PROTECTING CONSCIENTIOUS OBJECTION AS A FUNDAMENTAL RIGHT. CONSIDERATIONS ON THE DRAFT AGREEMENTS OF THE SLOVAK REPUBLIC WITH THE CATHOLIC CHURCH AND WITH OTHER REGISTERED CHURCHES [1]

Por

JAVIER MARTÍNEZ-TORRÓN / RAFAEL NAVARRO-VALLS
Professor of Law / Professor of Law
Complutense University of Madrid, Spain

jmtorron@der.ucm.es / rnv@der.ucm.es

ABSTRACT: Conscientious objection is an expression of the broader individual right to freedom of conscience. Its full protection can not be achieved through strictly legalist positions and requires a balancing process between the conflicting legal interests in each singular case. The current draft agreements of the Slovak Republic with the Holy See and with the other registered churches, aimed at protecting some conscientious objections typical of Catholics and of the faithful of other religions, can constitute a useful instrument to guarantee effectively the exercise of the right to conscientious objection. Therefore, it is surprising the negative opinion delivered by the European Union of Independent Experts on Fundamental Rights, apparently more interested in the guarantee of a hypothetical fundamental right to abortion or to homosexual marriage than in the actual protection of freedom of conscience.

Key words: Conscientious objection, freedom of conscience, Church-State agreements, abortion, homosexual marriage.

---

[1] Este trabajo está destinado al volumen colectivo sobre objeción de conciencia en la República Eslovaca, coordinado por Michaela Moravčíková, Directora del Institute for State-Church Relations, Bratislava, cuya publicación está prevista para 2007. Ha sido escrito en el contexto del Proyecto de Investigación SEJ2005-06642, del Ministerio de Educación.

LA PROTECCIÓN DE LA OBJECIÓN DE CONCIENCIA COMO UN DERECHO FUNDAMENTAL. CONSIDERACIONES SOBRE LOS PROYECTOS DE ACUERDO DE ESLOVAQUIA CON LA SANTA SEDE Y CON OTRAS CONFESIONES RELIGIOSAS

By JAVIER MARTÍNEZ-TORRÓN / RAFAEL NAVARRO-VALLS

RESUMEN: La objeción de conciencia constituye una manifestación del más amplio derecho de la persona a la libertad de conciencia. Su adecuada protección ha de huir de actitudes estrictamente legalistas y reclama un proceso de equilibrio de intereses entre los bienes jurídicos en conflicto. Los actuales proyectos de acuerdo de Eslovaquia con la Santa Sede y con otras confesiones religiosas, encaminados a tutelar algunas objeciones de conciencia típicas de católicos y de los fieles de otras religiones, pueden suponer un interesante instrumento para la garantía del derecho de objeción. Por eso sorprende el juicio negativo que esos proyectos han recibido de la European Union of Independent Experts on Fundamental Rights, aparentemente más interesados en la garantía de un hipotético derecho fundamental al aborto o al matrimonio homosexual que en la protección efectiva de la libertad de conciencia.

Palabras clave: Objeción de conciencia, libertad de conciencia, acuerdos Iglesia-Estado, aborto, matrimonio homosexual.

I. INTRODUCTION

When analyzing the phenomenon of conscientious objections -we use the plural intentionally- it is worth remarking that this is not an issue that can be considered only 'vaguely juridical'. It is also something very different from a supposed and unreasonable 'behavior *contra legem*' (against the law) rooted in ethical reasons that are exclusively valid for the individual, and therefore without any relevance for society. Conscientious

objections are one of the expressions of a human right of larger scope: freedom of conscience, which is protected by article 9 of the European Convention on Human Rights [2] (Ref. Iustel: §0000006), as well as by other international instruments [3] and by most European constitutions [4].

The relationship between conscientious objection and freedom of conscience has been affirmed by some constitutional courts [5] and, recently, by some European legislations on religious freedom, as in Portugal [6]. It has been recognized also by the European Charter of Fundamental Right of the European Union -part of the European

---

[2] Article 9(1) ECHR provides: "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".

[3] Among them, in a prominent place, the UN International Covenant on Civil and Political Rights (1966). Its art. 18(1-2) provides: "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice".

[4] The Spanish Constitution (Ref. Iustel: §0000001) specifically guarantees conscientious objection to military service (art. 30 § 2). Freedom of conscience, on the other hand, is included in the "freedom of ideology, religion and worship" protected by art. 16, according to reiterated doctrine of the Constitutional Court (see R. RODRÍGUEZ CHACÓN, *El factor religioso ante el Tribunal Constitucional*, Madrid 1992, pp. 40-41).

[5] In Spain see, especially, the decision of the Constitutional Court STC 53/1985, 11 April 1985, FJ 14.º (Ref. Iustel: §100433). The type of objection contemplated in this decision was conscientious objection to abortion.

[6] Art. 12 of the Portuguese Law on Religious Freedom (Law n.º 16/2001, 22 June 2001) explicitly guarantees the right of conscientious objection, in the following terms: "1. Freedom of conscience includes the right to object to the compliance of laws that contradict the imperative commands of one's own conscience, within the limits of the rights and duties imposed by the Constitution and under the terms of the law that may regulate the exercise of conscientious objection. 2. The commands of conscience that are considered as imperative are those whose infringement involves a serious offence to one's moral integrity and, consequently, make any other behavior as not mandatory. 3. Conscientious objectors to military service, without excluding those who also invoke a conscientious objection to civil service, have the right to a civil service system, which respects the commands of their conscience, as long as it is compatible with the principle of equality".

Constitution (Ref. Iustel: §0060465)-, whose article II-70 guarantees, in close connection, "freedom of thought, conscience and religion" and "the right to conscientious objection" [7].

Conscientious objection is, therefore, a 'normal' part of the legal order (a part, besides, of singular importance: fundamental rights) and not an exception to the legal order that would require an accommodation only when political reasons inexorably request it. Elementary as this assertion may seem, it is important to emphasize this departing point as a necessary backcloth in a matter that requires complex analysis and that, by its characteristics, is not open to simple solutions. This is especially true in the context of Western societies, two of whose most visible features are: in the political sphere, an interventionist and omnipresent State; and, in the cultural sphere, a post-modernity that reveals itself as highly permissive with regard to some ethical patterns and significantly rigid with regard to others (without providing always a clear and rational justification for that different attitude). This combination of elements is likely to produce areas of conflict in societies that tend to be more and more multi-religious [8].

II. THE LEGAL TREATMENT OF CONSCIENTIOUS OBJECTION

1. Notion of conscientious objection

The determination itself of the concept of conscientious objection is not free from problems, as demonstrated by the different positions that can be found in legal literature

[7] Art. II-70 of the European Charter provides: "1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right".

[8] The exposition that follows is necessarily brief, and bibliographical references have been reduced to a minimum (with especial emphasis on Spanish sources, which provide many interesting materials that are not always well-known abroad). We have developed our ideas more extensively in our forthcoming book R. NAVARRO-VALLS & J. MARTÍNEZ-TORRÓN, *Conflictos entre ley y conciencia*, Madrid 2006, in which we update and enlarge the views we had expressed in our previous books *Le obiezioni di coscienza. Profili di diritto comparato*, Torino 1995, and *Las objeciones de conciencia en el derecho español y comparado*, Madrid 1997. In different places of this essay we will have to refer to some others of our writings which contain broader explanations of some ideas mentioned here as well as further bibliographical or documentary references.

[9]. The main reason of those uncertainties among legal scholars is, apparently, the difficulty to distinguish this flexible concept from other neighboring, and often ambiguous, concepts -for instance, from civil disobedience. It is obvious that not every civil disobedience is conscientious objection, but sometimes the efforts to differentiate those two concepts seem to pay more attention to the words than to the facts [10].

In view of the very diverse conflicts that may arise between law and individual conscience, the most adequate attitude is, probably, to adopt a broad perspective when trying to define the general notion of conscientious objection. It can be understood as the individual's refusal, for reasons of conscience, to accept a behavior that, in principle, could be legally required, either by the law directly (legislation, regulations or judicial orders) or by a contract endorsed by the law. Thus, conscientious objections would include every conduct contrary to the law, motivated by axiological -not merely psychological- reasons, inspired in religious or non-religious beliefs, which could be aimed at different purposes: e.g. to elude the behavior demanded by the norm or the punishment established for its contravention, or even to obtain the modification of the law through the voluntary and passive acceptance of the repressive machinery [11].

It is important, in any event, to realize that this notion of conscientious objection implies two characteristics that must influence its legal treatment -at least when trying to regulate this

---

[9] Cf. R. BERTOLINO, *L´obiezione di coscienza*, in the collective volume AA.VV., *La objeción de conciencia en el ordenamiento español e italiano*, Murcia, 1990, p. 41; A. CASTRO JOVER, *La libertad de conciencia y la objeción de conciencia en la jurisprudencia constitucional española*, in "La libertad religiosa y de conciencia ante la justicia constitucional" (ed. by J. Martínez-Torrón), Granada 1998, 133 ff.; G. ESCOBAR ROCA, *La objeción de conciencia en la Constitución española*, Madrid 1993, pp. 39-44; J. MARTÍNEZ-TORRÓN, *Las objeciones de conciencia y los intereses generales del ordenamiento*, in "La objeción de conciencia" (ed. by V. Guitarte y J. Escrivá), Valencia 1993, pp. 257 ff.; L. PRIETO SANCHÍS, *La objeción de conciencia*, in I.C. IBÁN-L. PRIETO SANCHÍS-A. MOTILLA, *Curso de Derecho eclesiástico*, Madrid 1991, p. 344; M.J. ROCA, *Perfiles jurídicos de la objeción de conciencia*, in the collective volume "La objeción de conciencia", cit. supra in this same note, pp. 273-282; J. SOUSA DE BRITO, *Conscientious Objection*, in the collective volume "Facilitating Freedom of Religion and Belief: A Deskbook" (ed. by T. Lindholm, C. Durham & B. Tahzib-Lie), Leiden 2004, pp. 273 ff.

[10] On the relations between conscientious objection and civil disobedience, see L. PRIETO SANCHÍS, *La objeción de conciencia como forma de desobediencia al derecho*, in "Il diritto ecclesiastico" I (1984), pp. 3-34.

[11] See R. NAVARRO-VALLS Y J. MARTÍNEZ-TORRÓN, *Las objeciones de conciencia …*, cit. supra, in note n. 8 pp. 14-15.

social phenomenon from the perspective of the maximum possible degree of protection of human rights.

The first one is the fact that the objector finds himself in front of a serious internal conflict [12]; he has to yield either to the legal norm of the State or to the ethical norm that is invoked by his own individual conscience and that is vested as a supreme law. The immediate consequence is that there is a heavy moral burden on those persons, who are destined to choose between either disobeying the secular law or disobeying their supreme ethical rules. The former alternative entails a material punishment; the latter, a moral sanction. This is the reason why some scholars have affirmed that true conscientious objectors must be prepared to submit to the penalties established by the law it they are not afforded the requested exemption from legal duties [13]. In our opinion, this is perhaps too radical an statement, for it would mean, in practice, that every conscientious objector would have to be a sort of 'social hero'; and to require that attitude from citizens is not probably the best policy for the promotion of fundamental rights.

The second characteristic is the enormous possible variety of conscientious objections. In other words, its permanent unpredictability, which increases in proportion to society's religious and ideological pluralism [14]; and also in proportion to the constant legislator's intervention in new areas [15]. This characteristic is a consequence of the fact that

---

[12] See J.M. MARTÍ SÁNCHEZ, *La objeción de conciencia: visión de conjunto*, in "Anuario de Derecho Eclesiástico del Estado" 15 (1999), pp. 41-44. This aspect of conscientious objection has been well understood by the art. 12(2) of the Portuguese Law on Religious Freedom, cited supra, in note n. 6.

[13] See K. GREENAWALT, *Conflicts of Law and Morality*, New York 1987, p. 313.

[14] Among European legal literature, the broad panorama of possible conscientious objections that can be found in a country with a high religious pluralism, as the United States, has been well described and analyzed by R. PALOMINO, *Las objeciones de conciencia. Conflictos entre conciencia y ley en el derecho norteamericano*, Madrid 1994.

[15] To cite some recent examples that have attracted the attention of public opinion in Spain: problems of conscientious objection to participate in a jury only arise when a law imposes the peremptory obligation to accept the aleatory appointment as jury, as occurs in Spain since the 1995 Law of the Jury; moral opposition to certain types of bio-genetic experimentation acquires legal relevance when some scientific or technical practices are regulated by law and incorporated to the public health's sphere, with possible discriminatory consequences for conscientious objectors. The subject has been also widely discussed in Spanish public opinion when some judges or mayors expressed their conscientious objection to celebrate homosexual marriages, legalized in Spain in July 2005.

conscientious objection, although sometimes rooted in institutional religious beliefs, is essentially an individual phenomenon. The conscience of each person, affirming its individual autonomy, is the factor that may generate a conflict with a concrete legal obligation. This explains the difficulties to regulate conscientious objections exclusively through legislation, which would be efficient only with regard to the cases of objection that have extensively spread in society. And this explains also that the legal treatment of the problems derived from conscientious objection must be achieved through a prevalent resort to the judiciary. With or without legislative regulation of conscientious objection -even more in the latter case- only the courts can ultimately perform the individualized analysis that cases of conscientious objection demand.

2. Two basic approaches

Even at the risk of simplifying such a complex issue, we can affirm that there are two basic perspectives to understand the way the legal treatment of conscientious objection should be achieved. One is legalism and the other is the balance of interests.

The legalist perspective, frequent in the civil law tradition, departs from a double basis: the legislator is always right, and the legal system can be ultimately reduced to legislation. To say it in the words of an Italian jurist, its central axiom is that "legislation is all the law and all legislation is law" [16]. From that angle, every conflict between conscience and law -understood as statutory law- must be resolved always in favor of the latter. Any other solution -it is said- would imply a risk for legal security, a danger of 'pulverization' of the legal order, for general rules would be at the expense of each individual conscience's choices -choices that are unpredictable and not necessarily reasonable. Freedom of thought, conscience and religion is interpreted in a restrictive way, as protecting only against those laws specifically aimed at obstructing some particular religion or belief (or religion in general, although this is less likely in the European Union context). Thus, exemptions from the obligations imposed by a 'neutral' law -i.e. a law that pursues legitimate secular goals- could be granted only by the law itself. In other words, conscientious objection to a legal mandate could be alleged legitimately and successfully only when there is *interpositio legislatoris*, that is, when it has been explicitly accepted by the legislator.

In contrast, the approach of the balance of interests proceeds originally -and probably this is not just coincidental- from a conception of the law free from the prejudices of legal

[16] The original Italian wording, much more expressive, is "la legge è tutto il diritto e la legge è tutta diritto". The expression is from L. LOMBARDI VALLAURI, and is quoted by F. D´AGOSTINO, *Accoglienza alla vita in una epoca di secolarizzazione*, in the collective volume *Diritto e secolarizzatione*, Milano 1982, p. 44.

positivism; in particular, from a judge-made law as North-American law [17]. Its center of gravity is not the intangibility of statutory law but the search for the maximum possible degree of protection for freedom of religion, thought and conscience. Hence conscientious objection is not deemed as a tolerated exception to the general rule that -according to the positivist mythology- would absorb in itself the entire content of justice. On the contrary, as freedom of conscience is a constitutional value in itself, and therefore a rule, not an exception to a rule, it demands "a physiologic, and not a traumatic, recognition of conscientious objection" [18]. Conscience-based objection, accordingly, is not observed with diffidence, as an evasive attitude towards the legal system, but is analyzed, in the light of its conflict with other legal interests represented by the objected law, as the result of an attitude that "endeavors to affirm great ideals in 'minor' situations" [19].

Our position is, naturally, favorable to the balance of interests' approach, among other reasons because it is founded upon a much more precise -more realistic- analysis of facts. In effect, legalism is based, consciously or not, on a certain distortion of reality.

First, the laws usually called 'neutral' are not as neutral as they appear at first glance. It is true that they are neutral to the extent that they pursue a legitimate secular goal. But we must bear in mind that every law has an ethical foundation, more or less visible, and more or less direct, depending on the cases; after all, the law is but a series of instruments through which a society endeavors to organize itself around diverse values that are essentially ethical -and of course pre-juridical [20]. Normally, the ethical foundation of a norm corresponds to some values that are accepted by the largest part of a given society. As a consequence, that norm will not usually collide with the conscience of the majority of population, which in turn has been molded by the most influential religious or ideological ideas present in that society. But it is not surprising that the same norm causes some conflicts with the conscience of people maintaining minority religious or ideological options. In other words, neutral laws are aimed at realizing -and preserving- ethical values that are socially

---

[17] See, among European literature, J. MARTÍNEZ-TORRÓN, *Separatismo y cooperación en la experiencia jurídica norteamericana*, in "Los acuerdos del Estado español con las confesiones religiosas minoritarias", Madrid 1995, especially pp. 111 ff.; R. PALOMINO, *Las objeciones de conciencia*, cit. in note n. 14, especially pp. 28 ff.; J.I. RUBIO LÓPEZ, *La primera de las libertades. La libertad religiosa en EE.UU. durante la corte Rehnquist (1986-2005): una libertad en tensión*, Pamplona 2006, especially pp. 246-273.

[18] R. BERTOLINO, *L'obiezione di coscienza 'moderna'. Per una fondazione costituzionale del diritto di obiezione*, Torino 1994, p. 93.

[19] Ibid., p. 35.

[20] See J. MARTÍNEZ-TORRÓN, *Religión, derecho y sociedad*, Granada 1999, pp. 225 ff.

recognized as civic values and that often have a religious origin. To discard a priori, without further consideration, the possibility to argue conscientious objection against neutral norms implies, de facto, a potential discrimination against religious minorities that do not share the underlying values [21].

In the second place, the idea of the automatic prevalence of neutral laws over freedom of conscience is based upon an inaccurate analysis of the juridical interests that are in the balance. In brief, legalist analysis can be described according to the following sequence: free conscience is naturally a legitimate interest, but it is an individual or private interest, and therefore it must yield in front of the public interest represented by the law. This analysis is mistaken. First, freedom to live according to one's conscience is not merely an individual or private interest. From the State's perspective, as freedom of conscience is a fundamental right, its protection is a public interest of the highest rank. This applies to all cases, independently from the actual social relevance -great or minor- of a certain expression of the exercise of freedom of conscience. On the other hand, in cases of conscientious objection what it is really at stake is not the public interest represented by a law, for normally the objector does not seek the derogation of that law but only to be exempted from it [22]. The actual public interest in conflict with freedom of conscience is rather the interest in maintaining the application of a norm in the hundred per cent of cases, without any exception whatsoever.

From this angle, the analysis of conflicts between law and conscience is completely different from the one performed by the legalist approach previously described. We do not face a situation of private interest versus public interest, but rather two public interests in confrontation; and one of them is of the maximum category, for it is rooted in the exercise of a constitutional right, which is universally included in the international documents for the protection of human rights. We must still add that, in principle, the guarantee that the legal system provides for freedom of conscience does not discriminates between the diverse particular ethical values that inspire each individual conscience, for the same reason that the State does not make the protection of freedom of expression depend on which are the ideas expressed by each citizen. These fundamental rights are not aimed at defending some particular beliefs or opinions but at safeguarding certain spheres of autonomy for the

---

[21] See A. OLLERO TASSARA, *Derechos humanos y metodología jurídica*, Madrid 1989, p. 199.

[22] See F. ONIDA, *Contributo a un inquadramento giuridico del fenomeno delle obiezioni di coscienza*, in "Il diritto ecclesiastico" (1982), p. 229.

individual -and sometimes also for groups- which constitute necessary elements of democratic pluralism, and in which any interference must be carefully justified [23].

In the third place, to affirm that the system of balance of interests entails a danger of 'pulverization' of the legal order is, in the best of cases, a clear overstatement. We are not defending an automatic predominance of conscientious objection in opposition to the automatic predominance of neutral laws. As all fundamental rights, the exercise of freedom of conscience is subject to limitations, which, in the European countries are enumerated in article 9(2) of the European Convention on Human Rights [24]. The important thing is to analyze precisely the juridical interests in conflict to determine, *ad casum*, which of them must prevail. No matter how neutral a legal rule appears prima facie, its imposition against the dictates of free conscience is a restriction of a fundamental right. And, according to article 9(2) of the European Convention, the only legitimate restrictions to freedom of thought, conscience and religion are those which, being "prescribed by law", can be considered "necessary in a democratic society". That is, those measures which, according to the case-law of the Strasbourg Court, respond to a "pressing social need" [25].

For this reason, in the end, the balance of interests approach seeks to compel the State to clearly justify that the application of a legal rule without any fissures at all is strictly *necessary*, and that it is also *necessary* to deny any exemption to the people who, in

---

[23] See, in this regard, the European Court of Human Right's decision *Kokkinakis v. Greece*, 25 May 1993, § 31.

[24] Article 9(2) ECHR provides: "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". On the question of limitation on freedom of thought, conscience and religion, see the essays of different authors -from Europe and United States- collected in the monographic issue of *Emory International Law Review* 19 (2005).

[25] This doctrine has been reiterated by the European Court of Human Rights in numerous decisions since *Handyside v. United Kingdom*, 7 December 1976 (see especially § 49). With specific reference to religious freedom, see *Kokkinakisv. Greece*, 25 May 1993, § 47. For further details on this subject, see J. MARTÍNEZ-TORRÓN, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, in "Emory International Law Review" 19 (2005), pp. 587-636. For a comment on the significant *Kokkinakis* decision, see J. GUNN, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in "Religious Human Rights in Global Perspective" (ed. by J.D. van der Vyver & J. Witte), Boston 1996, pp. 305-330.

exercise of their freedom of conscience, allege serious moral scruples to abide by that rule [26].

It is important to add that, in the balancing process that must characterize the analysis of cases of conscientious objection, judges must avoid too simple solutions in terms of a mere response of 'yes' or 'no' to the objectors' claims. Sometimes, the crucial point consists in interpreting a legal rule in a way that permits the maximum possible adaptation to the moral duties alleged by objectors. This idea has been well understood by Canadian courts [27], in turn inspired by some U.S. Supreme Court decisions between the early 1960s and 1990 [28]. This judicial doctrine maintains that, in the balancing process, we must counterweight the two juridical interests in confrontation -protection of freedom of conscience versus the interest in keeping the application of a legal rule without any exception- taking into account two essential elements [29]. On the one hand, the State is obliged to seek an accommodation of the rule to the citizens' duties of conscience, except when it would cause an 'undue hardship' for other citizens or institutions. On the other hand, when freedom of conscience must yield to other legal interests, the State is required to apply the law in the way that is

---

[26] This was indeed the purpose of a federal law passed in the United States in 1993, under Clinton's presidency, later declared unconstitutional by the Supreme Court as contrary to the "establishment clause" of the Constitution (see, among the Spanish liteature, I. BRIONES, *La conciencia religiosa en la Religious Freedom Restoration Act de 1993 y la jurisprudencia norteamericana*, in "La libertad religiosa y de conciencia ante la justicia constitucional", cit. in note n. 9, pp. 385 ff.). Unfortunately, the doctrine of the European Court of Human Rights, perhaps afraid of opening an unpredictable Pandora's box, has not always been clear on these issues. The most significant cases are *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, *Efstratiou v. Greece*, 18 December 1996, and *Valsamis v. Greece*, 18 December 1996 (the text of the two latter decisions is almost identical, as almost identical were the facts of both cases). See J. MARTÍNEZ-TORRÓN & R. NAVARRO-VALLS, *The Protection of Religious Freedom in the System of the Council of Europe*, in the collective volume "Facilitating Freedom of Religion and Belief…, cited in note n. 9, pp. 230-236.

[27] Among Spanish bibliography, see the essays by E. RELAÑO PASTOR, *Multiculturalismo y libertad religiosa en Canadá*, in "Anuario de Derecho Eclesiástico del Estado" 15 (2000) pp. 63-86; and *El pluralismo religioso: el modelo canadiense*, in "Revista General de Derecho Canónico y Derecho Eclesiástico del Estado" 1 (2003), pp. 1-73 (www.iustel.com). We must note that the Canadian Charter of Rights and Freedoms not only guarantees freedom of conscience and religion, but also recognizes multiculturalism as an integral part of Canadian social identity (cf. arts. 2(a) and 27 of the Charter).

[28] See infra, note n. 32.

[29] Vid. R. PALOMINO, *Las objeciones de conciencia*…, cit. en nota n. 14, pp. 40-44.

least harmful for the objector's conscience -this has led to the judicial doctrines of the 'least restrictive means' in USA, and of 'minimal impairment' in Canada [30].

We could still add a fourth reason of legislative policy against strictly legalist positions in this matter. Undoubtedly, conscientious objectors refuse to abide by certain legal provisions, but normally they are persons of high moral standards, a characteristic that is a requirement to be a good citizen. This high concept of morals is precisely the cause of their scruples of conscience and the origin of their personal drama. They find it impossible, in a particular case, to harmonize their double loyalty -to their conscience and to society- and endeavor to obtain the exemption of a legal obligation that makes possible to keep that harmony. Conscientious objectors are usually good citizens, and want to continue to be deemed as such. To apply the legal rule with all rigor to them without a powerful reason is not, probably, the best policy.

3. Conscientious objection and State neutrality

The type of analysis that we defend here is based upon the notion that the *rule of law* is at the same time the *rule of rights* [31], with the consequence that public authorities are bound to facilitate a reasonable accommodation to citizens' duties of conscience, as far as this does not impair a predominant public interest [32]. Naturally, the State's responsibility of

---

[30] A recent application of this doctrine by the Supreme Court of Canada can be seen in the decision *Multani v. Commission scolaire Marguerite Bourgeoys*, 2006 SCC 6, J.E. 2006-508. The English and French versions of the decision, commented by S. CAÑAMARES, can be found in "Revista General de Derecho Canónico y Derecho Eclesiástico del Estado" 11 (2006) – www.iustel.com.

[31] The expression is from R. BERTOLINO, *L'obiezione di coscienza 'moderna'*, cit. supra, note n. 18, p. 77. The original Italian wording is much more expressive: a *stato di diritto* is also a *stato di diritti*.

[32] This position gained momentum in the case law of the U.S. Supreme Court especially since the case *Sherbert v. Verner*, 374 U.S. 398 (1963), related to conscientious objection to work on Saturdays (in the Spanish literature, an analysis of the case can be found in J. MARTÍNEZ-TORRÓN, *Las objeciones de conciencia en la jurisprudencia del Tribunal Supremo norteamericano*, in "Anuario de Derecho Eclesiástico del Estado" 1 (1985), pp. 436 ff., R. PALOMINO, *Objeción de conciencia y relaciones laborales en el Derecho de los Estados Unidos*, in "Revista Española de Derecho del Trabajo" 50 (1991), p. 908). Since 1990, with the case *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court began to revise its own doctrine, which has since then experienced an irregular evolution (for some comments on the transcendental *Smith* decision, from different perspectives, see M.W. MCCONNELL, *Free Exercise Revisionism and the Smith Decision*, en "University of Chicago Law Review" 57 (1990), pp.1109 ff.; D. LAYCOCK, *The Remnants of Free*

accommodation does not depend on the 'reasonability' of a certain objection in the context of a given society, nor does it depend either on the sympathy, or fear, that some choices of conscience may provoke in public opinion. It is worth stressing it, for sometimes the study of the questions raised by freedom of conscience is carried out from an emotional rather than from a juridical perspective, with an excessive emphasis on the affinity, or lack of affinity, that the observer may have with the objector's position. Even, sometimes, what should be a strictly legal analysis ends up metamorphosing into an ideological or political battlefield. Thus, we may find the paradox that the same people who passionately defend objection to military service or to pay the taxes corresponding to military expenses reject, with analogous fierceness, the right of objection to abortion, euthanasia or certain activities of biogenetic experimentation.

In our opinion, the legal analysis of each case of conscientious objection, according to a balancing process of the interests in conflict, must be performed independently from the specific content of the beliefs invoked by the objector -i.e. independently from whether these beliefs are 'reasonable' or not, typical or atypical, strictly individual or endorsed by the institutional tenets of a church. This 'aseptic' analysis is required by the ethical neutrality of the State, which entails refraining from any judgment on what is morally correct, except in those questions relating to the ethical principles that found the legal order, especially the constitutional order. This 'ethical relativism' of the State, essential to the maintenance of pluralism, has been affirmed by the European Court of Human Rights: "but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or

---

Exercise, en "Supreme Court Review" (1990), pp.1 ff.; W.P. MARSHALL, *In Defense of* Smith *and Free Exercise Revisionism*, en "The University of Chicago Law Review" 58 (1991), pp.308 ff.; M.A, GLENDON & R.F. YANES, *Structural Free Exercise*, cit., p.532; in Europe, see F. ONIDA, *La libertà religiosa nella giurisprudenza della Suprema Corte americana dell'ultimo decennio*, en "Il Diritto Ecclesiastico" (1993), pp.313 ff.). After *Smith*, a federal law (*Religious Freedom Restoration Act*, 1993), voted in Congress by a large and unusual majority, attempted to reinstate the previous state of things, but a substantial part of it was promptly declared unconstitutional by the Supreme Court in the case *City of Boerne v. Flores*, 521 U.S. 507 (1997). This was not, however, the end of the legislative initiatives at the federal level to guarantee religious freedom against possible interferences by public authorities, as demonstrated by the *Religious Land Use and Institutionalized Persons Act* passed in 2000. See in this respect J.I. RUBIO LÓPEZ, *La nueva protección de la libertad religiosa en Estados Unidos: la "Religious Land use and Institutionalized Persons Act" (RLUIPA) del 2000*, in "Revista General de Derecho Canónico y Derecho Eclesiástico del Estado" 10 (2006) – www.iustel.com.

the means used to express such beliefs are legitimate" [33]. This sentence reiterates, in a different wording, what the United States Supreme Court had expressed, more broadly, almost sixty years before: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" [34].

Similar reasons explain that protection of freedom of conscience must be the same when the objector's beliefs are religious and when they are not. It is universally recognized that freedom of conscience is a primarily individual right [35] that comprises positively religious attitudes as well as those inspired in atheistic or agnostic ideas [36]. The fact that a particular conscientious objection is endorsed by an institutional religious doctrine does not confer by

---

[33] *Hasan and Chaush v. Bulgaria*, 26 October 2000, § 78. The case was related to the State intervention in some disputes between Islamic communities for the election of their religious leaders.

[34] *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943). This case was related to Jehovah's Witnesses' conscientious objection to participate in the flag salute ceremony in public schools. For further details, see J. MARTÍNEZ-TORRÓN, *Las objeciones de conciencia*…, cit. in note n. 32, pp. 429-435.

[35] Sometimes, however, it is possible to speak of 'institutional conscientious objection'. The most frequent cases relate to the opposition of Catholic hospitals to the practice of voluntary abortions when these are decriminalized. See R. NAVARRO-VALLS, *La objeción de conciencia al aborto: derecho comparado y derecho español*, in "Anuario de Derecho Eclesiástico del Estado" 2 (1986), pp 284-285 and 289.

[36] See, in more detail, J. MARTÍNEZ-TORRÓN, *La protección internacional de la libertad religiosa*, in the collective treatise "Tratado de Derecho Eclesiástico", Pamplona 1994, pp. 186-193. The Committee of Human Rights' General Comment on freedom of thought, conscience and religion (art. 18 of the International Covenant on Civil and Political Rights) clearly indicates in its § 2: "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed". (General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/93; CCPR/C/21/Rev.1/Add.4, General Comment No. 22). Similar affirmations can be found in the case law of the Strasbourg Court. For instance, when, in the case *Kokkinakis v. Greece*, 25 May 1993, § 31, affirms: "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it".

itself an extra protection with regard to atheistic or agnostic objectors -although it can be taken into account as an element of evidence to prove the sincerity of the objector (i.e. to prove that conscientious objection is not alleged fraudulently with the mere intention to elude a legal duty).

4. Utility and limits of legislative regulation of conscientious objection

From our previous affirmations we can infer that, from the perspective of balance of interests, an explicit legislative recognition of each type of conscientious objection is not necessary, strictly speaking, for their juridical protection. As conscientious objections are an expression of the right to freedom of conscience, enshrined by the European Convention on Human Rights and usually also by national constitutions in European countries, the *interpositio legislatoris* is not indispensable and the courts are entitled to provide for the adequate protection of singular cases of objection [37].

However, if the possibility -and the necessity- of judicial protection of conscientious objections is patent, it is also indubitable the utility of their legislative regulation in a large part of the European continent, still permeated by a tradition of legalist positivism. This seems especially true if we consider that, in many European countries, a remarkable part of the courts are reluctant, in practice, to apply directly the rules of the Constitution or of the European Convention on Human Rights when deciding cases concerning fundamental freedoms that are not specifically regulated by statutory law. A specific legislative endorsement would grant many judges a 'sense of security' that they are unable to find either in their respective constitutions or in the European Convention. Thus, the legal status of conscientious objectors would certainly be more guaranteed through

[37] In Spain this idea was clearly expressed by the Constitutional Court when it decided on a motion of unconstitutionality against a draft law decriminalizing some types of voluntary abortions. The Court affirmed that the fact that the law did not include a specific clause to guarantee the rights of conscientious objection to abortion -as was usual in other European legislations- did not make the law unconstitutional, for "the right to conscientious objection … exists and can be exercised independently from the fact that this legal clause has been included or not. Conscientious objection forms part of the content of the fundamental right to freedom of ideology and religion recognized in article 16(1) of the Constitution; and, as this Court has repeatedly remarked, the Constitution can be directly applied [by the courts], especially in the area of fundamental rights" (Constitutional Court, STC 53/1985, 11 April 1985, FJ 14). On the case law of the Constitutional Court in this area, see, among the abundant Spanish literature, A. CASTRO JOVER, *La libertad de conciencia y la objeción de conciencia*…, cit. in note n. 9.

an explicit recognition by the legislator, which would correct the negative effects of a possible legalist attitude on the part of some courts.

We must not forget, in any event, that judges' responsibility in this area can not be substituted by legislation, which has its limits. First, legislation is appropriate to regulate only those types of conscientious objection that have reached a certain social spreading, but the rest of cases will have to be solved by the courts according to the general rules on fundamental freedoms. Second, the legislator tends to 'be late' -until a particular type of objection gets to be regulated by statutory law, many conflicts have already arrived to the courts, which must provide a just solution. Not rarely judicial experience is precisely the factor that persuades the legislator of the necessity of a statute and delineates its basic principles. In addition, even when a type of objection has already been the object of a specific legislation, the individualized analysis of each singular case continues to be necessary, as demonstrated by the abundant litigation on, e.g., objection to military service, abortion, jury, etc. [38]. Also in this area it is true the old idea -so well-known and so often forgotten- that statutes can not foresee all the particular circumstances of every case.

The issue of legislative recognition of objections leads us to consider a significant question: up to what extent a law that accepts a particular conscientious objection as legitimate must establish at the same time a substitutive service or activity. In our opinion, substitutive service is not, as such, essential to the legal acceptance of conscientious objection. This is something that belongs to the logic of fundamental rights, which can not place an extra legal burden on the citizens who choose to exercise them in a certain direction. Substitutive service makes sense when it is necessary to guarantee two objectives that are often in close relationship: the protection of the principle of equality and the prevention of legal fraud. That is, when it is imposed to objectors in order to make their juridical position equal to that of the rest of the citizens, or in order to dissuade potential pseudo-objectors from alleging inexistent scruples of conscience to get rid of a legal obligation. Thus, substitutive service may be efficient with regard to conscientious objection to military service or to the payment of social security fees [39]; but it seems

---

[38] See, in this regard the corresponding chapters of the books mentioned in note n. 8. See also the chapters on conscientious objections (chapters 7.9.1 through 7.9.9) in the collective textbook *Manual de Derecho Eclesiástico del Estado* (on line), available in www.iustel.com.

[39] In the Netherlands, for instance, conscientious objectors to pay social security fees, such as members of some churches of Mennonite origin, can benefit from a legal exemption, but must pay an equivalent amount as an extra income tax, to prevent legal fraud by pseudo-objectors. See R. NAVARRO-VALLS & J. MARTÍNEZ-TORRÓN, *Las objeciones de conciencia*…, cit. in note n. 11, pp. 229-

inappropriate when objectors do not obtain a privileged legal position with regard to non-objectors, as occurs in objection to abortion [40], or in cases of legal duties imposed in an aleatory manner, as participation in a jury or in electoral commissions [41].

III. THE DRAFT TREATIES BETWEEN THE SLOVAK STATE AN RELIGIOUS DENOMINATIONS ON CONSCIENTIOUS OBJECTION

The ideas expressed in the previous pages permit us to provide a brief opinion on the draft agreements between the Slovak State and religious denominations [42]. The starting point of these initiatives is article 7 of the 2000 Basic Agreement between the Slovak Republic and the Holy See, which recognizes the right of conscientious objection according to the principles of the Catholic Church and remits its detailed regulation to a further specific agreement [43]. This article generated a draft agreement between Slovakia and the Holy See, which has experienced diverse modifications in the last months and which gave origin to a twin agreement between the Slovak State and the other registered

---

230. Cf. also the information available at: http://www.european-voice.com/downloads/NL_New_Health_Insurance_System.pdf.

[40] See R. NAVARRO-VALLS, *La objeción de conciencia al aborto*, cit. in note n. 35, especially pp. 266-269.

[41] In Spain, for instance, participation in a jury is compulsory when a persona has been selected by draw and does not have a legal excuse or incompatibility; this has created some problems with Catholic clergymen and members of religious orders and with Jehovah's Witnesses -for very different reasons en each of these cases. On the other hand, the law regulating elections in Spain impose a strict duty to participate in the electoral commissions controlling voting in elections day when a persona has been selected by draw and is not excused by the corresponding electoral board of his area; refusal to comply with this duty is punished as "electoral crime". See J. MARTÍNEZ-TORRÓN, *Ley del jurado y objeción de conciencia*, in "Revista Española de Derecho Constitucional" 48 (1996), pp. 119-143.

[42] The text of these agreements, together with a brief and interesting historical explanation by Michaela Moravcikova, can be found in: http://eurel.u-strasbg.fr/ (under the headings Slovakia – current debates– April 2006).

[43] Article 7 of the Basic Agreement provides: "The Slovak Republic recognizes to everybody the right of conscientious objection according to the moral and doctrinal principles of the Catholic Church. The extent and conditions for the application of this right will be defined in a specific agreement between the two High Parties" (authors' translation).

churches and religious communities [44] -aimed, reasonably, at granting a similar legal status in this area to all registered churches.

1. A novelty that is not so new

These two draft agreements constitute a novelty in comparative law as far as they would be the only specific agreements between State and religious denominations with the exclusive purpose of guaranteeing the right of conscientious objection according to some institutional religious doctrines. However, the idea of providing specific protection to religious conscientious objection in the State legislation, or in the context of broader agreements between State and religions, is not completely new. On the contrary, there are some significant precedents in comparative law.

We can mention, for instance, some examples in Spanish law. The 1976 Agreement between the Spanish State and the Holy See recognizes the conscientious objection of Catholic priests in a particular case: the right to keep silence, even if asked in a criminal trial, on the communications they have heard in the sacrament of confession [45] -i.e. the so-called clergy-communicant privilege in the common law systems, which has an ancient history in the Occident [46]. Similar provisions can be found, with regard to their religious leaders, in the three agreements signed in 1992 by the Spanish State and, respectively, the Protestant, Jewish and Islamic federations [47]. These same 1992

---

[44] In total, ten different Christian churches and the union of Jewish communities. The text of this draft is almost identical to the one of the draft agreement with the Catholic Church, with the natural adaptations.

[45] See Agreement between the Holy See and the Spanish State, 28 July 1976, art. II(3.º).

[46] For a rigorous and interesting analysis of this subject in Spanish and comparative law, see R. PALOMINO, *Derecho a la intimidad y religión. La protección jurídica del secreto religioso*, Granada 1999.

[47] See article 3(2) of the agreements of 10 November 1992 between the Spanish State and the Evangelical Federation (FEREDE), the Jewish Federation (FCI) and the Islamic Federation (CIE). This rule, with reference to all religious ministers, was already contemplated since the 19th century in the Spanish law on criminal procedure (cf. art. 417 of the Ley de Enjuiciamiento Criminal). On the cooperation agreements of the Spanish State with Protestants, Jews and Muslims, see generally J. OTADUY, *Los Proyectos de acuerdo de cooperación con las Iglesias evangélicas y las comunidades israelitas*, in "Quaderni di diritto e politica ecclesiastica" (1991-1992/2), pp. 138 ff.; J. MARTÍNEZ-TORRÓN, *Separatismo y cooperación en los acuerdos del Estado con las minorías religiosas*, Granada 1994; J. MANTECÓN, *Los acuerdos del Estado con las confesiones acatólicas*, Jaén 1995; the collective volume *Acuerdos del Estado español con confesiones religiosas minoritarias* (ed. by

agreements contain some provisions related to conscientious objections in connection with religious duties of sabbatical rest (in the area of labor contracts, students' examinations at public schools and public examinations for the selection of civil servants), and also in connection with religious dietary prescriptions of people confined in military, penitentiary or educational centers. We could even mention that these agreements were criticized by scholars because of the scarce protection they provided to these types of conscientious objection, when we compare it with the equivalent provisions, e.g., of the Italian *intese* between State and religious denominations [48].

Thus, the draft agreements of the Slovak state on issues related to conscientious objection follow the path of other precedents in Western comparative law and constitute a step forward in the same direction, namely the guarantee of a certain expression of freedom of conscience. From this perspective, it is natural that the first impression they generate has to be a positive one. Therefore, we could not help our perplexity when reading the Opinion n.º 4-2005 (14 December 2005) written by the European Union Network of Independent Experts on Fundamental Rights on the draft agreement with the Holy See [49]. The reason is that this text, since the beginning, emphasizes the possible problems that this agreement could create for the protection of other alleged fundamental rights while ignoring the possible benefits that it could produce for the guarantee of freedom of conscience, which is its primary objective.

V. Reina & M.A. Félix), Madrid 1996; D. GARCÍA-PARDO, *El sistema de acuerdos con las confesiones minoritarias en España e Italia*, Madrid 1999; and the collective volume *Los Acuerdos con las confesiones minoritarias. Diez años de vigencia*, Madrid 2003.

[48] See J. MARTÍNEZ-TORRÓN, *Diez años después. Sugerencias sobre una posible revisión de los Acuerdos de 1992 con las Federaciones evangélica, israelita e islámica*, in the collective volume "Los Acuerdos con las confesiones minoritarias…", cited in the previous note, pp. 120-131; J. MANTECÓN, *Los acuerdos del Estado con las confesiones acatólicas* (1995), pp. 65-69. Article 3 of the *intesa* (agreement) of the Italian State with the Union of Hebraic Communities in Italy (1989, modified in 1996), recognizes the right to observe the sabbatical rest to the Jews working in the public or in the private sector. A similar provision is contained in article 17 of the *intesa* with the Union of Seventh-Day Adventist Churches (1988, modified in 1996). Article 6 of the *intesa* with the Hebraic Communities guarantees to the Jews in the military, in hospitals or in penitentiaries the right to observe their religious dietary rules.

[49] We will comment briefly on this opinion in the next section of this paper. Its text can be found in the source mentioned in note n. 49; also in the official web pages of the Network: http://ec.europa.eu/justice_home/cfr_cdf/index_fr.htm.

2. The draft agreements deserve a positive judgment

This positive first impression that the drafts deserve is reinforced by two factors.

One of them is the drafts' basic approach, as materialized in article 2 of the text. Its purpose is not to oppose to any other fundamental right, but merely to protect freedom of conscience -which is a fundamental right of utmost importance- in connection with other universal human values, such as human life and dignity, family or marriage. In this respect, it is difficult to find anything objectionable in the drafts' approach, especially when we consider that articles 5 and 6 exclude that the right of conscientious objection can be exercised in an abusive manner or against the Slovak Republic's legal order. Quite the contrary, the aim of these drafts is precisely to insert conscientious objection into the Slovak legal system to facilitate the solution of individual cases that may arrive to the courts and strengthen legal security in this area.

The second factor is the natural connection of these drafts with the atmosphere of cooperation between States and churches that is characteristic of the European Union. As has been recently remarked [50], the area of law and religion is not, and must not be, an exception to the increasing trend to seek consensus, and voluntary coordination of interests, between the State and social forces. This tendency is noticeable in the high percentage of European Union member countries that have a system of concordatarian relations with the Catholic Church -and sometimes also with other religious communities- and in the fact that all EU members, with different nuances, have systems of non-covenantal cooperation with institutionalized religions [51]. The notion of mutual cooperation between State and churches applies as well to the constitutional environment, where areas of common interest can be identified -as obviously occurs in the case of freedom of conscience. For this reason, article I-52(3) of the European Constitution extends to churches the same rule stated by article I-47(2) when defining the principle of participatory democracy: the European Union "shall maintain an open, transparent and regular dialogue with representative associations and civil society". With

[50] See A. HOLLERBACH, *Religion et droit en dialogue: l´élément contractuel dans la coopération entre l'État et les communautés religieuses*, in "Religion and law in dialogue: covenantal and non-covenantal cooperation between State and religion in Europe" (ed. by R. Puza & N. Doe), Leuven 2006, pp. 285 ff.

[51] A recent description and analysis of this European panorama can be found in the collective volume *Religion and law in dialogue*…, cited in the precedent note.

a difference in favor of the particular case of churches -article I-52(3) explicitly recognizes "their identity and their specific contribution" [52].

A more detailed analysis of the draft agreements reveals other positive aspects of their text. Among them, we can mention, briefly, the following.

Article 3(2) reserves the application of the right to conscientious objection only to serious cases of incompatibility between one's own conscience and certain activity that is in principle obliged by law. This clarification is interesting if we consider that, according to the Strasbourg jurisprudence, the term "practice", as utilized by article 9 of the European Convention on Human Rights, does not necessarily include each and every act motivated or influenced by a religion or belief [53]. The draft agreements do not endeavor to grant civil effect to the entire moral doctrine of the Catholic Church and of the other registered churches in every aspect of life. They limit conscientious objection to cases of strict incompatibility between law and conscience, so that these cases can be understood as actual interferences with freedom of conscience, which need to be justified according to article 9(2) of the European Convention.

Article 4 enumerates the types of conscientious objection included in the right protected by the agreements. All of them are rooted in the moral doctrine of the Catholic Church, but can be often found also in the doctrines of the other registered churches. They do not seem to raise, as such, particular problems to their acceptance. Objection to military service has had the support of international law and institutions for many years [54]. Conscientious objections in the area of labor law and other employment relationships has a long history of protection in some countries as United States or Canada, and have been also endorsed by some agreements between the Italian State and religious communities

---

[52] This aspect has been emphasized by A. HOLLERBACH, *Religion et droit en dialogue*…, cited in note n. 50, pp. 295-296.

[53] This doctrine was repeatedly stated by the European Commission of Human Rights -when it existed, before Protocol No. 11 to the European Convention entered into force in November 1998- and later assumed by the European Court. The first decision of the European Commission in this regard was *Arrowsmith v. United Kingdom,* Rep. Com. 7050/75 (in 19 "Decisions and Reports" 19-20); the case referred to a British pacifist sentenced to a term of imprisonment for having distributed illegal leaflets among English soldiers in Northern Ireland. With regard to the Court's decisions, see *Kalaç v. Turkey*, 1 July 1997, § 27; *Hasan and Chaush v. Bulgaria*, 26 October 2000, § 60.

[54] For further details, see J. MARTÍNEZ-TORRÓN, *La objeción de conciencia en el Derecho internacional*, in "Quaderni di Diritto e Politica Ecclesiastica" (1989/2), pp. 149 ff.

[55]. The same can be affirmed with regard to the area of education, which counts, in addition, with the support of article II-74(3) of the European Constitution [56], article 2 of the First Protocol to the European Convention on Human Rights [57] and some decision of the European Court [58]. Objections in the area of healthcare, as far as they touch issues that are highly controversial in our societies, can not be considered, as such, unreasonable. For instance, experiments in the field of bio-genetics are the subject of intense and

---

[55] With regard to the U.S., see R. PALOMINO, *Objeción de conciencia y relaciones laborales en el Derecho de los Estados Unidos*, in "Revista Española de Derecho del Trabajo" 50 (1991), pp. 901-930; with regard to Canada, see the essays by E. RELAÑO cited in note n. 27. The relevant provisions of the Italian *intese* or agreements are cited in note n. 48.

[56] Article II-74(3) of the European Convention provides: "The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right".

[57] Article 2 of the First Protocol provides: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

[58] *Campbell & Cosans v. United Kingdom*, 25 February 1982 (objection to corporal punishment in school). However, the doctrine of the European Court is all but clear in this point, as demonstrated by *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, 7 December 1976 (objection to sex education in public schools), and by the more recent decisions on Islamic headscarf cases: *Dahlab v. Switzerland,* decision on the admissibility of App. No. 42393/98 (ECtHR, 15 February 2001; *Leyla Şahin c. Turquía*, 29 June 2004 (Chamber decision) and 10 November 2005 (Grand Chamber decision). On the latter decisions, which have raised an intense scholarly debate in Europe, see S. CAÑAMARES ARRIBAS, *Libertad religiosa, simbología y laicidad del Estado*, Pamplona 2005, p. 179 ff.; E. RELAÑO PASTOR & A. GARAY, *Leyla Sahin contra Turquía y el velo islámico: la apuesta equivocada del Tribunal Europeo de Derechos Humanos. Sentencia del TEDH de 10 de noviembre de 2005*, in "Revista Europea de Derechos Fundamentales" 6-2.º semester (2005), pp. 213-238; N. LERNER, *How wide the margin of appreciation? The Turkish headscarf case, the Strasbourg court, and secularist tolerance*, in "Willamette Journal of International Law and Dispute Resolution" 13 (2005), pp. 65-85; J. GUNN, *Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights*; T. LINDHOLM, *The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: A Critical Assessment in the Light of Recent Case Law (Leyla Sahin v. Turkey, 29 June 2004)*; I. PLESSNER, *The European Court on Human Rights between fundamentalist and liberal secularism*; the three latter essays can be read in the Internet site http://www.strasbourgconference.org/papers.php.

heated debates, among scientists and jurists as well as in public opinion, and we are far from reaching a universally accepted agreement on these issues. Significantly, the efforts to protect conscientious objection in this delicate area have not come exclusively from churches, as demonstrated by some initiatives promoted by left-wing political forces [59]. And, when analyzing objection to abortion, we must not forget that -at least in Europe- the so-called 'legal' abortions are but typified situations in which voluntary abortions -interruptions of a human life in process of development- have been decriminalized, i.e., exempted from the normal criminal rules that impose a punishment for these acts; this is probably one of the reasons why most laws decriminalizing abortion include a specific clause for the protection of conscientious objectors [60].

In any event, we should not lose sight of a fundamental notion that was mentioned before. In Western democracies, we accept the right of conscientious objection not because we agree with the position of objectors, or because we think that their ideas are 'reasonable', but because we understand that certain activities obliged by law imply a moral drama for some citizens. Therefore, we try our best to find solutions in which freedom of conscience can be reconciled with other legal interests in particular cases; and, when freedom of conscience must yield, we try to find the least restrictive alternatives for objectors' moral duties [61].

3. The draft agreements and individual positions on moral issues

On the other hand, it is important to realize that these agreements, once they become part of the legal order of the Slovak Republic, will not exhaust the possibilities of conscientious objection of Catholics and of the faithful of the other recognized religions. It is natural that churches accentuate the institutional aspects of conscientious objection, i.e., that they look at conflicts between conscience and law from the perspective of their official moral doctrine -as they do in article 3 of the draft agreements. But the State's

---

[59] For instance, in Spain, in 1997, the left-wing trade union *Comisiones Obreras* -of communist orientation- presented a proposal of law on "conscientious objection in scientific issues", with the aim of guaranteeing objection, on moral grounds, "to participate directly in activities or interventions that include a research or pharmacological action on living beings", as well as objection to perform "experiments in the area of biotechnology or genetic engineering". The right to conscientious objection would be granted to physicians, researchers, nurses or medical assistants, technicians and students.

[60] See R. NAVARRO-VALLS, *La objeción de conciencia al aborto*…, cit. in note n. 35, pp. 257 ff.

[61] See supra, notes n. 27 to n. 30 and corresponding text.

perspective has to be different, and can not consider, for instance, that Catholics' conscientious objection would be justified only when it is endorsed by the official doctrine of the Church [62]. Conscientious objection is a consequence of the exercise of an individual right. For the State's legal order, the conscience of each citizen has a value in itself and not because it is consistent with the dictates of the Catholic Church or of any other religious denomination. The endorsement of a clear institutional doctrine in certain moral questions can serve as proof of the sincerity or of the coherence of the alleged conscientious objection, but it does not make this objection more worthy of protection.

It useful to draw attention to this point, for general moral rules can be adapted by the individual conscience in particular cases in diverse ways. Thus, a Catholic could consider himself freed from some generally binding moral rules in order to avoid conflict with a civil legal obligation. But the opposite could also occur, i.e. that individual conscience detects an inevitable conflict of duties -moral obligation versus civil legal obligation- where official Catholic rules are perhaps more flexible. This is not a mere hypothesis. In the United States, one of the significant cases decided by the Supreme Court on objection to military service had a practicing Catholic as protagonist [63], and it is well known that the Catholic Church does not have an institutional opposition to the existence of the army or of compulsory military service.

When there is a discrepancy between individual conscience and 'institutional conscience', the State's law must recognize that the former is prevailing, even when the individual's position is clearly divergent from the official doctrine of his church. Heterodoxy can be argued in the inside of a church's organization, but in the realm of the State's legal system the position adopted by the individual in the exercise of a fundamental right is what actually counts. This does not make superfluous that the State law explicitly recognizes conscientious objections grounded on the formal moral rules of some churches -as the draft agreements of the Slovak Republic do. This sort of recognition is useful to facilitate the allegation and proof of conscientious objections on the part of those individuals that are in the situations described by the law.

---

[62] See J. MARTÍNEZ-TORRÓN, *Las objeciones de conciencia de los católicos*, in "Cuestiones vivas de Derecho matrimonial, procesal y penal canónico. Instituciones canónicas en el marco de la libertad religiosa" (ed. by R. Rodríguez Chacón & L. Ruano Espina), Salamanca 2005, pp. 335 ff.

[63] The decision was *Gillette v. United States*, 401 U.S. 437 (1971), in which the Supreme Court also decided the twin case *Negre v. Larsen* (Negre was the Catholic). For a comment to this decision in the Spanish legal literature, see J. MARTÍNEZ-TORRÓN, *La objeción de conciencia en la jurisprudencia del Tribunal Supremo norteamericano*, cited in note n. 32, pp. 415-417; and R. PALOMINO, *Las objeciones de conciencia*, cit. in note n. 14, pp. 74 ff.

IV. THE SURPRISING APPROACH OF THE OPINION WRITTEN BY THE E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS

We are fully aware that the ideas we have expressed in the foregoing paragraphs are in sharp contrast with a substantial part of the Opinion n.º 4-2005 written by the E.U. Network of Independent Experts on Fundamental Rights (14 December 2005) [64] with specific regard to the draft agreement with the Holy See -although a large part of its content is applicable also to the draft agreement with the other registered churches in Slovakia, as the opinion itself acknowledges. The text of the Opinion is too complex to be commented in detail within the limited space of this paper, but we can not refrain from making some brief observations to conclude our contribution to this volume.

The most striking characteristic of the Opinion is, perhaps, its surprising approach to the analysis of the draft agreement. As we have noted previously, the first impression that the reader immediately obtains from the text is that the Opinion is mainly concerned about guaranteeing an alleged right to abortion and homosexual rights -including the supposed right to marriage between persons of the same sex- rather than about guaranteeing the right to conscientious conscience, which seems to be observed with diffidence. This is shocking, for conscientious objection is an expression of a fundamental right -freedom of thought, conscience and religion- enshrined by most European constitutions and the most relevant international law instruments, while we can not find in Europe a fundamental right to abortion or to celebrate a homosexual marriage recognized neither at constitutional nor at international level [65].

The Opinion puts a special emphasis on the potential conflicts between the conscientious objection of Catholics and the alleged women's right to abortion. This is particularly astonishing considering two factors.

First, we must not forget that the so-called 'legal abortions' are specific situations in which the State law has decriminalized an action that would be otherwise criminally prosecutable [66]. Properly there is no right to abortion or, even less, a fundamental right to abortion. Strictly speaking, voluntary abortion is, so to say, 'against the stream' of

---

[64] For the sources to find this text, see note n. 49.

[65] The Opinion explicitly recognizes it (p. 19).

[66] This is applicable, at least, to European legal systems. See, in the context of a comparison between European and U.S. approaches, M.A. GLENDON, *Abortion and Divorce in Western Law. American Failures, European Challenges*, Cambridge, Massachusetts, 1987 (some social tendencies may have changed since the time of this essay, but the legal framework continues to be essentially the same in Europe).

constitutional rights, for it constitutes a tolerated exception to the general rule that protects the right to life. On the contrary, conscientious objection to abortion are 'in favor of the stream' of constitutional rights, for it tends to ensure the protection of the right to life and of the right to freedom of conscience [67].

In the second place, the Network insists on the possible conflicts with therapeutic abortion, underlining the significance of adequately guaranteeing the woman's right to life. But it seems to ignore that article 6(2) of the agreements specifically provides that "the exercise of conscientious objection must not endanger human life or human health". And it apparently ignores also that we are not dealing with an underdeveloped country with poor conditions of public health or with a country in state of war, in which we may presume a frequent or even massive situation of women's rape. The draft agreements refer to Slovakia, a member country of the European Union with a considerable degree of economic and social development. And, in the European Union context, the reason most often invoked by women to require the performance of a legal abortion is, by far, the 'danger to the mental health of the mother' [68]. It is well-known that this means, in practice, a way to seek free abortion beyond the legal limits when a woman, for lack of prudence, becomes pregnant against her desire. This broadly consented legal fraud may receive different judgments according to the position of the observer -some will think that to overtly permit a massive legal fraud is not a wise policy, above all in matters so closely related to human rights; some others, instead, will judge it as a positive phenomenon, as far as it would be a sort of legitimate 'alternative use of law' in the context of the fight for women's liberation. In any event, in view of the European actual panorama of legalized abortions, the fact that the Network repeatedly mentions some isolated border cases -pitiful cases- of therapeutic abortion to make an argument in favor of the right to abortion against freedom of conscience looks somewhat an interested mystification of reality [69].

---

[67] See R. NAVARRO-VALLS, *La objeción de conciencia al aborto*…, cited in note n. 35, pp. 259-269.

[68] In Spain, according to the official data provided by the Health Ministry, in 96.7% of voluntary abortions performed in 2004 the alleged legal ground was the mother's health (it is well known that cases involving risk for the physical health of the mother are hardly over 1%). Significantly, in the same year 96,4 of abortions were performed in public centers (of which only 10% were hospitals). See the Internet pages of the Ministry in: http://www.msc.es/profesionales/saludPublica/prevPromocion/embarazo/tablas_figuras.htm.

[69] Significantly, the Network mentions a number of actions taken in the context of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights, but scarcely some of them refers to a country in economic and social conditions comparable to the Slovak Republic or any other European Union member (they mention, e.g.,

From this perspective, the European Network's Opinion seems to be, in its approach as well as in its final conclusions, more in the line of political activism supporting a right to free abortion than in the strict realm of legal opinions grounded on current European and international law. It is significant, for instance, its continuous reference to abortion as "medical services" in the context of healthcare activities. Or the fact that it indicates that the Network benefited from the contributions provided, upon request, by certain non-governmental organizations, without further specifications [70]; but in the text only NGOs working in favor of 'reproductive rights' are actually mentioned, and the Opinion's only appendix -in addition to the text of the draft agreement with the Holy See- is a written comment by the Center for Reproductive Rights with regard to a pending -and extreme- case before the European Court of Human Rights [71]. Naturally, we do not have anything against political activism, which is perfectly legitimate if it uses legitimate means, but one could expect a very different approach from a network of experts on fundamental rights, which is supposed to provide a legal opinion on such a relevant issue as the first experience of a covenantal State instrument exclusively focused on the guarantee of a fundamental right as freedom of conscience.

The Opinion also reveals some other important deficiencies from a strict legal viewpoint. In addition to the singularity of its approach to the potential conflicts between conscientious objection and voluntary sought abortion, the Opinion seems to adopt a fairly restrictive view of freedom of conscience's scope of protection -in overt contrast with the General Comment on article 18 of the International Covenant on Civil and Political Rights, paradoxically cited by the Opinion in different occasions as an authoritative source [72]. The Opinion virtually ignores the intense scholarly and judicial debate on this controversial issue -which includes many critic views of some decisions of the Court of Strasbourg- as well as the vast legal literature existing in Europe [73]. In our view, the logical attitude would have been, rather, to acknowledge the interest of an initiative aimed

---

Guatemala, Bolivia, Perú, Panamá, Mongolia, Tibet, Morocco, Nepal, Sri Lanka, etc.; see pp. 19-20 of the Opinion). The Opinion mentions only a case that could be applicable to Slovakia -a extreme case in Poland, which is pending before the European Court of Human Rights.

[70] See Opinion, p. 4.

[71] See Opinion, pp. 36-41.

[72] See especially n. 4 of the General Comment.

[73] It is astonishing that one of the very few scholarly sources cited by the opinion is a book written in Finnish in 1988, whose main source in this regard is an unpublished licenciate thesis written, in 1987, by one of the acting members of the Network (see note 28 of the Opinion).

at the protection of a human right, to identify its positive aspects and its potential usefulness in the European context -in which freedom of religion or belief tends to generate heated controversies and is not as well guaranteed as one may think at first glance-, and then to analyze whether it entails serious threats to other human rights or public legal interests and, if appropriate, to seek which prudential measures should be taken to prevent unnecessary or harmful conflicts of rights.

Two final comments on what, in our judgment, constitute other flaws of the European Network's Opinion on the draft agreement between Slovakia and the Holy See.

On the one hand, the Opinion seems to focus on the supposed privileges that the agreement would confer to the Catholic Church. It thus loses sight of a basic fact: that the purpose of the agreement is not to protect the rights of the major church in Slovakia but to better guarantee the freedom of conscience of Catholics; and the same can be affirmed with regard to the draft agreement with the other registered churches. Citizens, not churches, are the center of attention of the agreements, for freedom of conscience is an individual right. To protect this right constitutes a common interest of the Slovak State and of the churches -although they consider it from different perspectives- and for this reason they find it appropriate to create a specific covenantal legal instrument to that purpose.

On the other hand, it is inaccurate to affirm that the legal approval of these agreements on conscientious objections will grant a privileged position to the Catholic Church over the other registered churches -for the agreement with them would not be considered an international treaty- and, even more, over the rest of religious faiths in Slovakia [74]. This, plainly, does not make sense at all. As we have repeatedly affirmed, freedom of conscience is an individual right. All conscientious objections by all citizens -believers or non-believers- deserve the same degree of protection. Nobody could seriously maintain that 'Catholic' or, more generally, 'religious' conscientious objections have a primacy over 'atheistic' or 'agnostic' conscientious objections. But the aim of the agreements is not to create a 'privileged class' of conscientious objection, or to 'institutionalize' it -i.e. to transfer it to the hands of the churches. Their goal is to facilitate the exercise of freedom of conscience for a vast majority of citizens, especially by making easier the proof of the sincerity and the consistence of the moral ideas expressed by objectors [75]. It seems logical, and fully legitimate, to enact a law to facilitate the exercise

[74] See Opinion, pp. 6 & 31-32.

[75] We must remember that the European Court of Human Rights has emphasized that the ethical ideas -religious or non-religious- protected by article 9 of the European Convention are those which

of a fundamental right for a large amount of citizens when it is possible to identify a substantial number of potentially similar situations. This is perfectly compatible with the principle of equality and with the individual character of freedom of conscience. If we accepted the curious reasoning of the Network of Experts, we should also declare discriminatory all the Christian chaplaincies existing in the armies, penitentiaries or hospitals of many European countries -including the France governed by the constitutional principle of *laïcité*- for the fact that they make easier the exercise of religious freedom for faithful of the major religions in comparison with non-believers or with the faithful of minority religions.

In addition to its lack of logic, the argument of the Opinion with respect to the principle of equality is utterly unrealistic. Experience demonstrates that -at least in Europe- specific guarantees created to facilitate the freedom of religion and conscience of members of major religions not only have not impaired the legal situation of other religions but, on the contrary, have helped an improvement of their position. For instance, in Italy or in Spain, the existence of a concordat between the State and the Catholic Church has ended up ameliorating the legal status of the rest of religious denominations, sometimes through covenantal legal instruments -*intese* in Italy, *acuerdos de cooperación* in Spain- and sometimes through unilateral State laws [76].

denote "views that attain a certain level of cogency, seriousness, cohesion and importance" (*Campbell & Cosans v. United Kingdom*, 25 February 1982. § 36).

[76] See, in more detail, J. MARTÍNEZ-TORRÓN, *Religious Freedom and Democratic Change in Spain*, in "Brigham Young University Law Review" (2006), forthcoming.