he had spent the night without clothes and blanket. When he had refused to wear a military uniform once more, he had again been faced with ill-treatment. Thereafter he had begun a hunger strike. He had been sued repeatedly for similar reasons. In these lawsuits, his lawyers stated that Aydemir was prepared to perform alternative service, and they alleged that the absence of an alternative service contravened the Convention. In 2010, the Ankara Military Hospital diagnosed Aydemir with antisocial personality disorder and hence, he was acquitted.

In 2011, Aydemir applied to the Court for alleged violations of Articles 3 and 9 of the Convention due to the ill-treatment he had been exposed to and repeated cases against him. Similar to the Bayatyan case, the Court referred to the important documents on conscientious objection adopted by the United Nations and the Council of Europe. The Court found that treatments such as violent acts, the forced removal of civilian clothes, and the compulsory donning of military uniforms to be humiliating and degrading. This inhuman and degrading treatment represents a violation of Article 3 of the Convention.

[166] Pınar Kemerli, "Religious Militarism and Islamist Conscientious Objection in Turkey," *International Journal of Middle East Studies* 47, no. 2 (2015): 281-301. Doi: 10.1017/S0020743815000057.

Aydemir's allegation of the violation of Article 9 had not been recognized. His refusal to serve in the army of a secular nation and his advocacy of a system of Sharia law is what distinguishes this case from the others. The Court noted that the cases of Bayatyan, Erçep, Buldu, and Others were related to a religious objection of Jehovah's Witnesses and that the cases of Savda and Tarhan were related to pacifist and antimilitarist convictions. According to the Military Court, Aydemir's objection stemmed from political reasons, not from a serious and insurmountable contradiction between compulsory service and his sincere religious beliefs. Aydemir's statement that he was ready to do military service in a system where the Quran is referenced indicates that he had not completely rejected compulsory military service, rather he did not want to do military service due to his idealism and political opinions. The Court, like the military court, concluded that there was no qualification that would lead to the application of Article 9 due to these reasons. Therefore, the Court decided that Article 9 had not been violated.

6.10 Papavasilakis v. Greece (2016)

Leonidas Papavasilakis appeared before the Greek military's armed forces' special committee in 2013 because he wished to perform alternative service on the grounds of conscientious objection. He argued that his objection was based on his religious education received from his mother, who was a Jehovah's Witness. The special committee ruled that his arguments were unfounded, and rejected his application. Papavasilakis was neither a member of a religion that forbids the use of force nor a participant in any nonviolent movement.

In 2014, Papavasilakis appealed to the Court arguing that the special committee's decision "constituted a breach of his negative freedom not to be a follower of a particular religion or a member of an anti-militarist organization." Also, he objected to the committee's decision because of the composition of the committee on the day of his hearing. Under normal conditions, the special committee was comprised of five

persons responsible for the examination of applications relating to exemption from military service: two university professors, one advisor at the State Legal Council, and two high-ranking army members. However, in his case, the two university professors were absent. Hence, Papavasilakis opposed the idea that a committee consisting of a majority of soldiers could come to an objective judgment on his request. The Court was sympathetic to his concerns. Thus, the Court ruled that in order to achieve equal representation for conscientious objectors, some arrangements for alternative service should be made. Due to this failure to guarantee equal representation, Greek authorities had violated Article 9 of the Convention.

6.11 Adyan and Others v. Armenia (2017)

Four Armenian nationals and Jehovah's Witnesses — Artur Adyan, Garegin Avetisyan, Harutyun Khachatryan, and Vahagn Margaryan — appealed to the Court alleging that their rights under Article 9 of the Convention had been violated. When they were conscripted in 2011, they wrote letters to local authorities stating that they refused to perform both military service and alternative service. The alternative service in Armenia was under the control of military authorities, and their consciences did not allow them to perform any work that served the military, even if indirectly. However, they stated that they were ready for an alternative service that was not associated with the military. Their requests were not recognized, and the applicants were sentenced to prison. They were released with a general amnesty after serving twenty-six to twenty-seven months of their sentences.

These four people appealed to the Court, alleging that their convictions had caused the violation of their rights guaranteed under Article 9 of the Convention. The Court examined relevant international legal texts, as well as Armenian documents that were critical to the case. Documents related to Armenia were critical to the case. In the PACE's Opinion No. 221 in 2000, it is stated that Armenia promised to adopt a law on alternative service in accordance with European standards within the next three years of accession. With Resolution 1532 in 2007, the PACE stated that the existing

laws were inadequate, that the alternative service system was both punitive and deterrent in character, and that the conscientious objectors were still sentenced to prison. According to the Court, their objection to both military service and alternative service was a manifestation of their religious beliefs. Therefore, imprisoning them was a violation of their freedom to manifest their religion, protected under Article 9 of the Convention. Furthermore, the Court emphasized that the alternative service system in Armenia was not of an authentically civilian nature. While the duration of armed military service was twenty-four months, the duration of alternative service was forty-two months. This differentiation indicates that the alternative service was in fact deterrent and punitive by nature. The Court determined that the punishments of the four applicants were incongruent with the practices of a democratic society. As a result, the Court decided that there had been a violation of Article 9 of the Convention.

6.12 Baydar v. Turkey (2014)

In 2003, Çağatay Baydar, a Turkish citizen, was assigned to the military barracks in the Turkish Republic of Northern Cyprus (TRNC) to complete his military service. In 2004, he was temporarily permitted to leave the barracks because of health problems. However, he did not return to the barracks as expected. For this reason, in 2011, a warrant of arrest was issued against him for the offense of abusing his leave. He was arrested and taken to the public prosecutor's office to give a statement. He stated that he had not returned to the barracks due to family and financial reasons; specifically, that he had to work because of his mother's illness. However, he was sentenced to 10 months of imprisonment on the grounds that he had not provided sufficient evidence. In 2012, he received a warning letter advising that he should go to his unit as soon as possible to avoid being subjected to criminal proceedings on the grounds of abuse of leave. In 2013, he appealed to the Compensation Commission with a claim that he could not perform his military service on the grounds of being a conscientious objector, and that compulsory military service contradicted essential human rights. His application was rejected. After the legislative amendments dated

2013, his situation was re-assessed in 2014, and he was sentenced to ten months in prison for the offense of abuse of leave. However, the decision was suspended, with the condition that he must not commit any intentional offense for the next five years.

In his application to the ECtHR, Baydar complained about the absence of the right to conscientious objection in Turkey and asserted that to be obliged to fulfill the compulsory military service despite his conscientious and religious views was contrary to Article 9 of the Convention. The Court stated that Article 9 does not directly include the right to conscientious objection and that in order to decide whether Article 9 was applicable, each case must be evaluated separately. The Court found the claim that there had been a violation of Article 9 inadmissible. According to the Court, the applicant had failed to demonstrate that his refusal to do military service constituted "sufficient cogency, seriousness, cohesion, and importance to fall within the scope of Article 9 of the Convention." Although Baydar claimed that he refused to perform military service on the basis of conscientious and religious beliefs, he did not state this argument before the national authorities. Rather, he offered his financial situation and his mother's illness as a justification.

The second claim of the applicant was that he had faced extreme difficulties in his daily life because of his obligation to fulfill the compulsory military service. The Court examined this complaint under Article 3, but found this allegation inadmissible, as there was no information on physical or mental ill-treatment in the case file.

This result showed that the Court examines every conscientious objection case in light of its own circumstances. Moreover, in order to examine the conscientious objection cases under Article 9, the Court considers that the conviction or belief behind the opposition to military service must have sufficient cogency, seriousness, cohesion, and importance.

6.13 Concluding Remarks

The absence of a widely shared approach on the issue of conscientious objection in the 1960s resulted in the Commission's predictable ruling in the Grandrath case; namely, that the case was inadmissible. As stated in the previous chapter, none of the bodies of the Council of Europe took any formal steps regarding conscientious objection until Resolution No. 337 was adopted by the PACE in 1967. In all five cases of conscientious objection filed until 2000, the Commission's decision was that the cases were "inadmissible." After the establishment of the new single Court to replace the dual structure consisting of the Commission and the Court, decisions regarding conscientious objection cases began to shift. In the case of Thlimmenos in 2000, the Court recognized, although indirectly, that the right to conscientious objection was under the scope of Article 9. In this way, the Court paved the way for examining conscientious objection cases under Article 9. The Bayatyan case, dated 2011, was a turning point for conscientious objectors. At the outset, in spite of the progress made in the cases of the Thlimmenos and the Ülke, the Chamber, using the Grandrath case as a reference point, decided that there had been no violation of Article 9. However, the Chamber did not decide unanimously. Thanks to other, relevant factors, such as the dissenting opinion of Judge Ann, the circumstances of the period, and the current consensus on conscientious objection around the world, the case was re-examined by the Grand Chamber. The Grand Chamber, by reevaluating the Convention in the light of present conditions, recognized the right to conscientious objection. In subsequent conscientious objection cases following the Bayatyan case, the Court maintained this approach. As might be expected, consensus on conscientious objection among the bodies of the Council of Europe has had a direct impact on member states. As the only member state that does not recognize the right to conscientious objection, and has not developed any internal regulations for conscientious objection, Turkey is inevitably and severely impacted by these changes in international law. Thus, the next chapter will discuss the right to conscientious objection in Turkey in light of the ECtHR judgments.

CHAPTER 7

CONSCIENTIOUS OBJECTION IN TURKEY

The previous chapters of this study have examined the right to conscientious objection in historical state-based and international contexts. On the basis of this foundation, the sixth chapter focuses on conscientious objection in Turkey. The first part of this chapter investigates the historical conditions which have made conscientious objection a proscribed subject in Turkey. The second part examines how military service and conscientious objection are regulated in Turkey's domestic laws. Finally, the chapter discusses steps required to align Turkish laws with international case-law and CoE decisions.

7.1 Conscientious Objection in Turkey: Historical Context

The 1920s and the 1930s in Turkey was a period of tumultuous modernization. The absence of a strong economic middle class meant that this transition was directed primarily by the Turkish military. In founding the new nation-state, the leaders of the Republic of Turkey adopted three principles, the first of which was the belief that history is the struggle of nations. The second principle was that only powerful military nations can succeed in this struggle. The last founding principle was that the population of a country needs to be turned into a nation in order to create a powerful military.[167]

After the end of the War of Independence in 1923, public opinion towards the Turkish military was quite negative. In order to shift the public's view into a more positive attitude, those in control adopted a strategy to keep civilians in a constant state of

[167] Çınar, *Turkey's Obligation,* 72-74.

alert and anxiety in order to provide support to the army.[168] Military elites disseminated the idea that there would always be enemies inside and outside Turkey, and the army was defined as the protector of the regime and the nation against those enemies. The founders of the Republic of Turkey (as have many leaders of countries who have attempted the nation-state building process) encouraged the rise of a nationalistic ideology. They promoted the belief that the Turkish nation was a military nation, and that military service was a sine qua non of Turkish national identity.[169] State-encouraged maxims, such as "Every Turk is born a soldier" encouraged militarism as an inherent racial and cultural feature, and imbued it with a sense of national pride. Because of this, military service in Turkey has been accepted as an intrinsic and non-contestable reality. Military service is essentially inextricable from Turkish culture. Somewhat ironically (yet effectively), the secular state also used religious concepts, such as the idea of martyrdom, to smooth the religious public's reaction to control by a secular military. As a result, the civilian arena has long been under the strong influence of the military.

This discourse of anxiety, stoked by militaristic leadership in Turkey, has taken different forms ever since the establishment of the Republic. After becoming a member of the North Atlantic Treaty Organization (NATO) in 1952, the *Union of Soviet Socialist Republics* (*USSR*) and the possibility of nuclear war was presented as a potential threat to Turkey. The Turkish government itself, which showed dictatorial tendencies in the 1950s, was considered a threat by military elites. In the 1980s, the threat was the Kurdish movement for independence. Also, throughout the latter half of the 20th century, there were several coups, after which the military intervened and maintained order until a civil government could be reestablished. The people of Turkey long believed that the military was the only power that could solve all these problems. However, it is important to emphasize that while the public expects the

[168] Çınar, *Turkey's Obligation,* 72-74.

[169] Ayşe Gül Altınay, "Refusing to Identify as Obedient Wives, Sacrificing Mothers, and Proud Warriors," in *Conscientious Objection: Resisting Militarized Society,* eds. Özgür Heval Çınar and Coşkun Üsterci (London: Zed Books, 2009): 168-170. Hereinafter: Altınay, *Refusing to Identify*.

army to intervene in civilian government decisions when required, they want this intervention to be temporary. In other words, people expect the army not to govern the state, but to transfer administration of the state to civilian authority after the military has restored order in society. The eventual outcomes of such expectations were twofold: the army became increasingly politicized, and it also attained an almost sacred position. Since military service is presented as nationalistic, patriotic, culturally inherent, and even sacred, and furthermore this duty is assigned only to men, it follows that a large proportion of the population — such as women, children, homosexuals, and conscientious objectors — is automatically marginalized and reduced to second-class citizenship. It is taken for granted that a man must complete military service to be beneficial to himself, to his family and to his country.[170] As a result of this powerful legal and ideological link between military service and citizenship, conscientious objection has been seen as a weakening influence on the power of the entire country.[171]

Nevertheless, resistance to military service is a reality, and state authorities' ignoring conscientious objection does not mean it does not exist. The compulsory military system has become a more controversial system in Turkey with the rise of feminism, the increasing emphasis on human rights, and most importantly, the effects of the Turkish-Kurdish conflict that began in 1984. The definitive conscientious objection movement in Turkey began as an anti-war movement. The concept of conscientious objection was first raised in 1989 in Turkey. Tayfun Gönül became the first conscientious objector after publicly declaring his refusal to perform military service in the magazine *Sokak*. This declaration was followed by Vedat Zencir's statement of conscientious objection in 1990. Both of them were sued for 'alienating people from the armed forces' under Article 155 of the Penal Code, and both were tried in civil courts. After their declarations, there was a surge in the formation of conscientious

[170] Altınay, *Refusing to Identify*, 90.

[171] Bahar Rumelili, Fuat Keyman, and Bora Isyar, "Turkey's Conscientious Objectors and the Contestation of European Citizenship," (working paper, 2010): 7-8.

objection associations and campaigns.[172] In 1992, the İzmir War Resisters' Association (İzmir Savaş Karşıtları Derneği) was established to resist war, militarism, and racism. The struggle against militarism was defined as the association's main purpose. However, the Governorship of İzmir stated that since there was no militarism in Turkey, an institution against militarism was not necessary, and it closed the association. The association was later re-established in 1993. It has become a place for the anti-militarist movement and conscientious objectors to organize. In 1994, the Istanbul War Resisters' Association was established, and it held a press conference to introduce new conscientious objectors. Shortly thereafter, the association was raided by security forces and members were detained and arrested. Hence, the association was closed.[173] In 1993, on the HBB channel, an interview was published with Aytek Özel, who was the president of the İzmir War Resisters' Association, and Menderes Meletli, who was a conscientious objector and a member of the association. These two individuals, as well as the producer of the program and the cameraman, were arrested. They were tried in a military court on charges of alienating people from the armed forces under Article 155 of the Turkish Penal Code. This was the first time that civilians were tried in a military court for conscientious objection. The military court consisted of two military judges and one officer. Since the active officer could not be considered independent or impartial under the circumstances, his presence was considered a violation of the right to a fair trial under Article 6 of the European Convention on Human Rights (Convention).

In recent years, relations with the European Union have had a strong influence on Turkey's approach to the right to conscientious objection. For example, under the influence of the EU, criticizing the military in Turkey is no longer considered a crime requiring criminal sanctions. Nevertheless, in the absence of a law on conscientious objection, conscientious objectors have faced criminal sanctions. Conscientious

[172] Altınay, *Refusing to Identify*, 96.

[173] Uğur Yorulmaz and Coşkun Üsterci, "Conscientious Objection in Turkey" in *Conscientious Objection: Resisting Militarized Society,* eds. Özgür Heval Çınar and Coşkun Üsterci (London: Zed Books, 2009): 96.

objectors have been sentenced to short prison terms in anticipation of changing their minds, and they have also been sentenced to longer prison terms in order to send a message to the public. Objectors have also confronted many other obstacles, such as being expelled from their professions, diagnosed with mental illness, deprived of civil rights and education, and denied the right to work. As an example of this, in 1996, Osman Murat Ülke was arrested and indicted by a military prosecutor under Article 155 of the Penal Code and Article 58 of the Military Penal Code, on the charge of inciting conscripts to evade military service. In 1998, Osman Murat Ülke appealed to the European Commission of Human Rights, which has since enabled the conscientious objection movement in Turkey to gain momentum. An international solidarity network was established for Ülke. Also, a wide variety of related activities, such as solidarity and legal support for prisoners, war protests, antimilitarism festivals, and "rice day" blossomed. The anti-militarism festival called "Militurism" is an unusual and significant kind of activism in Turkey. The main purpose of this festival is to visit and criticize the militarist and nationalist institutions, monuments, and symbols of Turkey. In addition, at a Militurism festival in 2004, for the first time, women declared their conscientious objection to militarism.[174]

In Turkey, most conscientious objectors have adopted an anti-militarist stance. Thus, their purpose goes beyond replacing compulsory military service with a strictly professional army. They want the military and compulsory military service to be removed altogether. They are worried that if the state recognizes the right to conscientious objection to military service, then alternative service will become compulsory for objectors. They claim that in this case, conscientious objectors still may be used for the interests of the state. However, conscientious objectors who have a liberal background consider the recognition of the right to conscientious objection and the removal of the compulsory military system to be an achievement. This difference of opinion seems to be one of the biggest obstacles in the way of

[174] Uğur Yorulmaz and Coşkun Üsterci, "Conscientious Objection in Turkey" in *Conscientious Objection: Resisting Militarized Society*, eds. Özgür Heval Çınar and Coşkun Üsterci (London: Zed Books, 2009): 173.

conscientious objectors acting as a united group. There had not been a single conscientious objection declaration based on religious grounds until Enver Aydemir's in 2007.[175] After this, religious objections began to emerge alongside political or philosophical objections. Muhammed Serdar Delice, who refused to serve in a non-Muslim army; Muhammed Cihad Ebrari, who refused to serve any authority other than Allah; Mehmet Lütfü Özdemir, a member of the group called Anti-Capitalist Muslims; and Nebiye Arı, a woman who is a theology student, are all examples of people who have declared conscientious objection on religious grounds.[176]

7.2 Conscientious Objection in Turkey: Legal Context

The right to conscientious objection is still not legally recognized in Turkey. In order to determine whether there is a definitive obstacle to the recognition of the right to conscientious objection, it is of utmost importance to examine how the issue is dealt with in Turkey's current legal system. The military service in Turkey is regulated on the basis of Article 72 of the Constitution. In the Political Rights and Duties chapter of the Constitution of the Republic of Turkey, the subject of national service is handled under Article 72, which states:

> National service is the right and duty of every Turk. The manner in which this service shall be performed, or considered as performed, either in the armed forces or in public service, shall be regulated by law.[177]

It is stated that the national service is regulated by law. The relevant law on the issue is the Military Service Act No. 1111, which was adopted in 1927. According to

[175] This information has been reached by examining the conscientious objection declarations on the website of the Vicdani Ret Derneği. See https://vicdaniret.org/tarih-sirasina-gore/.

[176] See the following web addresses to reach their statements of conscientious objection: https://vicdaniret.org/muhammed-serdar-delice/; https://vicdaniret.org/muhammed-cihad-ebrari/; https://vicdaniret.org/mehmet-lutfu-ozdemir/; https://vicdaniret.org/nebiye-ari/.

[177] Constitution of the Republic of Turkey, https://global.tbmm.gov.tr/docs/constitution_en.pdf, Article 72. Hereinafter: The Constitution.

Article 1 of Law No. 1111, all male citizens of the Republic of Turkey are obliged to do military service.[178] According to Article 2 of the Military Service Act, military service conscription may begin on the first of January of the year when a man reaches the age of twenty and it ends on the first of January of the year when he reaches the age of forty-one.[179] It is stated in Article 3 of the Military Service Act that "Military [eligibility] age shall be divided into three periods: the draft period, active service, and the reserve [list]."[180] The draft period is the period from the beginning of the military age (twenty) until the start of active service.[181] The period of providing military service in a specified military unit is considered to be the active service period. With the decision of the Council of Ministers dated 21.10.2013 number 2013/5501, the duration of active military service is limited to twelve months.[182] The period from the end of active service to the end of military service, at age forty-one, is called the reserve period.[183]

Certain points are noteworthy. The first point is that there is no "military service" expression in Article 72 of the Constitution, rather the term "national service" is used. In fact, the only article relating to military service in the Constitution is Article 76, which states that persons who have not performed military service shall not be elected as deputies to the Grand National Assembly of Turkey.[184] Consequently, the Constitution does not demand a military obligation from citizens. Using the term "military service" in Law No. 1111 is a limited interpretation of the Constitution.

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[178] Military Service Act, no. 1111, June 21, 1927, Official gazette dated July 12-17, 1927, Article 1. Hereinafter: Military Service Act.

[179] Military Service Act, Article 2.

[180] Turkey: Law No. 1111 of 1927, Military Law, March 20, 1927. https://www.refworld.org/docid/3ae6b4d020.html.

[181] Military Service Act, Article 4.

[182] Military Service Act, Article 5.

[183] Military Service Act, Article 7.

[184] The Constitution, Article 76.

The second point is that although it is written in the Constitution that every Turk is obliged to perform national service, the law only mentions men. It is written in Article 10 of the Constitution that "Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds." However, according to Article 1 of the Military Service Act, only male citizens are obliged to do military service. This situation may be interpreted as a contradiction between the constitution and the law. In order to understand how the issue of equality between men and women in military service has been interpreted in the case-law of the European Court of Human Rights, the Spöttl v. Austria[185] case may be considered. In 1991, Thomas Spöttl refused to complete military service and wished to be recognized as a conscientious objector. He was recognized as a conscientious objector by the Austrian Federal Minister for Internal Affairs in 1992. Spöttl was therefore obliged to perform civil service. In response, he appealed to the Constitutional Court, asserting that the fact that women exempted from civil service was discrimination on the grounds of sex. The Constitutional Court remitted the case to the Administrative Court, and the Administrative Court rejected Spöttl's complaint. He then appealed to the European Commission of Human Rights alleging that there had been a violation of Article 14 in conjunction with Article 4. However, according to the Commission, this difference in practice is justified by objective reasons. "The Commission observes that a common standard exists among the Contracting States according to which women are not liable to mandatory military service."[186] Therefore, the Commission regarded the application as manifestly ill-founded and declared as inadmissible. In other words, according to the Court, the fact that women do not have to do military service does not cause discrimination on the grounds of sex.

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[185] *Thomas Spöttl v. Austria*, The European Commission of Human Rights, no. 22956/93 (May 15 1996). https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22sp%C3%B6ttl%22],%22itemid%22:[%22001-2889%22]}.

[186] *Thomas Spöttl v. Austria*, The European Commission of Human Rights, no. 22956/93 (May 15 1996). https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22sp%C3%B6ttl%22],%22itemid%22:[%22001-2889%22]}.

Returning to Turkish law, a third noteworthy point to the question of conscientious objection is related to alternative service. The statement that "the national service shall be performed or considered as performed, either in the armed forces or in public service" in the Constitution strongly implies that there is an alternative service. In other words, to serve in the armed forces is not the only way to fulfill national service. Conversely, there is no reference to alternative service in Law No. 1111. This point indicates a conflict between the relevant law and the Constitution.

Article 45 of the Military Penal Code states that "The fact that a person is acting according to his conscience or religion does not free him from a punishment that is arising from doing or not doing an act."[187] On the basis of this article, military courts have rejected conscientious objector status demands. There is an absence of any laws or regulations specifically relating to conscientious objection in Turkey. Since conscientious objection is neither recognized as a crime nor as a right, conscientious objectors are taken to court on different grounds. Some of these grounds are desertion, draft evasion, disobedience, persistent disobedience, and discouraging individuals from performing military service. The process of determining the health status of the persons responsible for military service, whether they are suitable for military service, their educational status, their profession, and their qualifications is called drafting.[188] After this drafting process, those who are responsible for military service are divided in two groups: those who are suitable for military service and those who are unfit for military service.[189] If the directing authority decides that a person is psychologically or physically unfit for military service, he is exempted from military service. The report given to those who are said to be incompatible with military service is called the "rotten report." According to Article 12 of the Military Service Act No.1111, those who do not go to the drafting stage without an excuse written in the law are

[187] Translation by author.

[188] Military Service Act, Article 14.

[189] Military Service Act, Article 28.

considered to be draft evaders (yoklama kaçağı).[190] The difference between conscientious objection and draft evasion is that conscientious objection is publicly known. Those who have been enlisted at the drafting stage but have not shown up when they were asked to or those who have shown up but not joined the army detachment are categorized as "bakaya."[191] According to the same article, leaving a unit without permission after joining the army is called desertion (firar).[192] Those who do not fulfill the orders of their superiors are charged with disobedience.[193] Those who refuse to fulfill orders despite the repetition of orders are accused of persistent disobedience.[194] Those who incite one or more soldiers to disobedience are considered to be fomenters of revolt.[195] According to the information provided by former Prime Minister Binali Yıldırım at a meeting on June third of 2018, there are currently 570,422 draft evaders, 56,947 bakaya, and 5,722 deserters in Turkey.[196] It should be kept in mind that these numbers given by official authorities may be less than the actual numbers, on the grounds that public opinion towards the army may be affected negatively. The total number of known conscientious objectors in Turkey from 1989 until today is 544.[197]

As seen in the abovementioned Ülke case, until 2005, conscientious objectors were on trial for the offense of alienating people from military service in accordance with

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[190] Military Service Act, Article 12

[191] Military Service Act, Article 12.

[192] Military Service Act, Article 12.

[193] Military Penal Code [*Askeri Ceza Kanunu*], no. 1632, May 22, 1930, Official gazette dated June 15, 1930, Article 87.
http://www.mevzuat.gov.tr/MevzuatMetin/1.3.1632.pdf. Hereinafter: Military Penal Code.

[194] Military Penal Code, Articles 87 and 88.

[195] Military Penal Code, Articles 93 and 94.

[196] Vahap Munyar, "5.5 Milyonun Askerlik Sorunu Çözüm Bekliyor," *Hürriyet,* June 4, 2018, http://www.hurriyet.com.tr/gundem/5-5-milyonun-askerlik-sorunu-cozum-bekliyor-40856762.

[197] This number has been reached from the website of the Vicdani Ret Derneği. https://vicdaniret.org/vicdani-retlerini-aciklayanlar/.

Article 155 of the Turkish Penal Code.[198] On June 1, 2005, the new Turkish Criminal Code No. 5237 went into effect. In the new Penal Code, the offense of alienating people from military service was regulated under Article 318 as part of the section on "Crimes against National Defense".[199] With the Law on the Amendment of Some Laws in the Context of Human Rights and Freedom of Expression adopted on April 11, 2013, Article 318 of the Turkish Penal Code was amended. Article 318 is currently as follows:

> 1) Any person who encourages, or uses repetition which would cause the persons to desert or have the effect of discouraging people from performing military service, shall be sentenced to a penalty of imprisonment for a term of six months to two years.
> 2) Where the act is committed through the press or broadcasting, the penalty shall be increased by one half.[200]

Offenses regulated under Article 318 of the Turkish Criminal Code are considered terror crimes under Article 4 of the Anti-Terror Law.[201] Therefore, penalties for those charged with Article 318 are increased by half. The offense of alienating people from military service is also included in Article 96 of the Military Penal Code. In addition, according to Article 58 of the Military Penal Code, those who broadcast and deliver speeches to alienate people from military service are charged with the crime of damaging national morale.[202]

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[198] Turkish Penal Code [*Türk Ceza Kanunu (mülga)*], no. 765, March 1, 1926, Official gazette dated March 13, 1926 (no. 320), Article 155.
http://www.ceza-bb.adalet.gov.tr/mevzuat/765.htm.

[199] Turkish Penal Code [*Türk Ceza Kanunu*], no. 5237, Sept. 26, 2004, Official gazette dated Oct. 12, 2004 (no. 25611), Article 318.
http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf.

[200] European Commission for Democracy through Law (Venice Commission) of the CoE, Opinion No. 831/2015, "Penal Code of Turkey," February 15, 2016.
https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2016)011-e.

[201] Terörle Mücadele Kanununda Değişiklik Yapılmasına Dair Kanun, no. 5532, June 29, 2006, Article 4.
https://www.tbmm.gov.tr/kanunlar/k5532.html.

[202] Military Penal Code, Article 58.

Another article under which conscientious objectors are tried is Article 301 of the Turkish Criminal Code. Article 301 on Degrading Turkish Nation, State of the Turkish Republic, the Organs and Institutions of the State is as follows:

> 1) A person who publicly degrades Turkish Nation, State of the Turkish Republic, the Turkish Grand National Assembly, the Government of the Republic of Turkey and the judicial bodies of the State shall be sentenced a penalty of imprisonment for a term of six months to two years.
> 2) A person who publicly degrades the military or security organisations shall be sentenced according to the provision set out in paragraph one.
> 3) The expression of an opinion for the purpose of criticism does not constitute an offence.
> 4) The conduct of an investigation into such an offence shall be subject to the permission of the Minister of Justice.[203]

These articles are quite problematic in terms of freedom of expression protected under Article 10 of the Convention. Furthermore, the European Court of Human Rights has stated that "Article 10 protects not only the information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference but also those that offend, shock or disturb; such are the demands of that pluralism, tolerance, and broad-mindedness without which there is no democratic society."[204]

Even if conscientious objectors are tried for any of these articles and complete their sentences, they are tried again and again with the same articles when they repeat their conscientious objection. Therefore, conscientious objectors in Turkey are locked in an unending cycle of criminal prosecution. Those who do not want to be suspended in a repeated circle of persecution live as fugitives. As mentioned above in the case of Osman Murat Ülke, the ECtHR refers to this situation as civil death.

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[203] European Commission for Democracy Through Law (Venice Commission) of the CoE, Opinion No. 831/2015, "Penal Code of Turkey," February 15, 2016. https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2016)011-e.

[204] Monica Macovei, "Freedom of expression: A Guide to Implementation of Article 10 of the European Convention on Human Rights," *Human Rights Handbooks* 2, 2004. https://rm.coe.int/168007ff48

The prosecution of conscientious objectors is contrary to Articles 24 and 25 of the Turkish Constitution. Article 24 of the Constitution states that "Everyone has the freedom of conscience, religious belief and conviction." Article 25 of the Constitution states that "Everyone has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose; nor shall anyone be blamed or accused because of his/her thoughts and opinions."[205] In fact, these two articles are in line with the right to freedom of thought, conscience, and religion which is guaranteed under Article 9 of the Convention. Turkey is one of the founding members of both the United Nations and the Council of Europe. Turkey is, therefore, a signatory state to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. All of these human rights instruments recognize that the right to conscientious objection to military service derives from the right to freedom of thought, conscience, and religion. While interpreting the relationship between domestic law and international law, Turkey embraces a monistic approach, which means that domestic and international law are related, not separated, and international law is superior to domestic law.[206] Article 90 of the Constitution states that "In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."[207] However, Turkey still does not recognize the right to conscientious objection, although it has adopted these texts and accepted their superiority. Turkey is the only member of the Council of Europe that does not recognize the right to conscientious objection.

[205] The Constitution, Articles 24 and 25.

[206] Çınar, *Turkey's Obligation,* 82.

[207] The Constitution, Article 90. This sentence was added to Article 90 in 2004 with the law containing amendments to some articles of the Constitution. See *Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun*, no. 5170, adopted on 07.05.2004. http://www.anayasa.gen.tr/5170sk.htm.

In Turkey, not only does the right to conscientious objection not exist; there is no regulation applying to alternative service. Under Article 10 of the Military Service Act, the conditions of exemption from military service have been regulated. Article 10 (2) of the Military Service Act includes the following expressions:

> If in a call-up term the number of the soldiers being transferred to the training centres in each draft period is higher than the requirement specified by the Office of the Chief of General Staff, the surplus number of soldiers to be conscripted shall be considered to have fulfilled their military service, following their military training, by paying half the Turkish lira equivalent of the fixed foreign exchange fee for exemption from military service at the Turkish Central Bank's foreign currency buying rate for 1st January of that year, or by working in a public institution or organization, if so desired.[208]

However, as stated in Article 10 (4), those who will serve in public institutions and organizations are determined by the method of lottery according to the amounts and principles determined by the Office of the Chief of General Staff. The forms of employment of these persons and the principles and procedures to which they are subject were previously determined by the Council of Ministers. However, from now on these procedures are to be determined by the President of the Republic in accordance with the Decree-law No.700, officially dated 02.07.2018. In disciplinary cases, those who serve in public institutions or organizations, military courts or disciplinary courts are authorized. They cannot fulfill their military service obligations in the event of war and mobilization by working in public institutions or paying a fee. To summarize, those who would be able to perform military service obligations by working in public institutions or by paying the fee are subject to the Military Service Act as well. It is decided by the state, looking at the human resources that the army needs, that these people can fulfill their military service with the means mentioned above. In other words, the fulfillment of their military service in this way depends on the discretion of the state, not their own preferences. Therefore, it is

[208] Turkey: Law No. 1111 of 1927, Military Law, March 20, 1927. https://www.refworld.org/docid/3ae6b4d020.html

impossible to acknowledge the existence of an authentic alternative civil service in Turkey.

The Turkish government avoids recognizing a legal right to conscientious objection, claiming that, due to the geostrategic position of Turkey, the army must remain strong, and that if the right to conscientious objection is granted, it will weaken the military. In addition to this security concern, the great cultural value attributed to the army has prevented the recognition of the right to conscientious objection. However, in Resolution 1380 (2004) of the PACE, it is stated that "Despite Turkey's geostrategic position, the Assembly also demands that Turkey recognize the right of conscientious objection and introduce alternative civilian service."[209] Although the amended Turkish Penal Code in 2004 can be considered a development in terms of human rights, there has not been any improvement in regard to conscientious objection in these amendments. Based on Article 9 (2) of the Convention, the government of Turkey is still considering public safety and order as legitimate reasons for restricting the freedom to manifest one's religion or belief, despite the fact that with the Bayatyan case, the European Court of Human Rights — the sole interpreter of the Convention — has abandoned this interpretation.

With the impact of the Ülke case, the European Commission stated in a progress report dated from 2005 that Turkey does not recognize the right to conscientious objection and has no alternative civilian service in accordance with the principles of conscientious objection put forward by the Council of Europe.[210] In 2006, the European Parliament directly asked Turkey to recognize the right to conscientious objection and reported that the recognition of the right is a condition for EU

[209] PACE, Resolution 1380, "Honouring of Obligations and Commitments by Turkey," June 22, 2004 (18th Sitting).
http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=17225&lang=EN.

[210] European Commission, SEC (2005) 1426, "Turkey: 2005 Progress Report," Nov. 9, 2005.
http://ec.europa.eu/transparency/regdoc/rep/2/2005/EN/2-2005-1426-EN-1-0.Pdf.

membership. The European Parliament resolution on Turkey's progress towards accession states as follows:

> The European Parliament recalls that the ECHR advised Turkey to prepare a new legal framework for conscientious objectors and reminds Turkey that the right to conscientious objection is recognised in the EU Charter of Fundamental Rights; therefore welcomes the initiative by the Ministry of Justice to legalize the right to conscientious objection and to propose the introduction of an alternative service in Turkey; is concerned that in a recent judgment of the Turkish military court a conscientious objector to military service was sentenced to imprisonment and that the military court openly declined to follow a relevant ruling of the ECHR; condemns the on-going persecution of journalists and writers who have expressed their support for the right of conscientious objection to military service.[211]

By 2006, conscientious objectors were considered soldiers and were tried in military courts. With the amendment to the Military Court Law in 2006, conscientious objectors who failed to undergo the draft stage, or who were draft evaders, were tried in civil courts. However, as they are still subject to the provisions of the Military Penal Code, their trial in civil courts cannot be regarded as an indication of progress regarding the issue of conscientious objection. However, those who declare conscientious objection after enlistment shall be tried before a military court.[212] In other words, as those who pass the enlistment stage are considered to be soldiers, they are tried in military courts.

In 2007, the Committee of Ministers of the Council of Europe issued a resolution entitled Execution of the Judgment of the European Court of Human Rights, which was related to the Ülke case. In this resolution, the legal situation in Turkey after the Court's decision regarding the Ülke case was assessed. It is stated that, in accordance with Article 90 of the Turkish Constitution, the Court's decisions were directly applicable, and that despite this fact, the applicant faced the risk of being tried for the

[211] European Parliament, Resolution no. 2006/2118(INI), "Turkey's Progress towards Accession," Sept. 27, 2006. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0381+0+DOC+XML+V0//EN

[212] Çınar, *Turkey's Obligation,* 98.

previous reasons yet again.[213] In recent years, the government has tried to avoid the problem of conscientious objectors, with the effect of decisions made by the ECtHR against Turkey in conscientious objection cases. For instance, with the adoption of individual applications to the Constitutional Court in 2010, it is aimed to prevent violations that lead to negative decisions on Turkey by the ECtHR.

In 2011, the Committee of Ministers asked the Turkish government to provide information on Ülke's case and urged the government to bring necessary legal arrangements on conscientious objection. With this decision, the Deputies "reiterated that legislative measures are required to prevent similar violations" and "strongly invited the Turkish authorities to give priority to the adoption of the necessary legislative measures without any further delay after the general elections of June 2011."[214] Soon after, Turkey made an arrangement for men who are over thirty years old and who had not fulfilled their military service requirement. It was ruled that these men could be exempted from military service for 30,000 Turkish Liras.[215] However, the Turkish government has not made any substantive changes in its domestic law on conscientious objection. It seems that these paid military service arrangements have not encouraged any progress regarding the status of conscientious objectors. Furthermore, this leads to obvious inequality of opportunity.

Although the Turkish government has not recognized the right to conscientious objection, it did take a concrete step that closely involved conscientious objectors. With Resolution No. 93/4613 published in the official gazette dated 25.07.1993, the Council of Ministers made several arrangements concerning the military service of

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[213] Committee of Ministers, Resolution *CM/ResDH(2007)109*, "Execution of the Judgment of the European Court of Human Rights: Ülke against Turkey," *Oct. 17, 2007 (1007th meeting of the Ministers' Deputies).*
https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805adea0#globalcontainer.

[214] Committee of Ministers, Decision Case no. 24, "Case against Turkey," June *8, 2011 (115th Meeting).*
https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805b0a14

[215] Military Service Act, Provisional Article 46 [*Geçici Madde 46*], no 6252/4, Nov. 30, 2011.
https://www.mevzuat.gov.tr/MevzuatMetin/1.3.1111.pdf.

those who have multiple citizenships.[216] According to Article 5 of this resolution, those who live abroad and who prefer, due to their beliefs, to complete their military service by serving in civil institutions and organizations, are considered to have fulfilled their military service — provided that they document these constructs. This situation forms the basis for serious inequality. On one hand, the right to conscientious objection is not recognized for the citizens living in Turkey; on the other hand, this right is recognized for those who live abroad, even though the term "conscientious objection" is not used directly.

Military courts in Turkey often decide against conscientious objectors. The reasons for these decisions are that conscientious objection is not recognized as a constitutional right; the international documents to which Turkey is a party do not include the right to conscientious objection; and military service in Turkey is compulsory, and those who do not fulfill the compulsory military service will be punished according to the relevant provisions of the Military Penal Code. However, the Malatya Military Court's decision in the Muhammed Serdar Delice case is considered a milestone. After five months of military service, Delice refused to serve in a non-Muslim army and declared his conscientious objection. The Malatya Military Court referred to the European Court of Human Rights' decisions on conscientious objection. It stated that the European Court of Human Rights adopted the idea that the right to conscientious objection was within the scope of the right to freedom of thought, conscience, and religion, therefore, this approach of the ECtHR should be taken as a basis for serious consideration. For the first time, a Turkish military court referred to Article 9 of the European Convention on Human Rights and expressed positive opinions about conscientious objection. Moreover, the Malatya Military Court referred to the Bayatyan case and stated that Bayatyan was a Jehovah's Witness and that the European Court of Human Rights had decided in view of this fact; however, Islam was not a system of beliefs and thoughts that prevented military

[216] 93/4613 Sayılı Bakanlar Kurulu Kararı, "Birden Fazla Tabiiyetli Vatandaşların Askerlik Yükümlülüklerini Yerine Getirmiş Sayılmalarına Dair Esaslar," *Resmi Gazete*, adopted on 05/07/1993, published on 25/07/1993.
http://www.resmigazete.gov.tr/arsiv/21648.pdf.

service. To wit, while the military court was not convinced that Delice was sincere in his conscientious objection, it accepted the existence of the right to conscientious objection.[217] The Isparta Military Court took this decision a step further and acquitted Barış Görmez, a member of the Jehovah's Witnesses, who was sentenced to a total of four years of imprisonment for refusing to do military service. The Isparta Military Court reached this decision by referring to the recent judgments of the European Court of Human Rights.[218]

It is stated in Recommendation No. R (87) 8 of the Committee of Ministers that "States may lay down a suitable procedure for the examination of applications for conscientious objector status or accept a declaration giving reasons by the person concerned." Accordingly, the Committee of Ministers left this choice to the states' discretion. If the application is examined, the applicant must be entitled to appeal this decision and the appellate authority must be independent of the military authority. Another question is whether the applications for a conscientious objector status should be made before or after the call-up. If a claim of conscientious objection can be made after being called to the military, should there be any day limit? How many days will this limit be? Will access to information on conscientious objection status be easy and clear? Will the government prepare booklets or brochures for citizens about conscientious objection? The answers to these questions would be indicative of how sincere the state is when it recognizes the right to conscientious objection. In

[217] See "Vicdani Redde Yeşil Işık," *NTV*, March 3, 2012, https://www.ntv.com.tr/turkiye/vicdani-redde-yesil-isik,QTAWIuwrhkyeAXT8rJnU9w; "Türkiye'de Vicdani Ret İlk Defa Tanındı," *Birgün Gazetesi*, March 10, 2012, https://www.birgun.net/haber-detay/turkiyede-vicdani-ret-ilk-defa-tanindi-60970.html; Ekin Karaca, "Mahkeme, Delice'yi Değil ama Vicdani Reddi Tanıdı," *Bianet*, March 9, 2012, http://bianet.org/bianet/bianet/136810-mahkeme-delice-yi-degil-ama-vicdani-reddi-tanidi; Ali Balcı, "Askeri Mahkeme Vicdani Reddi Tanıdı," *Sabah Gazetesi*, March 10, 2012, https://www.sabah.com.tr/gundem/2012/03/10/askeri-mahkeme-vicdani-reddi-tanidi; "Vicdani Red Davasında Tarihi Karar," *Agos Gazetesi*, March 9, 2012, http://www.agos.com.tr/tr/yazi/809/vicdani-red-davasinda-tarihi-karar.

[218] See Ekin Karaca, "Yehova Şahidi'ne Vicdani Ret Hakkı," *Bianet*, March 13, 2012, http://bianet.org/bianet/bianet/136899-yehova-sahidi-ne-vicdani-ret-hakki; "Turkey: Military courts recognise right to conscientious objection," May 1, 2012, https://www.wri-irg.org/en/story/2012/turkey-military-courts-recognise-right-conscientious-objection.

a possible alternative service arrangement, the government of Turkey should take into consideration the following statements in Recommendation No. R (87) 8:

> Alternative service, if any, shall be in principle civilian and in the public interest. Nevertheless, in addition to civilian service, the state may also provide for unarmed military service, assigning to it only those conscientious objectors whose objections are restricted to the personal use of arms;
> Alternative service shall not be of a punitive nature. Its duration shall, in comparison to that of military service, remain within reasonable limits;
> Conscientious objectors performing alternative service shall not have less social and financial rights than persons performing military service. Legislative provisions or regulations which relate to the taking into account of military service for employment, career or pension purposes shall apply to alternative service. [219]

7.3 Concluding Remarks

In accordance with Article 46 of the Convention, Turkey has undertaken to abide by the final decision of the Court. For this reason, the issues contradicted by the Convention should be reformed. As there is not a worldwide accepted approach regarding how the right to conscientious objection should be applied, how to regulate this right in domestic law is at the discretion of the government of Turkey. These regulations should be made in the light of the Court's case-law and resolutions issued by the Committee of Ministers. Turkey is obliged to fulfill the requirements of the decision given by the Court. However, how these requirements will be fulfilled is at the state's discretion. Therefore, the government may make regulations in accordance with Turkey's legal structure. The key point for the CoE is that the state shall not allow a similar violation to be repeated. The state shall decide on the questions regarding the application of the right to conscientious objection, such as which convictions will be considered sincere, who will be the determining authority, or whether there will be the option of alternative service. In fact, the above-mentioned factors such as the contradiction between the Constitution and the Law and the

[219] Committee of Ministers, Recommendation no. R (87) 8, "Recommendation no. R (87) 8 of the Committee of Ministers to Member States Regarding Conscientious Objection to Compulsory Military Service," Apr. 9, 1987 (406th meeting of the Ministers' Deputies). https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e6689.

government's obligations arising from international agreements pave the way for recognizing the right to conscientious objection in Turkey. The current approach of the Council of Europe, the United Nations, the European Union and the member states of these institutions reveal the necessity for Turkey to take legal steps regarding conscientious objection as soon as possible. If Turkish authorities accept that the right to conscientious objection is derived from the right to freedom of thought, conscience, and religion, as adopted in the ECHR and the UDHR, this right can be developed within the scope of Articles 24 and 25 of the Constitution.

CHAPTER 8

CONCLUSION

The decision reached by the European Court of Human Rights (the Court, ECtHR), the judicial body of the Council of Europe in the Bayatyan v. Armenia case in 2011 has been considered a precedent for conscientious objection cases examined by the Court. On the basis that the European Convention on Human Rights (the Convention) is a living instrument that should be interpreted in the light of the present conditions, the Court decided that Armenia's decision to punish Bayatyan for being a conscientious objector is a violation of his right to freedom of thought, conscience, and religion, which is protected by Article 9 of the Convention. After the Bayatyan case, the idea that the right to conscientious objection is a right derived from the right to freedom of thought, conscience, and religion has become a well-established principle of the European philosophy of human rights. Hence, the Member States of the Council of Europe are required to recognize the right to conscientious objection in their respective legal systems. As one of the founding members of the Council of Europe, Turkey should also fulfill its obligation to recognize the right to conscientious objection as it is required by the Council of Europe, and must comply with international human rights standards. In addition, the international conventions to which Turkey is a party also oblige Turkey to change its resistant attitude towards the right to conscientious objection to military service.

The Court's decision to change the case-law in the Bayatyan case has resulted in various outcomes. Among these reactions was the Turkish state's announcement that it was willing to make necessary arrangements in the domestic legal system in accordance with the Court's decision. Due to the decisions the Court has made against Turkey's interests in many conscientious objection cases, some recent regulations in the legal system regarding military service in Turkey show that the Turkish

government actually attempts to avoid conflict with conscientious objectors. Yet while the government does take some precautions to avoid convictions given by the Court, these measures are far from recognizing the right to conscientious objection, and they usually take the form of practical daily solutions. For example, the introduction of the right to individual petition to the Constitutional Court of Turkey in 2010 aims to circumvent any decisions made by the ECtHR against Turkey. Implementation of this policy is difficult for Turkish citizens, who must exhaust domestic remedies before applying to international courts. The unspoken goal of this policy is to preempt the number of cases that might go to the ECtHR by resolving them in the Turkish Constitutional Court.

Based on the Court's case-law before the Bayatyan case, Turkish courts did not recognize the right to conscientious objection at all. Even though there has not been any official progress on the question of conscientious objection, after Bayatyan, the practices of the Turkish courts began to change. Recently, in two of the cases, Turkish judges have recognized the right to conscientious objection, albeit indirectly. The first of these was the case of Cenk Atasoy, a Jehovah's Witness, who, in line with his convictions, requested the option of alternative civilian service instead of military service. As he was being tried on charges of draft evasion, the judge referred to developments in international law, such as decisions of the Human Rights Committee, and Recommendation no 87 (8) of the Council of Europe. As a result, the court stated that Cenk Atasoy had no intention of avoiding national service, and it ruled that there was no reason to doubt the sincerity of his objection, as the evidence presented to the court confirmed the basis of his religious reasoning. As a result, Cenk Atasoy was acquitted. The second case in which judges in Turkey indirectly recognized the right to conscientious objection was the case of Barış Görmez, who was also a Jehovah’s Witness. Referring to the resolutions of PACE, the Committee of Ministers and the European Parliament, the Bayatyan and Erçep cases of the

European Court of Human Rights, and Article 9 of the Convention, the military court decided to acquit Görmez.[220]

These cases reveal that it is possible to recognize the right to conscientious objection in Turkey, since there is not any definitive restriction against it in the Constitution. There are multiple ways to recognize the right to conscientious objection, and to make arrangements to define and recognize the category of conscientious objector as a distinct legal status. First of all, as discussed above, it is possible to claim that the right to conscientious objection has already been recognized by the Constitution, which does not necessarily limit national service to military service. Second, the right to conscientious objection can be derived from the right to freedom of thought, conscience, and religion as it is defined in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the European Convention on Human Rights. Thus, the right to conscientious objection can be developed under Articles 24 and 25 of the Turkish Constitution, which do recognize and regulate the right to freedom of thought, conscience, and religion. The third possibility is to make amendments to the Military Service Act, rather than changing the articles of the Constitution. By amending the Article 1 of the Military Service Act, the perception that national service is equivalent to military service could be changed.

According to general opinion in Turkey, military service is a sacred duty; therefore, a request for exemption from this duty is unacceptable. A citizen who evades such a sacred duty is usually labeled a coward. According to this popular line of thought, the protection of the country is not a matter that can be left to the conscience of an individual citizen; there is the greater demand of national security. Since the right to conscientious objection to military service is, in fact, an objection to these widely shared thoughts and emotions, it remains taboo in Turkey. However, according to the ECtHR, the principles of pluralism and tolerance, which are vital for democratic

[220] Çınar, Ö. (2014). *The Right to Conscientious Objection to Military Service and Turkey's Obligations under International Human Rights Law,* Palgrave Macmillan, 84-85.

societies, require consideration of ideas which can and may offend, shock, or disturb the state and certain sections of society, and yet are still within the scope of freedom of expression. Along these lines, the traditional emphasis on military service in Turkey should not be an obstacle for conscientious objectors to express their ideas. Therefore, the articles of legal documents that enable the prosecution of conscientious objectors, such as Article 45 of the Military Penal Code, Article 318 of the Turkish Penal Code, and Article 4 of the Anti-Terror Law should be amended, or they should be completely abolished.

Answering some questions is crucial for a fruitful discussion on laws or regulations that can be legislated in the future concerning conscientious objection. Is the declaration by the objector sufficient to achieve a status of the conscientious objector? If not, will the application be examined by a competent authority? This thesis has argued that if a decision-making mechanism to examine the sincerity of conscientious objectors is to be established, it must be independent and impartial. If an individual's application for the status of conscientious objection is rejected by this independent and impartial body, the appeal to higher courts and authorities should be possible. In other words, a second review should be accepted protocol. Since evaluating conscientious objectors according to the reasons and motivations they have in objecting to military service constitutes a violation of the prohibition of discrimination as addressed in Article 14, both religious and non-religious grounds should be accepted as valid.

According to international standards, individuals can demand conscientious objection status both before military and during military service. In other words, professional soldiers should also be able to demand the status of conscientious objection, and when the members of the army demand conscientious objector status, they should be tried in civilian and not military courts.

Given the contemporary trend of abolishing compulsory military service, Turkey may also anticipate this step in the near future. Until the establishment of a voluntary

military system, Turkey may respond to the demands of conscientious objectors by offering an alternative civilian service option. While some conscientious objectors consider the offer of alternative civilian service to be a step forward, others oppose it. This opposition demands not the replacement of compulsory military service with a volunteer army, and/or an option of alternative civil service, but abolishment of the army as a whole. Still, according to the Recommendation 1518 of the Parliamentary Assembly of the Council of Europe, if alternative service is to be offered, this must be neither punitive nor deterrent. Similarly, alternative service should not be excessively long as compared to the compulsory service period; it should be compatible with reasons for conscientious objection; and it should be of civilian character. If alternative service is under the control of the Ministry of National Defense or the military, it will damage the civilian character of this service. Non-combatant or non-armed roles in the army cannot be considered as an alternative service. The information on alternative service and the right to conscientious objection should be easily accessible. In order to provide information on the right to conscientious objection and alternative service, sources such as booklets and brochures may be prepared.

In the absence of regulation on conscientious objection, the conflict between the conscientious objector and the state may be more severe. Even if this conflict between the conscientious objector and the state might not disappear completely with the introduction of regulation, the public's tolerance of conscientious objection may increase over time. In this way, conscientious objectors would no longer be criminalized and would not be condemned to civil death. In accordance with the principle of ne bis in idem, conscientious objectors should not be punished repeatedly simply for being conscientious objectors. Conscientious objectors who suffer ongoing trials should be acquitted. In addition to these steps that can be taken in the future, the government may also make some attempts in regard to those individuals who have been tried and punished for being conscientious objectors in the past. The penalties conscientious objectors receive because of conscientious objection may be

expunged from their criminal records. In this way, the burden they faced because of their criminal records may be lightened.

Of course, the discourses adopted in this process are of as critical importance as the application of new laws. For example, discourse that describes conscientious objection as a feat of bravery may lead to paradoxical and undesirable consequences, such as the consolidation of militarism through the reconstruction of masculinity, or the marginalization of conscientious objectors from society. Therefore, both the state and the media should pay maximum attention to the language they adopt on the issue of conscientious objection.

If Turkey does not take necessary measures on the recommendations of the Committee of Ministers regarding conscientious objection, it may face serious political sanctions in accordance with Article 8 of the Statute of the Council of Europe.[221] Furthermore, Turkey has always aspired to join the European Union, and one step it should take in order to make progress in this direction is to recognize the right to conscientious objection.

[221] Çınar, Ö. (2014). *The Right to Conscientious Objection to Military Service and Turkey's Obligations under International Human Rights Law,* Palgrave Macmillan, 86.

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APPENDICES

A. TÜRKÇE ÖZET / TURKISH SUMMARY

İnsanlık tarihi bir şiddet tarihidir. Bu şiddet çoğunlukla örgütlü siyasi iktidar tarafından uygulanmıştır. Her ne kadar örgütlü teritoryal birimler antik dönemlerden beri ordulara sahip olsa da, modern dönemde çoğu zaman askerlik hizmeti erkek vatandaşların zorunlu ancak geçici olarak askere alınması şeklinde gerçekleşmiştir. Fakat elbette bu zorunluluğun beraberinde bir direnişi de getirmesi kaçınılmaz olmuştur. Bu direnişi anlamak için M.S. 295 yılında Hristiyanlık inancı gereği Roma ordusunda savaşmayı reddeden yirmi bir yaşındaki genç Maximilian'ı anmadan geçmemek gerekir. Orduda savaşmayı reddeden Maximilian'ın reddinin temelinde ünlü Hristiyan teoloh Tertullian'ın fikirleri yatıyordu. Tertullian'a göre, bir Hristiyanın dünyevi bir savaşta yer alması kabul edilemezdi. Çünkü ona göre bir Hristiyan "asker" yalnızca kötülükle savaşmalıydı ve bu savaşta yalnızca manevi silahlarını kullanabilirdi. Bu anlayış, erkekleri imparatorlara veya krallara askeri bir bağlamda hizmet etmekten men etti. Bu fikirleri benimseyen Maximilian'a göre ordunun en büyük günahı insan hayatını almaktı, bu yüzden Hristiyanlık ve askerlik hizmeti birbiriyle çatışıyordu. Onun inanışına göre İsa'nın ordusuna katılan bir inananın üzerinde bir imparatorun adı yazılı askeri bir madalyon taşımak gibi pagan uygulamaları yerine getirmemesi gerekiyordu. Bu fikirlerden hareket ederek genç Maximilian itirazlarının sonuçlarını kabul ederek orduya katılmayı reddetti ve sonucunda infaz edildi. Fakat arkasında yüzyıllar boyunca tartışılacak bir konu bırakacağını muhtemelen hayal bile edemezdi: askerlik hizmetine karşı vicdani ret.

Vicdan, bireylerin kendi yargıları doğrultusunda iyi ile kötü arasında bir ayrım yapmasını sağlayan ve bu yönü ile sosyal normları aşan bir olgudur. Vicdan özgürlüğü temel olarak bireyin toplumda kabul gören bir normun kendi yargıları ile çelişmesi durumunda kendi vicdanının sesini dinleyerek bu norma karşı

çıkabilmesini ifade eder. Bu bağlamda, askerlik hizmetini, belirli bir savaşı veya belirli bir silahı kendi vicdanına karşı kabul eden birey vicdani retçi olabilir. Bugün literatürde geniş kabul gören tanıma göre vicdani ret, kişinin dini, vicdani, politik, ahlaki, etik, felsefi, insani veya benzer temelli fikirlerine aykırı bir emrin gereklerini yerine getirmeyi reddetmesidir. Elbette bu kapsamlı tanımın kabul edilmesi kolay olmamıştır.

Tarihsel olarak bakıldığında vicdani reddi teşvik eden temel olgunun din olduğu görülmektedir. Maximilian örneğinin etkisi ile vicdani ret, uzun bir dönem boyunca Hristiyan pasifizmi, dolayısı ile de din ile ilişkilendirilmiştir. Zorunlu askerlik, 18. Yüzyılın sonlarında ulus-devletin yükselişi ile milliyetçilik ideolojisi etrafında ortaya çıkmıştır. Bu, vicdani reddin kademeli olarak sekülerleşmesini sağlamış ve buna paralel olarak dini çağrışımlarının azalmasında büyük ölçüde etkili olmuştur. Bu sekülerleşme süreci Avrupa Aydınlanmasında yansımasını bulan özerk ve kendi kendine yeten bir varlık olan bireyin doğuşu ile perçinlenmiştir. Kavramın politikleşmesi ise 20. Yüzyılın ilk çeyreğinde vicdani retçilerin devlet otoritesini sorgulayan organize bir harekete dönüşmesi ile gerçekleşmiştir. Özellikle Birinci Dünya Savaşı ile birlikte vicdani ret politik bir mesele haline gelmiştir. İkinci Dünya Savaşı sırasında o güne kadar görülmemiş boyutlardaki insan kayıpları ve insan hakları ihlalleri kamuoyu farkındalığını artırarak devletlerin vicdani ret taleplerine karşı direnişini kırmıştır. Fakat 1900lerin ilk yarısında yaşanan iki dünya savaşının etkisi ile savaş arası dönemde ulusal güvenliğe atfedilen önem, konunun devletlerin özel alanlarından çıkmasına engel olmuştur. Ancak İkinci Dünya Savaşı'ndan sonra ulusararası ilişkilerde yaşanan dönüşüm ve insan haklarına verilen önemin artması ile birlikte vicdani ret konusu uluslararası alanda dikkatleri üzerine çekmiştir. İkinci Dünya Savaşı sonrası dönemde ulusal güvenlik ile ilgili sıkı önlemlerin yerine daha ılımlı bir devlet yaklaşımı benimsenmiş olsa da, kendilerini bireysel özgürlüklerin ateşli savunucuları olarak konumlandıran modern batı ülkeleri de komünist ülkelerin vicdani ret hakkını tanımadıkları gerekçesi ile vicdani ret hakkını tanımamayı seçmiştir. Ayrıca vicdani retçilerin samimiyeti sorunu ile vicdani ret hakkının tanınmasından kaynaklanabilecek huzursuzluk ve eşitsizlik olasılığı da tartışma

konusu olmaya devam etmiştir. Vicdani ret hakkının tanınması konusunun dünyanın hemen her ülkesinde büyük tartışmalara yol açtığını söylemek abartı olmayacaktır. Doğal olarak, devletlerin ulusal güvenlikleri ile yakından ilgili olduğunu düşündükleri bir konuda kolayca taviz vermeleri beklenemez. 1980lerin sonunda Soğuk Savaş'ın sona ermesi ile birlikte devletlerin bireysel otoriteleri erozyona uğramış ve devletlerin özerkliğinden ziyade devletlerin karşılıklı bağımlılıklarına yapılan vurgu artmıştır. Başta Birleşmiş Milletler tarafından atılan adımlar olmak üzere çeşitli uluslararası girişimler ile vicdani ret kavramı daha görünür hale gelmiştir. Buna ek olarak Soğuk Savaş sonrasında özellikle silah teknolojisindeki gelişmeler ile birlikte geleneksel kitle ordularına olan ihtiyaç azalmış ve zorunlu askerlik Batı Avrupa ve Kuzey Amerika'da gittikçe artan bir şekilde terkedilmeye başlanmıştır. Devletlerarasındaki siyasi ilişkilerde yaşanan bu değişim vicdani ret hakkını pekiştirmeye yardımcı olmuştur. Ayrıca eğitimli genç erkekleri hayatlarının en verimli dönemlerinde askere almaya ikna etmek daha da zorlaşmıştır. Bütün bunlara ek olarak dünyanın çeşitli bölgelerindeki vicdani retçilerin birbirleri ile etkileşimi sonucunda vicdani ret politik bir mücadele aracı olarak yaygınlaşmıştır.

Literatürde vicdani retçiler devletle işbirliği yapmaya olan istekleri, retlerinin temelinde yatan gerekçeler veya inançlarının kapsamları gibi çeşitli kriterler kullanılarak kategorize edilmektedir. Bu kategorizasyonlardan bazıları şu şekildedir: dini veya seküler vicdani retçiler; evrensel veya seçici vicdani retçiler; alternatif servisi kabul eden veya total vicdani retçiler. Çeşitli kategorilerde yer alan bu vicdani retçilerin ortak özelliği kişisel inançları nedeni ile silahlı mücadeleden kaçınmalarıdır. Burada bahsedildiği gibi kişisel inançlardan kaynaklanan bireysel bir tutum olduğu sürece vicdani ret devletler için bir problem teşkil etmez iken kamusal alana girdiği anda devlet açısından problem başlamaktadır. Çünkü vicdani reddin temelinde bireylerin hayatları mevzubahis olduğunda devlet gücünün sınırlandırılabileceği fikri yatar. Modern devletler ise devlet gücünün sınırlandırılabileceği fikrini destekleyen herhangi bir yaklaşımı gönüllü olarak kabul etmeyecektir. Çünkü bu kendi meşruiyetlerinin sorgulanması anlamına gelecektir. Dolayısıyla devletler, vicdani ret hakkı da dahil olmak üzere bireysel haklara saygı

duymak, onları korumak ve güçlendirmek zorunda olmakla birlikte, devletin gücünün sınırlarını ortaya çıkaran vicdani reddin kendi egemenliklerini zayıflatmadığından emin olmaya çalışmaktadırlar.

Modern uluslararası sistemin temel karakteristiklerinden biri uluslararası hukuka verilen önemdir. Bugün vicdani ret hakkı giderek artan bir şekilde düşünce, vicdan ve din özgürlüğü hakkının ayrılmaz bir boyutu olarak kabul edilmektedir. Bu kabul beraberinde devletlere bir dizi yükümlülük getirmektedir. Bugün devletlerin büyük bir kısmı vicdani ret hakkını tanımış ve iç hukuklarında bu doğrultuda çeşitli düzenlemeler yapmışlardır. Bu gerçekten hareketle bu tezde askerlik hizmetine karşı vicdani ret hakkına kayıtsız kalan devletlerin temel bir insan hakkını ihlal ettiği iddia edilmiştir. Başka bir deyişle, vicdani ret hakkını tanımayan devletlerin uluslararası insan hakları hukukundan kaynaklanan yasal sorumluluklarını yerine getiremediği vurgulanmıştır. Çalışmada Avrupa insan hakları sistemi ışığında Türkiye'de vicdani ret konusunu incelemektedir. Türkiye'nin taraf olduğu uluslararası kuruluşlar ve antlaşmaların gerektirdiği şekilde vicdani ret hakkını kabul etmekle yükümlü olduğu tartışılmıştır. Özellikle bölgenin öncü kuruluşlarından biri olan Avrupa Konseyi'nin pratiklerine odaklanılmıştır. Avrupa Konseyi ilkelerine göre bir kişiyi inançları ile çelişen bir eyleme zorlamak veya bu eylemi reddettiği için cezalandırmak Sözleşme'nin ihlali anlamına gelmektedir. Bu doğrultuda Avrupa İnsan Hakları Sözleşmesi (AİHS) ve Avrupa İnsan Hakları Mahkemesi (AİHM) içtihatları temel referans kaynağı olarak belirlenmiştir. Avrupa İnsan Hakları Sözleşmesi'nin yaşayan bir belge olduğu gerçeği onu gelecekteki düzenlemeler için hayati bir belge konumuna getirmektedir. Dolayısıyla Avrupa İnsan Hakları Sözleşmesi gelecekte Türkiye'de vicdani ret konusunda atılabilecek adımlar için de en önemli kaynaktır. Ayrıca bu tezde AİHS ve AİHM kararları yanı sıra kitaplar, makalaleler, dergiler, el kitapları, bölgesel ve uluslararası dökümanlar, ve ayrıca Avrupa Konseyi dışındaki önemli uluslararası organizasyonların kararları, önergeleri, raporları, protokolleri gibi çeşitli kaynaklar da incelenmiştir.

Avrupalı devletlerin İkinci Dünya Savaşı'ndan sonra bir değerler seti etrafında buluşmalarını sağlamak için atılan en önemli adımlardan biri Avrupa İnsan Hakları Sözleşmesi'nin kabul edilmesidir. AİHS'nin yazarlarının amacı ne vicdani ret hakkını tanımak ne de dışlamak olmuştur. Daha ziyade bu yazarlar askerlik hizmetini ve askerlik hizmeti yerine kabul edilecek alternatif hizmetleri zorla çalıştırma ya da zorunlu çalışma tanımının kapsamının dışında tutmayı amaçlamışlardır. Dolayısı ile de vicdani ret davaları uzun bir süre boyunca Sözleşme'nin kölelik ve zorla çalıştırma yasağı ile ilgili olan 4. maddesi ile ilişkilendirilmiştir. Bununla birlikte, daha sonra Avrupa Konseyi Parlamenterler Meclisi'nin öncülüğünde ve dünyadaki diğer gelişmelerin etkisi ile Avrupa Konseyi'nin vicdani ret konusundaki tutumu değişmeye başlamıştır. Avrupa Konseyi'nin iki önemli organı olan Parlamenterler Meclisi ve Bakanlar Komitesi vicdani ret hakkını Sözleşme'nin 9. maddesinden türetilen bir hak olarak kabul etmiştir.

Avrupa Konseyi insan hakları kukuku sistemine bakıldığında vicdani ret hakkının özellikle Avrupa İnsan Hakları Sözleşmesi'nde yer alan iki özel hakkın yorumlanması ile ilişkili olarak geliştiği görülmektedir. Söz konusu iki maddenin ilki kölelik ve zorla çalıştırma yasağını düzenleyen 4. madde iken ikincisi ise düşünce, vicdan ve din özgürlüğü hakkını koruyan 9. maddedir. İlk madde zorla çalıştırmayı yasaklar fakat askerlik bir istisna olarak ele alınmıştır, dolayısı ile de vicdani reddi sınırlıyor görünmektedir. İkinci maddede ise vicdani ret hakkının temelinde yatan dini, ahlaki ve/veya entelektüel kanıları koruma altına almaktadır. 1998'de feshedilen eski Avrupa İnsan Hakları Komisyonu ve Avrupa İnsan Hakları Mahkemesi'nin bu iki hakkı vicdani ret hakkı bağlamında yorumlama şekli zaman içinde değişimlere uğramıştır. 1960larda vicdani ret konusunda geniş kabul görmüş bir yaklaşımın yokluğu Avrupa İnsan Hakları Komisyonu'nun Gradrath davasında öngörülebilir bir sonuç olarak davanın kabul edilebilir olmadığına karar vermesine neden olmuştur. 1967'de Avrupa Konseyi Parlamenter Meclisi'nin 337 sayılı kararına kadar Avrupa Konseyi organlarının hiçbiri vicdani ret konusunda resmi bir adım atmamıştır. 2000 yılına kadar açılan beş vicdani ret konulu davada Avrupa İnsan Hakları Komisyonu'nun kararı davaların kabul edilemez olduğu yönünde olmuştur. Avrupa

İnsan Hakları Komisyonu ve Avrupa İnsan Hakları Mahkemesi'nden oluşan iki ayaklı yapının yerini alan yeni tek Mahkeme'nin kurulmasından sonra ise vicdani ret davalarında benimsenen tutum değişmeye başlamıştır. 2000 yılında Thlimmenos davasında AİHM dolaylı da olsa vicdani ret hakkının 9. madde kapsamında olduğunu kabul etmiştir. Bu şekilde AİHM, vicdani ret davalarının 9. madde ile incelenmesinin önünü açmıştır. 2001 tarihli Bayatyan davası ise vicdani retçiler için bir dönüm noktası niteliği taşımaktadır. Başlangıçta Thlimmenos ve Ülke davalarında kaydedilen ilerlemeye rağmen, Bayatyan davasında Mahkeme Grandrath davasını referans noktası almış ve 9. maddenin ihlal edilmediğine karar vermiştir. Ancak bu karar oybirliği ile alınmamıştır. Yargıç Ann'in muhalif görüşü, dönemin koşulları ve dünyadaki vicdani ret konusunda mevcut fikir birliği gibi diğer ilgili faktörler sayesinde dava Büyük Daire tarafından yeniden incelenmiştir. Büyük Daire, Sözleşme'yi güncel koşullar ışığında yeniden değerlendirerek vicdani ret hakkını kabul etmiştir. Bayatyan/Ermenistan davasına AİHM vicdani ret hakkını tanımış ve neredeyse yarım asırdır devam ettirdiği yaklaşımını tersine çevirmiştir. AİHM'in 2011'den beri benimsediği yeni yaklaşıma göre, vicdani ret hakkı, Avrupa İnsan Hakları Sözleşmesi'nin 9. Maddesinden türeyen bir haktır ve 4. madde artık geçerli değildir. Bayatyan'dan sonraki vicdani ret davalarında Mahkeme bu yaklaşımını korumuştur. Bayatyan davasından önce Avrupa İnsan Hakları Mahkemesi vicdani ret konusunda bu tutumu benimsemediği için Avrupa Konseyi organları arasında vicdani ret konusunda benimsenmiş ortak bir tutumun olmadığı görülmektedir. Söz konusu davaya kadar Parlamenterler Meclisi ve Bakanlar Komitesi üye devletlere vicdani ret hakkını tanımaları için çağrıda bulunsalar da Avrupa İnsan Hakları Komisyonu ve Avrupa İnsan Hakları Mahkemesi vicdani ret davalarında 4. maddeyi dikkate almaya devam etmiştir. Bayatyan davası ile AİHM vicdani ret hakkını kabul etmiştir ve bu sayede Avrupa Konseyi organları arasında bir uzlaşmaya varılmıştır.

Avrupa Konseyi'nin yargı organı olan Avrupa İnsan Hakları Mahkemesi'nin 2011 yılında Bayatyan/Ermenistan davasında verdiği karar daha sonraki vicdani ret davaları için emsal teşkil etmektedir. Avrupa İnsan Hakları Sözleşmesi'nin güncel koşullar ışığında yorumlanması gereken yaşayan bir belge olduğu fikrinden hareket

eden mahkeme Ermenistan'ın Bayatyan'ı vicdani retçi olduğu için cezalandırmasının Sözleşme'nin 9. maddesi ile korunan düşünce, vicdan ve din özgürlüğü hakkının ihlali olduğu sonucuna varmıştır. Bayatyan davasından sonra vicdani ret hakkının düşünce, vicdan ve din özgürlüğü hakkından türetilmiş bir hak olduğu fikri Avrupa insan hakları felsefesinin ayrılmaz bir parçası haline gelmiştir. Tahmin edilebileceği gibi, Avrupa Konseyi organlarının vicdani ret konusunda fikir birliğine varması üye devletler üzerinde doğrudan bir etkiye sahiptir. Dolayısı ile, Avrupa Konseyi üye devletlerinin kendi yasal sistemlerinde vicdani ret hakkını kabul etmeleri gerekmektedir. Avrupa Konseyi kurucu üyelerinden biri olan Türkiye, bu üyeliğin bir gereği olarak vicdani ret hakkını tanıma yükümlülüğünü yerine getirmeli ve uluslararası insan hakları standartlarına uymalıdır. Ayrıca, Türkiye'nin taraf olduğu uluslararası sözleşmeler de Türkiye'nin vicdani ret konusundaki tutumunu değiştirmesi gerektiğini ortaya koymaktadır. Türkiye dışında, zorunlu askeri sisteme sahip olan Avrupa Konseyi üyesi ülkelerin tamamı, askerlik hizmetine karşı vicdani reddi kabul etmiş veya en azından alternatif hizmet seçeneği sunma konusundaki niyetlerini ifade etmiştir. Sözleşme'nin 46. maddesi uyarınca Türkiye, Mahkeme tarafından verilen nihai kararlara uymayı taahhüt etmiştir. Bu nedenle Sözleşme ile çelişen konuların yeniden düzenlenmesi gerekmektedir. Vicdani ret hakkının nasıl uygulanması ve düzenlenmesi gerektiği konusunda dünya çapında kabul görmüş bir yaklaşım olmadığı için bu hakkın iç hukukta nasıl düzenleneceği Türk hükümetinin takdirindedir. Fakat düzenlemelerin Mahkeme içtihatları ve Bakanlar Komitesi tarafından verilen kararlar ışığında yapılması gerektiği dikkate alınmalıdır. Hükümet Avrupa Konseyi ilkelerını temel referans noktası kabul ederek Türkiye'nin yasal yapısına uygun düzenlemeler yapmalıdır. Avrupa Konseyi için kritik nokta, devletin benzer bir ihlalin tekrarlanmasına izin vermemesi gerektiğidir. Hangi inançların samimi kabul edileceği, karar verici otoritenin kim olacağı, alternatif hizmet seçeneğinin olup olmayacağı gibi vicdani ret hakkının uygulanmasına ilişkin sorulara cevap vermek devletin takdirindedir. Aslında Anayasa ile Kanun arasındaki çelişki ile hükümetin uluslararası antlaşmalardan doğan yükümlülükleri gibi faktörler Türkiye'de vicdani ret hakkının tanınmasına giden yolu açmaktadır. Avrupa Konseyi, Birleşmiş Milletler, Avrupa Birliği ve bu kurumlara üye devletlerin güncel yaklaşımı,

Türkiye'nin mümkün olan en kısa sürede vicdani ret konusunda yasal adımlar atması gerektiğini ortaya koymaktadır.

Mahkeme'nin Bayatyan davası ile birlikte yaklaşımını değiştirmesi çeşitli sonuçlara yol açmıştır. Bu sonuçlardan biri de Türkiye'nin iç hukuk sisteminde Mahkeme'nin kararına uygun gerekli düzenlemeleri yapmaya istekli olduğunu ifade etmesidir. Aslında Türkiye'nin askerlik hizmetine ilişkin yaptığı bazı yeni düzenlemeler göstermektedir ki Türk hükümeti Mahkeme'nin birçok vicdani ret davasında Türkiye aleyhinde verdiği kararların etkisi ile vicdani retçiler ile çatışmaktan kaçınmaktadır. Bu sebeple Türk hükümeti Mahkeme'nin aleyhinde verdiği kararlardan kaçınmak için bazı önlemler almasına rağmen bu önlemler vicdani ret hakkını tanımaktan uzak ve genellikle pratik günlük çözümler biçimini almaktadır. Örneğin 2010 yılında getirilen Anayasa Mahkemesi'ne bireysel başvuru hakkı ile esas olarak AİHM'in Türkiye aleyhindeki kararlarından kaçınmak amaçlanmıştır. Uluslararası mahkemelere başvurmadan önce iç hukuk yollarını tüketmek zorunda olan Türk vatandaşları için AİHM'e başvurmak zorlaşmıştır. Başka bir deyişle, bireysel başvuru hakkının kabul edilmesinin amaçlarından biri davaların Anayasa Mahkemesi'nde karara bağlanması ve AİHM'e gidebilecek davaların sayısının engellenmesidir.

Türkiye'deki genel görüşe göre askerlik kutsal bir görevdir ve bu sebeple bu görevden muafiyet talebi kabul edilemez. Böylesine kutsal bir görevden muaf olmak isteyenler korkak olmakla suçlanmaktadır. Bu genel kanıya göre ülkenin korunması gibi ulusal güvenlik için hayati önem taşıyan bir mesele bireylerin vicdanına bırakılabilecek bir mesele değildir. Vicdani ret hakkı aslında toplumda yaygın olarak paylaşılan bu düşüncelere karşı bir itiraz niteliği taşıdığı için Türkiye'de tabu olarak kalmaya devam etmektedir. Bununla birlikte AİHM'e göre, demokratik toplumlar için hayati önem taşıyan çoğulculuk ve hoşgörü ilkeleri gereği devleti ve toplumun bazı kesimlerini rahatsız ve hatta şok edebilecek fikirler de ifade özgürlüğünün kapsamındadır. Buradan hareketle Türkiye'de askerlik hizmetine atfedilen geleneksel

önemin vicdani retçilerin fikirlerini ifade etmeleri için engel olmaması gerektiği iddia edilebilir.

Bu tezin amaçlarından biri, Türkiye'nin iç hukukunda vicdani ret konusundaki yaklaşımını incelemek ve yerel mevzuatın Türkiye için bağlayıcı olan uluslararası insan hakları standartlarına uyumu için öneriler sunmaktır. Mevcut duruma bakıldığında görülmektedir ki Türkiye'de vicdani reddin tanınması konusunda anayasal bir engel yoktur. Vicdani ret hakkını tanımak ve/veya yasal bir statü olarak vicdani retçi statüsünü tanımak için çeşitli yollar bulunmaktadır. Bu yollardan birincisi Anayasa'nın vatan hizmetini askerlik hizmeti ile sınırlandırmadığı gerçeğinden hareket ederek vicdani ret hakkının zaten tanındığını iddia etmektir. Anayasa'nın 72. maddesinde yazıldığı üzere her Türk'ün hakkı ve ödevi olan vatan hizmetinin Silahlı Kuvvetler yanında kamu kesiminde yerine getirilebilmesinin yolu açıktır. 1111 Sayılı Askerlik Kanunu ise vatan hizmetini yalnızca erkek vatandaşlar tarafından yerine getirilecek olan askerlik hizmeti şeklinde düzenleyerek anayasanın kapsamını daraltmaktadır. Dolayısıyla yeni ve daha kapsamlı bir yorum vicdani reddin tanınması veya vatan hizmetinin silahlı kuvvetler dışında yerine getirileceği alternatif yollar sunulması için olanak sağlayacaktır. İkinci yol olarak vicdani ret hakkı tıpkı İnsan Hakları Evrensel Beyannamesi, Medeni ve Siyasi Haklara İlişkin Uluslararası Sözleşme, ve Avrupa İnsan Hakları Sözleşmesi örneklerinde olduğu gibi düşünce, vicdan ve din özgürlüğü hakkından türetilebilir. Halihazırda düşünce, vicdan ve din özgürlüğü Türkiye Cumhuriyeti Anayasası'nın 24. ve 25. maddeleri altında korunmaktadır. Eğer Türk otoriteleri, tıpkı Avrupa İnsan Hakları Sözleşmesi, Medeni ve Siyasi Haklara İlişkin Uluslararası Sözleşme ve İnsan Hakları Evrensel Beyannamesi örneklerindeki gibi, vicdani ret hakkının düşünce, vicdan ve din özgürlüğü hakkından kaynaklanan bir hak olduğunu kabul ederlerse vicdani ret hakkı Anayasa'nın 24. ve 25. maddeleri altında türetilebilir. Üçüncü bir yol ise Askerlik Kanunu'nun 1. maddesinde yapılacak değişiklik ile vatan hizmetinin askerlik hizmetine eşit olduğu anlayışının değiştirilmesi olabilir. Son olarak Türkiye Cumhuriyeti Anayasası'nın 90. maddesine göre temel hak ve özgürlükler ile ilgili konularda uluslararası antlaşmalarda yer alan hükümler esas alınmaktadır. Türk

mahkemeleri uluslararası antlaşma hükümlerini esas alarak vicdani ret konusunda ilerleme kaydedebilir.

Mahkeme'nin Bayatyan davası öncesindeki kararlarını referans kabul eden Türk mahkemeleri vicdani ret hakkını tanımamıştır. Vicdani ret konusunda herhangi bir resmi adım olmamasına rağmen Bayatyan'dan sonra Türk mahkemelerinin uygulamalarında bir değişikliğin de söz konusu olduğu görülmektedir. Yakın zamanda görülen iki davada Türk hakimler dolaylı olarak da olsa vicdani ret hakkını tanımıştır. Bu davalardan ilki inançları gereği askerlik hizmeti yerine alternatif sivil hizmet seçeneği talep eden Yehova Şahidi Cenk Atasoy'un davasıdır. Bu davada mahkeme uluslararası hukukta görülen gelişmelere atıfta bulunmuştur. Mahkeme Cenk Atasoy'un vatan hizmetinden kaçmak gibi bir niyetinin olmadığını ve dini inancından kaynaklanan itirazının samimiyetinin şüpheye yer bırakmadığını ifade etmiştir. Sonuç olarak Cenk Atasoy beraat etmiştir. Türkiye'deki hakimlerin dolaylı olarak vicdani ret hakkını tanıdığı ikinci dava ise yine bir Yehova Şahidi olan Barış Görmez davasıdır. Avrupa Konseyi Parlamenterler Meclisi, Bakanlar Komitesi ve Avrupa Parlamentosu kararları ile AİHM'in Bayatyan ve Erçep davalarında verdiği kararlara atıfta bulunan askeri mahkeme Görmez'in beraatine karar vermiştir. Bu iki davada verilen kararlardan görülebileceği üzere vicdani ret konusunda herhangi bir anayasal engelin varlığı söz konusu değildir. Dolayısı ile Türkiye'de vicdani ret hakkını tanımak mümkündür.

Gelecekte vicdani ret ile ilgili kabul edilebilecek yasalar veya yapılabilecek düzenlemler hakkında verimli bir tartışma için bazı soruların cevaplanması oldukça önemlidir. İtirazcının beyanı vicdani retçi statüsü için yeterli midir? Değilse, vicdani ret statüsü için yapılan başvuru yetkili bir makam tarafından incelenecek midir? Bu çalışmada eğer vicdani retçilerin samimiyetini inceleyecek bir karar alma mekanizması kurulacaksa bu mekanizmanın bağımsız ve tarafsız olması gerektiği savunulmuştur. Başvurunun söz konusu bağımsız ve tarafsız otorite tarafından reddedilmesi halinde yüksek mahkemelere ve otoritelere itiraz yolunun açık olması gerekmektedir. Başa bir deyişle, ikinci bir inceleme protokolü kabul edilmelidir.

Vicdani retçileri askerlik hizmetine itiraz ettikleri sebep ve motivasyonlara göre ayırmak 14. maddede belirtilen ayrımcılık yasağının ihlaline sebep olacağı için hem dini hem de dini olmayan gerekçeler vicdani ret için geçerli kabul edilmelidir.

Vicdani ret konusunda bir düzenlemenin yokluğu vicdani retçi ve devlet arasındaki çatışmanın daha şiddetli olmasına sebep olabilir. Vicdani ret konusunda yapılacak düzenlemeler ile birlikte bu çatışma tamamen ortadan kalkamasa da toplumun vicdani ret konusundaki toleransı artabilir. Bu sayede vicdani retçilerin kriminalize edilmesi ve medeni ölüme mahkum olmaları engellenebilir. Dünyada zorunlu askerlik sisteminin kaldırılması konusundaki eğilim göz önüne alındığında Türkiye'de de yakın gelecekte bu yönde adımların atılması beklenebilir. Profesyonel orduya geçiş veya gönüllülüğe dayanan bir askeri sisteminin kurulmasına kadar Türkiye, alternatif sivil hizmet seçeneği sunarak vicdani retçilerin taleplerine cevap verebilir. Bazı vicdani retçiler söz konusu alternatif sivil hizmet seçeneğini bir ilerleme olarak görürken, bazıları ise bu fikre karşı çıkmaktadır. Bu muhalif kesim, zorunlu askerlik hizmetinin gönüllü bir ordu ile değiştirilmesi ve/veya alternatif bir kamu hizmeti seçeneğini değil, ordunun bir bütün olarak kaldırılmasını talep etmektedir. Avrupa Konseyi Parlamenterler Meclisi 1515 sayılı Tavsiye kararına göre, eğer alternatif hizmet önerilecek ise, bu hizmetin cezalandırıcı veya caydırıcı nitelik taşımaması gerekmektedir. *Ne bis in idem* ilkesine uygun olarak vicdani retçiler vicdani retçi oldukları için tekrar tekrar cezalandırılmamalıdır.

Türkiye, Bakanlar Komitesi'nin vicdani ret ile ilgili önerileri konusunda gerekli önlemleri almazsa, Avrupa Konseyi Statüsü'nün 8. maddesi uyarınca siyasi yaptırımlar ile karşı karşıya kalabilir. Ayrıca uzun yıllardır Avrupa Birliği'ne katılmak yönündeki isteğini belirten Türkiye'nin bu doğrultuda ilerleme kaydedebilmek için atması gereken adımlarda biri de vicdani ret hakkını tanımaktır.

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TEZİN ADI / TITLE OF THE THESIS (**İngilizce** / English) : THE RIGHT TO CONSCIENTIOUS OBJECTION UNDER EUROPEAN REGIME OF HUMAN RIGHTS, WITH SPECIAL REFERENCE TO TURKISH PRACTICE

TEZİN TÜRÜ / DEGREE**:** **Yüksek Lisans** / Master ■ **Doktora** / PhD ☐

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