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### **Conscientious Objection and the Treaty with the Holy See and other registered Churches \***

I would like to focus on two connected points on the legal framework for conscientious objection. First, the peculiarity which concerns the effective exercise of that right, and second, the particular instrument regulating the relations between churches and State, concerning the system of agreements with the various denominations present in the State<sup>1</sup>.

1- Religious objection can lead to a refusal to comply with obligations imposed by State laws, which are deemed conflicting with higher imperatives that the objector cannot waive. Such refusal may be based on religious grounds, but also ethical or ideological. The exercise of

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<sup>1</sup> The system of agreements between the State and denominations leads to a bilateral legislative approach by the State, concerning its relations with different denominations. This system of legislation allows to meet denominations' specific needs and, at the same time, it provides additional strength to the achieved discipline, which can only be changed through a new agreement. To deepen the historical formation of the different forms of relationships between the State and churches see **C. CARDIA**, *Stato e Confessioni religiose*, il Mulino, Bologna, 1988; **A.C. JEMOLO**, *La classifica dei rapporti fra Stato e Chiesa*, in *Pagine sparse di diritto e storiografia*, Giuffrè, Milan, 1957, p. 327 ss.; **L. DE LUCA**, *La qualifica dello Stato in materia religiosa*, in *La legislazione ecclesiastica. Atti del Congresso celebrativo del centenario delle leggi amministrative di unificazione*, Neri Pozza, Vicenza, 1967, p. 327 ss., and **F. MARGIOTTA BROGLIO**, *Sistemi di intese e rapporti colla Chiesa cattolica*, in C. Mirabelli (ed.), *Le intese tra Stato e confessioni religiose. Problemi e prospettive*, Giuffrè, Milan, 1978, p. 138 ss. See for further details, referred to Italian bilateral system of agreements with denominations, **C. CARDIA**, *Fonti del diritto (diritto ecclesiastico)*, in *Enc. giur. Treccani*, VI, Rome, 1988; S. Ferrari (ed.), *Concordato e Costituzione*, il Mulino, Bologna, 1985; S. Ferrari, T. Scovazzi (ed.), *La tutela della libertà di religione. Ordinamento internazionale e normative confessionali*, Cedam, Padua, 1988, and **F. FINOCCHIARO**, Art. 7-8, in *Commentario della Costituzione*, G. Branca (ed.), Zanichelli-Il Foro italiano, Bologna-Rome, 1975, p. 32 ss.



conscientious objection is independent from the objector's religious or ideological affiliation. As we know, the objector can exercise his or her right regardless of personal religious beliefs. He or she can justify the refusal to comply with laws for different ideological reasons than those inspiring catholic or other religious objectors. At the same time, he or she can be catholic, atheist or other, and want to exercise the right of conscientious objection for the same reasons, although inspired from different ways of thinking<sup>2</sup>. The various national legal systems in Europe about conscientious objection create a legal institution not directly aimed at changing the law, still considered fair by the majority<sup>3</sup>. Conscientious objection aims to enable individuals not to observe the law, where they consider that they could not obey it in their conscience. It is a sort of a "conscience residual safeguard" versus contested laws. The conscientious objection is determined by a *conscience wound*, because of a traumatic moral choice<sup>4</sup>. It implies a real ethical, religious and philosophical conflict with the most intimate personal beliefs and certain legislative choices. Law may therefore protect these personal beliefs, because of the existence of this strong inner conflict.

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<sup>2</sup> For a discussion on the subject of conscientious objection see **C. CARDIA**, *L'obiezione di coscienza. Seminario "Archivio Giuridico" - 15 ottobre 2013*, in *Archivio giuridico Filippo Serafini*, 2013, p. 391 ss.; **C. CARDIA**, *Principi di Diritto Ecclesiastico. Tradizione Europea Legislazione italiana*, 3<sup>a</sup> ed., Giappichelli, Turin, 2010, p. 170 ss; **R. BERTOLINO**, *L'obiezione di coscienza moderna*, Giappichelli, Turin, 1996; **R. NAVARRO VALLS, J. MARTÍNEZ TORRÓN**, *Conflictos entre conciencia y ley: Las objeciones de conciencia*, Iustel, Madrid, 2011; **L. MUSSELLI, C.B. CEFFA**, *Libertà religiosa, obiezione di coscienza e giurisprudenza costituzionale*, Giappichelli, Turin, 2014; **F.C. PALAZZO**, *Obiezione di coscienza*, in *Enc. Dir.*, XXIX, Giuffrè, Milan, 1979, p. 539 ss.; **G. CODES BELDA**, *Objecion de Conciencia: Normas que se tienen y normas que nos sostienen*, in *Archivio giuridico Filippo Serafini*, 2013, p. 231 ss. and **M.C. RUSCAZIO**, «Preferirei di no». *Le ragioni dell'obiezione di coscienza*, in *Quaderni di diritto e politica ecclesiastica*, 2014, p. 387 ss.

<sup>3</sup> See C. Moskos, J. Whiteclay Chambers II (ed.), *The New Conscientious Objection: From Sacred to Secular Resistance*, Oxford University Press, New York, 1993; **C. PROESCHEL**, *Objection de conscience et cohésion sociale*, in M. Moravčíková (ed.), *Výhrada vo svedomí - Conscientious Objection*, Institute for State-Church Relations, Bratislava, 2007, p. 156 ss.; **E. TAWIL**, *Conscientious objection in French law*, ibidem, p. 277 ss.; **E. SEWELL, W. COLE DURHAM JR.**, *Conscientious objection in the United States*, ibidem, p. 299 ss.; **J.P. SCHOUPPE**, *Réflexions juridiques autour de la notion d'objection de conscience institutionnelle*, in G. Boni, E. Camassa, P. Cavana, P. Lillo, V. Turchi (ed.), *Recte Sapere. Studi in onore di Giuseppe Dalla Torre*, II, *Diritto Ecclesiastico*, Giappichelli, Turin, 2014, p. 1205 ss. and **M.A. VACCA**, *A Re-Examination of Conscience Protections in Healthcare*, in *Medicina e morale*, 2013, p. 1203 ss.

<sup>4</sup> **C. CARDIA**, *L'obiezione di coscienza. Seminario "Archivio Giuridico" - 15 ottobre 2013*, cit., p. 391.



2 - European countries have progressively implemented various types of objections, including conscription, participation in abortion practices, artificial insemination, surrogacy, use and experimentation on embryos, euthanasia, assisted suicide or animal testing. The military service objection started an important multiplication of conscientious objection hypotheses comprising different areas<sup>5</sup>. The Council of Europe, the United Nations and the European Parliament have all stressed on numerous occasions that right to conscientious objection is a fundamental aspect of the freedom of thought, conscience and religion. In April 1987, the Committee of Ministers issued Recommendation R(87)8 regarding conscientious objection to compulsory military service, which invites governments of member states to bring their national legislation and practice in line with the respect of the right to be released from the obligation to perform military service. In May 2001, the Parliamentary Assembly recalled these minimum standards by adopting Recommendation 1518/2001<sup>6</sup>, in which member states were again invited to bring their legislation and practice in line with the basic principles laid down in Recommendation R(87)8<sup>7</sup>. Conscientious objection is one of the expressions of a human right, concerning freedom of conscience, which is protected by article 9 of the European Convention on Human Rights, as well as by the other international instruments and by most European constitutions<sup>8</sup>.

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<sup>5</sup> See for conscientious objection to military service in Europe **H. TAKEMURA**, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders*, Springer-Verlag Berlin Heidelberg, Berlin, 2009, p. 83 ss.

<sup>6</sup> Recommendation 1518/2001, *Exercise of the right of conscientious objection to military service in Council of Europe member States*, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 May 2001 (see Doc. 8809, report of the Committee on Legal Affairs and Human Rights). For further discussion see **R. UITZ**, *La liberté de religion dans les jurisprudences constitutionnelles et conventionnelles internationales*, Editions du Conseil de l'Europe, Strasbourg, 2008, p. 73 ss. and **O. HEVAL ÇINAR**, *Conscientious Objection to Military Service in International Human Rights Law*, Palgrave MacMillan, New York, 2013.

<sup>7</sup> See **M. STOLWIJK**, *The Right to Conscientious Objection in Europe: a Review of the Current Situation*, Quaker Council for European Affairs, Brussels, April 2005 (in <http://www.refworld.org/pdfid/42b141794.pdf>).

<sup>8</sup> See Article 18 of the Universal Declaration of Human Rights and Article 8 of the International Covenant on Civil and Political Rights (ICCPR), which states "any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors".



3 - Legislative provisions concerning the typical sensitive issues generally discipline conscientious objection too. For example, in Italy, abortion law provides that "health personnel and allied health personnel shall not be required to assist in the procedures referred [...] or in pregnancy terminations if they have a conscientious objection, declared in advance". Art. 9 states that

"conscientious objection shall exempt health personnel and allied health personnel from carrying out procedures and activities specifically and necessarily designed to bring about the termination of pregnancy, and shall not exempt them from providing care prior to and following the termination"<sup>9</sup>.

4 - The topic related to conscientious objection touches not only on the rights of the individual, but also the principle of autonomy of religious denominations and the exercise of the activities performed by the associated bodies. This theme is strictly connected with ideologically or religiously oriented institutions. Directive 2000/78/EC, regarding the fight against discrimination based, *inter alia*, on religion or belief, after outlining the necessary principles for protecting the right to non-discrimination, provides important exceptions for these institutions with regard to indirect discrimination. In this sense, art. 4 states that a difference of treatment "shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement". Therefore, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief,

"a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's

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<sup>9</sup> See for further details **V. TURCHI**, *Il concetto generale di «obiezione di coscienza»*. *L'esperienza giuridica italiana, con riferimenti di diritto comparato*, in M. Moravčiková (ed.), *Výhrada vo svedomí, Conscientious objection*, cit., p. 81 ss.; **ID.**, *Obiezione di coscienza: a trent'anni dalla prima legge. Bilancio di un'esperienza e problematiche emergenti*, in *Quaderni di diritto e politica ecclesiastica*, 2003, p. 77 ss.; **C. CARDIA**, *La disciplina sull'interruzione della gravidanza*, in *Democrazia e diritto*, 1978, p. 443 ss., and **S. LARICCIA**, *L'obiezione di coscienza in Italia: vent'anni di legislazione e di giurisprudenza* (Paper for "VI Congreso internacional de derecho eclesiástico del Estado", Valencia, 28th May 1992), in *Diritto ecclesiastico*, 1992, II, p. 259 ss.



religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos".

These institutions ask of their employees an adhesion to their ideological or religious orientations and, correspondingly, the law aims to protect the alignment of these institutions<sup>10</sup>.

5 - Therefore, analysing this discipline, it is possible to affirm that a religiously oriented institution should not be obliged to practice health treatments, if these treatments are prohibited by the same religious motivations that ask the faithful to exercise conscientious objection. The inevitable consequence is that a catholic hospital, or other religious health structure, should not be forced to carry out an abortion procedure within its facilities.

6 - This brief analysis of the particularities characterising conscientious objection, its reference to all and to any individual choice, the irrelevance of religious beliefs for the objectors for the exercise of this right, seems to suggest the ordinary way of a domestic law. Anyway, the exercise of conscientious objection concerns both conscience and religious freedom. In particular, it directly affects the Catholic Church and other religious groups in Europe<sup>11</sup>. Initially, conscientious objection to military service

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<sup>10</sup> On the subject of anti-discrimination law, the European Union introduced Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Opposed to what happens with the international law and in many interventions of the European Union, these two directives regulates in a separated way the racial and religious discrimination (**F. MARGIOTTA BROGLIO**, *Discriminazione razziale e discriminazione religiosa*, in *Quaderni di diritto e politica ecclesiastica*, 2000, p. 269 ss.). This decision has raised many questions. See **N. FIORITA**, *Le direttive comunitarie in tema di lotta alla discriminazione, la loro tempestiva attuazione e l'eterogeneità dei fini*, in *Quaderni di diritto e politica ecclesiastica*, 2004, p. 363; **M. BELL**, *Anti-discrimination law and the European Union*, Oxford University Press, Oxford, 2002, p. 131 ss.; for a general study see A. Lawson, D. Schiek (ed.), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, Ashgate, Farham, 2013; E. Ellis, P. Watson (ed.), *EU Anti-Discrimination Law*, Oxford University Press, Oxford, 2012, and **C. FAVILLI**, *La non discriminazione nell'Unione europea*, il Mulino, Bologna, 2009.

<sup>11</sup> See A. Haworth (ed.), *Right to Object? Conscientious Objection and Religious Conviction*, British Humanist Association, London, 2013; **C. CARDIA**, *La coscienza religiosa di fronte al problema dell'aborto*, in *Quale giustizia*, 1975, 1, p. 546 ss., and **C. VASIL**, *Alcuni cenni sulla storia della formazione del concetto di coscienza e attuale collocamento della coscienza nel diritto*



has raised questions because of some religious groups, such as Jehovah's Witnesses<sup>12</sup>. This prompted several European States to provide for specific rules to allow all conscientious objectors, regardless of their religious affiliation, to make an alternative choice to military service<sup>13</sup>.

7 - Therefore, there are currently no obstacles about regulating conscientious objection through a system of agreements between the State and churches. Conscientious objection in some cases is regulated by an agreement between State and church. For example, art. 17 point 4 of the agreement between Portugal and Holy See provides that "ecclesiastical persons may fulfil their military obligations by offering Catholic religious assistance to the Armed and Security Forces, provided their right of conscience is respected". This is a very specific case of conscientious objection<sup>14</sup>. Other examples are the agreements between Slovakia and the Holy See<sup>15</sup>. In Slovakia, the right of conscientious objection to military

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*canonico e nell'insegnamento del Concilio Vaticano II*, in M. Moravčíková (ed.), *Výhrada vo svedomí - Conscientious Objection*, cit., p. 245 ss.

<sup>12</sup> **J.B. SCHROEDER**, *The Role of Jehovah's Witnesses in the Emergent Right of Conscientious Objection to Military Service in International Law*, University of Essex, Colchester, 2009, p. 15 ss., and T.C. Wyatt, R. Gal (ed.), *Legitimacy and Commitment in the Military*, Greenwood Publishing Group, Westport CT, 1990, p. 91 ss.

<sup>13</sup> See European Consortium for Church-State Research, (1992), *Conscientious Objection in the EC countries. Proceedings of the Meeting, Brussels-Leuven, December 7-8, 1990*, Peeters, Leuven, 1992, and **L. STAN, L. TURCESCU**, *Church, State, and Democracy in Expanding Europe*, Oxford University Press USA, New York, 2011.

<sup>14</sup> See also **J. MARTÍNEZ-TORRÓN, R. NAVARRO-VALLS**, *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*, in M. Moravčíková (ed.), *Výhrada vo svedomí - Conscientious Objection*, cit., p. 586 ss. The Author mentions some examples in Spanish law. The Agreement between the Holy See and the Spanish State, 28 July 1976, art. 2 (3), recognises conscientious objection of Catholic priests providing the right to keep silence, even if asked in a criminal trial, on the communications they have heard in the sacrament of confession. Similar provisions can be found, with regard to their religious leaders, in the three agreements signed in 1992 by 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).the Spanish State and, respectively, the Protestant, Jewish and Islamic federations. For further discussions see **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, p. 138 ss.

<sup>15</sup> Relations between Slovakia and the Holy See have historically been regulated by the «Modus Vivendi» of 1927, while for non-Catholic Churches, Slovak Parliament adopted an amendment to Law no. 308 of 1991, approved by Law no. 394 of 2000, that granted the right of churches and registered religious society to enter into agreements with the State



service was enshrined in Article 25 of the Constitution, which states, "no one must be forced to perform military service if this runs counter to his conscience or religious belief". The Slovak legal system has recognized with Act no. 308/1991 on the freedom of religious faith and on the position of churches and religious societies, the freedom of conscience and belief as human rights and fundamental freedoms. The Civilian Service Act no. 207/1995 provides that citizens can refuse military service through a statement based on their religious and conscientious motivations. With regard to the exercise of the objection, the Abortion Act of 1986, art. 4 states that "pregnancy shall be artificially terminated if the woman makes a written request to this effect, the pregnancy has not passed the twelfth week, and there are no contraindications on health grounds". However, there are no specific provisions concerning the exercise of conscientious objection by healthcare professionals. This creates problems to objectors working in health structures.

8 - In addition, agreements with the Holy See and with other registered churches refer to conscientious objection. Art. 7 of the Basic Treaty between the Holy See and the Republic of Slovakia states that:

"the Republic of Slovakia recognises the right of all to obey their conscience according to the doctrinal principles and morals of the Catholic Church. The extent and conditions of the application of this right will be defined by special Accord between the Above Parties".

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(**P. MULÍK**, *Church and State in Slovakia*, in S. Ferrari, W. Cole Durham Jr., E.A. Sewell (ed.), *Law and Religion in Post-Communist Europe*, Peeters, Leuven, 2003, p. 315 ss.). Slovakia's first agreement is the Basic Agreement between the Holy See and the Slovak Republic, adopted in 2000. This document provides four more agreements in order to increase Catholic influence in schools, the armed forces and health care and to finance all of this with funds from the state. Agreements approved are the Agreement concerning religious assistance to the Catholic faithful in the armed forces and armed units (2002) and the Agreement on education and catholic education (2004). For a deepening, see **T. BUCHTA**, *International Agreements in Force between the Slovak Republic and the Holy See and their Relationship to Community Law*, in M. Šmid, M. Moravčíková (ed.), *Clara Pacta Boni Amici. Contractual Relations between State and Churches*, Institute for State-Church Relations, Bratislava, 2009, p. 30 ss.; **M. ČEPLÍKOVÁ**, *Contribution of the agreement between the Slovak Republic and Registered Churches and Religious Societies to the Progress of Freedom of Belief*, *ibidem*, p. 53 ss.; **M. ŠABO**, *Fundamental Factors of the International Subjectivity of the Catholic Church, Apostolic See and the Vatican State, and their Application in the legal Order of Slovak Republic*, *ibidem*, p. 323 ss. and **A. DE OTO**, *Church and State Relations in the Czech Republic and in Slovakia*, in S. Ferrari and R. Cristofori (ed.), *Law and Religion in the 21st Century. Relations between States and Religious Communities*, Ashgate, Farham, 2010, p. 174 ss.



Agreement between the Slovak Republic and the registered Churches and Religious Societies has the same legal provision of the Basic Treaty between the Holy See<sup>16</sup>.

9 - This situation has prompted both the Holy See and the other churches to engage in negotiations with the State to regulate conscientious objection<sup>17</sup>. The draft agreements on the subject of conscientious objection in 2005, with the Holy See, registered churches and religious societies respectively, lay down some interesting principles. First, art. 2, recognising the freedom of conscience, seems to be compatible with common constitutional traditions and general principles of the European Union<sup>18</sup>. Drafts identify five areas of action regarding conscientious objection, related to 1) service in the armed forces or armed corps, 2) the healthcare area, 3) educational activities, 4) the provision of legal services and 5) labour-law and other labour relationships. In this way, churches identify the different situations in which it is possible for the faithful to exercise conscientious objection. In the same way, Drafts permit hospitals founded by churches or religious societies to abstain from carrying out activities contrary to their principles of teaching of faith and morals.

10 - Finally, art. 5 of both Drafts explicitly provides that the right to exercise objection in conscience *shall be applied according to the legal order of the Slovak Republic and within its limits*. This is a fundamental provision of the Drafts. It is clear that drafts provisions cannot contradict what domestic law provides regarding this matter. Conscientious objection is the expression of the right of conscience, a right that the law must

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<sup>16</sup> See **M. ŠMID**, *On the Essence and the Meaning of Freedom of Conscience and Freedom of Religion: on Article 7 of the Basic Treaty between the Slovak Republic and the Holy See and on the Drafts of the Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objections in Conscience and of the Treaty between the Slovak Republic and the Registered Churches and Religious Societies on the Right to Exercise Objections in Conscience*, in M. Moravčíková (ed.), *Výhrada vo svedomí - Conscientious Objection*, cit., p. 434 ss.

<sup>17</sup> **M. MORAVČÍKOVÁ**, *Matter of Values, Church Policy and Sociopolitical Dimensions of the Non-Acceptance of the Agreements on the Right to Exercise Objections in Conscience in the Slovak Republic in 2006*, in M. Moravčíková (ed.), *Výhrada vo svedomí - Conscientious Objection*, cit., p. 376 ss.

<sup>18</sup> For further details see **A. CHROMÍK**, *Draft Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection in Conscience and Freedom of Conscience*, *ibidem*, p. 526 ss. The Author states, "The draft treaty on the right to exercise objection in conscience concluded between the Slovak Republic and the Holy See [...] in the notion of conscientious objection is based on common constitutional traditions and general principles of member states of the European Union, thus the Slovak Republic too".





guarantee to all, regardless of religious or ideological motivations of the objector. Art. 5 of both Drafts does not prevent domestic law from regulating the conscientious objection of every citizen, atheistic or other.

11 - In 2005, the Opinion of the E.U. Network of Independent Experts on Fundamental Rights found some critical points of the draft agreement with the Holy See on conscientious objection. Not all observations of the Network can be shared<sup>19</sup>. It does, however, seem to be right when it states that there is not an "obligation imposed on the State to take all the necessary measures to ensure that a woman seeking abortion, in circumstances where it would be lawful, will effectively have access to this service"<sup>20</sup>. More, the Opinion states

"there is still a large group of people whose conscience or moral principles are not governed by the official principles of teaching of faith and morals of either Catholic Church or of any other church or religious society registered in the Slovak Republic. These people, or their right to objection of conscience respectively is, of course, covered neither by the Draft Treaty, nor the Draft Agreement"<sup>21</sup>.

12 - The analysis of the discipline developed by these projects highlights a risk of discrimination against those who are not protected by the two agreements in question. However, it does not appear possible to impute this risk situation to the Drafts. Only a domestic law can regulate conscientious objection for every citizen, regardless of his or her religion. The Opinion made "a conceptual error" which, in itself, could affect any

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<sup>19</sup> Opinion no. 4 of 14th December 2005 of the E.U. Network of Independent Experts on Fundamental Rights, in <http://ec.europa.eu>. See **D. DURISOTTO**, *Il progetto di accordo tra la Santa Sede e la Slovacchia per l'esercizio dell'obiezione di coscienza e le valutazioni della E.U. Network of Independent Experts on Fundamental Rights*, in M. Šmid, M. Moravčíková (ed.), *Clara Pacta Boni Amici. Contractual Relations between State and Churches*, cit., p. 109 ss., and in *Diritto di famiglia e delle persone*, 2009, p. 938 ss. See also **N. MARCHEI**, *L'accordo tra la Santa Sede e la Slovacchia sull'obiezione di coscienza al vaglio del Parlamento europeo*, in *Quaderni di Diritto e Politica Ecclesiastica*, 2007, p. 3 ss.; **L.L. CHRISTIANS**, *Le droit à l'objection de conscience et la conclusion par les Etats membres de l'Union européenne de Concordats avec le Saint-Siège. A propos d'une opinion du Réseau européen d'experts indépendants en matière de droit fondamentaux*, in M. Moravčíková (ed.), *Výhrada vo svedomí - Conscientious Objection*, cit., p. 333 ss., and **R. PALOMINO**, *Securing Freedom, Preventing Conflicts Some Thoughts on the Draft Treaty between the Slovak Republic and the Holy See on the Right to Objection of Conscience*, *ibidem*, p. 608 ss.

<sup>20</sup> Opinion no. 4 of 14th December 2005, cit., 31.

<sup>21</sup> Opinion no. 4 of 14th December 2005, cit., 32.



kind of agreement between the State and religious denominations: a bilateral agreement cannot refer to members of other religions or ideological organizations, because it would be out of its area of competence. The Network looks at these agreements as if they represented the unique rules existing in Slovakia on conscientious objection and as if they were part of the general law that covers all citizens and all religious organizations (or other) <sup>22</sup>. Individuals not protected by the agreements would find themselves forced to exercise conscientious objection not in the name of their personal conscience, but according to the principles of Catholic Church as recognized by its magisterium, or of another religion recognized by the Slovak Republic. The recognition of the human right of conscientious objection in an agreement with the Holy See creates a form of special objection, a sort of "Catholic objection", which requires to each objector a specific profession of faith, and, therefore, cannot allow the exercise of conscientious objection for everybody<sup>23</sup>.

**13** - Anyway, an agreement regarding conscientious objection between a State and the Holy See, or the registered churches and religious societies, *can doubtless be concluded*. Art. 7 of the Basic Treaty, recognising the right of all to obey their conscience according to the doctrinal principles and morals of the Catholic Church, tries to satisfy the principle of tendency legal irrelevance of religious affiliation and belief in public life<sup>24</sup>. Draft Treaty also does not seem to prevent the Slovak Republic to enact a law in which it is possible for all citizens to exercise conscientious objection<sup>25</sup>. Conscientious objection and bilateral agreements, or legislation with previous negotiation, could complement each other for a successful legal solution. The aim of the agreement – or legislation with previous negotiation –

«is not necessarily to restrain State power and regulation (a regulation that supposedly endangers human rights), but rather to

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<sup>22</sup> C. CARDIA, *Parere sull'Opinione 4-2005 della Rete E.U. relativa all'Accordo tra Santa Sede e Slovacchia sulla obiezione di coscienza*, unpublished, p. 2 ss.

<sup>23</sup> N. MARCHEI, *L'accordo tra la Santa Sede e la Slovacchia sull'obiezione di coscienza al vaglio del Parlamento europeo*, cit., p. 12 ss.

<sup>24</sup> C. CARDIA, *Principi di Diritto Ecclesiastico. Tradizione Europea Legislazione italiana*, 3<sup>a</sup> ed., Giappichelli, Turin, 2010, p. 149.

<sup>25</sup> C. CARDIA, *Parere sull'Opinione 4-2005 della Rete E.U. relativa all'Accordo tra Santa Sede e Slovacchia sulla obiezione di coscienza*, cit., p. 3. See also N. MARCHEI, *L'accordo tra la Santa Sede e la Slovacchia sull'obiezione di coscienza al vaglio del Parlamento europeo*, cit., p. 15 ss.



establish one possible route for cooperation. The legislator acquires detailed information to find out the specific needs of religious conscience in order to avoid, if feasible, a clash between State law and religious conscience, and then facilitating for the citizens the free compliance with their duties of conscience. In sum, this kind of agreement functions as a big "container" to protect effectively, and legally, religious conscientious objection»<sup>26</sup>.

14 - However, it would be also appropriate to draft a domestic law on the subject of conscientious objection. The entry into force of these agreements, accompanied by a national law, would remove all highlighted critical points. In this way, there would be two important results: the protection of the involved denominations' specific needs and the possibility for anyone to exercise the right of conscientious objection, even an atheist, regardless of his or her motivation, with no risks of discrimination, concerning religious affiliation<sup>27</sup>. An agreement with

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<sup>26</sup> **R. PALOMINO**, *Securing Freedom, Preventing Conflicts Some Thoughts on the Draft Treaty between the Slovak Republic and the Holy See on the Right to Objection of Conscience*, cit., p. 616. The Author states "the explanation for this is as follows: Each bilateral agreement or legislation with previous negotiation – requires a previous formal and official dialogue between the State and a given religious or belief group. In this dialogue, the State becomes fully aware of those specific problems, conflicts and scruples its legislation creates for members of a religious or belief group. And through dialogue and final agreement the State and the religious group establish a legal path to avoid those conflicts, balancing the State interest with the freedom of conscience of the believer".

<sup>27</sup> For a different opinion according to this risk of discrimination, see **R. LINDENTHAL**, *Relationship of the Draft Treaty between the Slovak Republic and the Holy See on the Right to Objection of Conscience, and European Law*, in M. Moravčíková (ed.), *Výhrada vo svedomí - Conscientious Objection*, cit., p. 636 ss. The Author states "from the wording of the above-mentioned Art.13 of the EC Treaty [now Art. 19 TFEU] – the so-called antidiscrimination provision –, it is obvious that it does not have a direct effect; moreover, its scope of application is limited only within the competences of the EC according to the EC Treaty". Actually, the prohibition of discrimination in the exercise of fundamental rights cannot refer to the aforementioned Directive only. The right to non-discrimination as a fundamental right is protected by article 21 of the Charter of Fundamental Rights of the European Union. The article 14 ECHR states "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". These principles finds their root on universal human rights and the law must satisfy them, as provided by Article 2 of Universal Declaration of Human Rights and Article 2 of Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief proclaimed by General Assembly resolution 36/55 of 25 November 1981.



churches, accompanied by a domestic law, surely can bring the discussion concerning approving agreement between Slovakia and the Holy See on conscientious objection from the area of the right of religious freedom of Catholics to exercise conscientious objection, to the wider area of the right of freedom of conscience and religion, for everyone, as protected by article 9 ECHR. Recommendation 1518(2001) states that the right to conscientious objection is a "fundamental aspect of the right to freedom of thought, conscience and religion" enshrined in the Convention. Art. 10 par. 2 of the Charter of Fundamental Rights of the European Union explicitly states that "the right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right". As the Grand Chamber states in the case of *Bayatyan v. Armenia* in 2011,

"such explicit addition is no doubt deliberate [...] and reflects the unanimous recognition of the right to conscientious objection by the member States of the European Union, as well as the weight attached to that right in modern European society"<sup>28</sup>.

Although the Court

«referred those arguments to the particular situation of an objector to military service, we should understand them as applicable to all other types of conflicts between individual conscience duties and neutral laws, provided that these moral obligations are grounded on a

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<sup>28</sup> Case *Bayatyan v. Armenia*, ECtHR's Grand Chamber, Application no. 23459/03, 7 July 2011, point 106. In this case the Court recognised a right to conscientious objection under Article 9. The Court abandoned the European Commission of Human Rights prior interpretation of Article 9 in conjunction with Article 4 par. 3 and overruled the previous Chamber decision of 27 October 2009 (for further details see **C. EVANS**, *Freedoms of Religion under the European Convention on Human Rights*, Oxford University Press, Oxford, 2001, p. 170 ss. and **J. MARTÍNEZ TORRÓN**, *Conflictos entre conciencia y ley: Las objeciones de conciencia*, cit., p. 102 ss.). At point 107 the Court states "within the Council of Europe, both the PACE and the Committee of Ministers have also on several occasions called on the member States, which had not yet done so, to recognise the right to conscientious objection [...]. Furthermore, recognition of the right to conscientious objection became a pre-condition for admission of new member States into the organisation [...]. In 2001 the PACE, having reiterated its calls made previously, stated specifically that the right to conscientious objection was a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the Convention [...]. In 2010 the Committee of Ministers, relying on the developments in the UNHRC case-law and the provisions of the European Union Charter of Fundamental Rights, also confirmed such interpretation of the notion of freedom of conscience and religion as enshrined in Article 9 of the Convention and recommended that the member States ensure the right of conscripts to be granted conscientious objector status".



"conviction or belief of sufficient cogency, seriousness, cohesion and importance"»<sup>29</sup>.

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<sup>29</sup> **J. MARTÍNEZ TORRÓN**, *Religious pluralism: the case of the European Court of Human Rights*, in **F. REQUEJO**, **C. UNGUREANU**, *Democracy, Law and Religious Pluralism in Europe. Secularism and post-secularism*, Routledge, Abingdon, 2014, p. 131. See also Case *Francesco Sessa v. Italy*, ECtHR Second Section, Application no. 28790/08, 3 April 2012 and Case *Eweida and others v. United Kingdom*, ECtHR Fourth Section, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.