

Securing Freedom, Preventing Conflicts

Some Thoughts on the Draft Treaty between the Slovak Republic
and the Holy See
on the Right to Religious Conscientious Objection*

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Summary: 1.- Promoting and protecting freedom of thought, conscience and religion. Two patterns for modern democracies. 2.- Concordats and agreements with religious groups revisited. 3. - The role of formal bilateral agreements to protect liberty: the law as a “container” of future religious conscientious objections 4.- The umbrella for conscientious objectors and the role of a religious group. 5.- Concluding remarks.

1. Promoting and protecting freedom of thought, conscience and religion. Two patterns for modern democracies.

Modern Constitutional Democracies follow two basic patterns to protect and promote religious freedom¹. We refer to these patterns as the “separation” model and the “cooperation” model. Both stem from the Western experience about religion and political power, according to which some degree of separation between the State and any system of beliefs is necessary to secure the basic conditions under which freedom of religion or belief may flourish openly.

Both, separation and cooperation, coexist in the same European context². Both represent the delicate balance between liberty and equality, the equilibrium at stake in almost all the areas of civil liberties and with

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¹ See W. Cole Durham, “Perspectives on Religious Liberty: A Comparative Framework”, *Religious Human Rights in Global Perspective* (edited by John Witte and Johan D. van der Vyver) vol.2 Legal Perspectives, The Hague ; London : Martinus Nijhoff (1996), pp. 12-24; J. Martínez-Torrón, *Separatismo y Cooperación en los Acuerdos del Estado con las minorías religiosas*, Comares, Granada (1994).

² For an accurate description of the European panorama, see G. Robbers, “Diversity of State-Religion Relations and European Union Unity”, *Ecclesiastical Law Journal*, vol. 7 issue 34 (2004), pp. 304-316-

significant consequences in the field of Religion and State relations³. Neither separation nor cooperation exist in a pure state, without interferences. History, religious affiliation of citizens, politics, immigration issues, legal tradition, economics, etc. play an important role in shaping their contours.

The separation model takes a firm stand for a minimalist concept of freedom of religion or belief in terms of *non-coercion*. Thus, the State leave citizens free in matters relating to religion or belief, whatever they may be. And simultaneously, in order to secure that freedom the State appeals for complete independence from religions or beliefs (freedom *from religion*) which means a sort of *neutrality*. This kind of model is called in American Constitutional Law “category neutrality”, under which the equality principle gains the upper hand: «[t]he purpose of the constitutional provision [for instance in the U.S. Establishment Clause], in this view, is to ensure that the government treats religious choices the same way it treats other categories of belief, preference, and motivation. If religious choice is protected, category neutrality requires that other choices —based on nonreligious reasons— must be given similar protection»⁴. Category neutrality implies, among other things, the same basic legal regime for religious and non-religious groups and entities alike, a common legal regulation for all beliefs (religious, philosophical, ideological views) and a clear preference for *prima facie* neutral laws in those cases in which conflicts arise between State law and religious norms or religious conscientious objections.

The cooperation model proclaims and recognizes religious freedom and maintains the separation between the State and religious or belief groups as well. Nevertheless, its separation (or benevolent neutrality⁵) is a *soft* one since this model considers religious or belief groups as instruments which promote the religious freedom of the citizens in many ways. Besides, in some cases the model recognizes that religious or belief groups (and not only individuals) are entitled to religious freedom themselves. Therefore, the State deems it important to uphold a dialogue in “legal terms” with religious groups. This legal dialogue is reflected in legal, not necessarily bilateral, instruments in a formal way (i.e. concordats or bilateral agreements). It is important to note that the dialogue follows “legal” paths:

³ Andrés Ollero, *España, ¿un Estado laico? La libertad religiosa en perspectiva constitucional*, Thomson Civitas, Madrid (2005), p. 42.

⁴ M.W. McConnell, R.A. Posner, “An Economic Approach to Issues of Religious Freedom”, *University of Chicago Law Review*, vol. 56 (1989), p. 37.

⁵ As the U.S. Supreme Court describes it, benevolent neutrality is a middle ground between separation and identification, a neutrality «which will permit religious exercise to exist without sponsorship and without interference.» *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970) at 669.

so the result of the “legal dialogue” is not a prerogative, since principles of “freedom” and “non-discrimination” play a fundamental role in order to fairly craft accommodations, legal arrangements⁶ or *ad hoc* adjustments to balance liberty and equality in specific situations. This model of cooperation promotes “incentive neutrality” to «remove governmental disincentives to religious choice»⁷ and entails, among other things, special secular legal personality for religious groups, specific regulations for religious or belief phenomena and a willingness on the part of the State law to carve out exceptions —through different legal tools— to accommodate facially neutral laws with regards to religious conscientious objections or religious scruples.

It is virtually impossible to assert which of these two systems — separation or cooperation— is better for protecting and promoting religious freedom. Like legal traditions, systems relating to religious freedom protection rest heavily upon many social and legal factors. As a result, we reach the same conclusions Professor Merryman reached in analyzing legal traditions: «Which is better? At one level this is a foolish question. It is like asking whether the French language is superior to the English language. Better for whom? Surely no one should suggest that the Italians would be better off with the common law tradition, or the Americans with the civil law. The law is rooted in the culture, and it responds, within cultural limits, to the specific demands of a given society in a given time and place. It is, at bottom, a historically determined process by which certain social problems are perceived, formulated, and resolved. Substitution of one legal tradition for another is neither possible nor desirable»⁸. This is probably why the Treaty establishing a European Constitution shows respect towards the status of religious groups (which is part of the framework of freedom of religion or belief)⁹ in each Member State.

⁶ See for instance A. Rosen-Zvi, “Freedom of Religion: The Israeli Experience”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1986) 46/2, pp. 213-248.

⁷ M.W. McConnell, R.A. Posner, “An Economic Approach to Issues of Religious Freedom”, *cit.* (footnote 4), p. 37.

⁸ J.H. Merryman, *The Civil Law Tradition.- An Introduction to the Legal System of Western Europe and Latin America* (2nd edition), Stanford University Press (1985), p. 149.

⁹ Article I-52 Status of churches and non-confessional organisations.

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

However, we have several hints as to how to address from an abstract perspective on the conditions under which one system functions better than the other. The separation system works better in those countries in which pluralism is limited to a single religious trend in which “believers” and “non-believers” try to live within the same society in continuous and creative liberty/equality arrangement machinery. Besides, in those countries in which governmental legal intervention in society is low-dense, the separation system guarantees a fair treatment of all religious or belief groups on behalf of the State. On the contrary, the cooperation system could serve better to protect religious freedom effectively in those countries with a heterogeneous religious composition, with transitional periods from religious persecution/establishment of religion to comprehensible and equal religious freedom recognition, and in those developed countries which meet the characteristics of a performance State with increasing governmental intervention in civil society¹⁰, since «as regulations proliferate, there is increased demand for exceptions that can sensitively accommodate religious needs. In the last analysis, if accommodation can be achieved without undue difficulty, a regime which fails to accommodate manifests a lesser degree of religious liberty»¹¹.

I think it is possible to understand the Draft Treaty between the Slovak Republic and the Holy See on the Right to Objection of Conscience in this context of cooperation and benevolent neutrality¹². In order to gain a better understanding of the Draft Agreement, the following section will be devoted to modern concordats and their role in religion freedom issues.

3.-Concordats and agreements with religious groups revisited.

The Catholic Church has preserved an enduring tradition according to which She resolves conflicts and confrontations with the Secular powers—and settles what is known as *res mixtae*— through what it is commonly called *concordats*.

¹⁰ A. Motilla, “Notas sobre problemas fundamentales del derecho eclesiástico contemporáneo”, *Anuario de Derecho Eclesiástico del Estado*, vol. V (1989), p. 214.

¹¹ W. Cole Durham, “Perspectives on Religious Liberty: A Comparative Framework”, cit. (footnote 1), p. 24.

¹² For further information about the Slovakian system, see U. S. Department of State, “Slovak Republic”, *International Religious Freedom* [on line] [ref. 05.06.2006], available in web <<http://www.state.gov/g/drl/rls/irf/2005/51580.htm>>; M. Moravčíková, “Relationship Between the State and Churches in the Slovak Republic”, The International Center for Law and Religion Studies, *The 1981 U.N. Declaration on Religious Tolerance and Non-Discrimination: Implementing Its Principles after Twenty-five Years* (proceeding of the Symposium), [on line] [ref. 05.06.2006], available in web <<http://www.iclrs.org/papers/Moravcikova%20English.pdf>>.

Concordat could be described as a legal rule of a written text, divided into clauses or articles, signed by two international sovereign subjects¹³ (one of which is the Holy See on behalf of the Catholic Church), as a bilateral compact¹⁴. This is a broad notion of concordat, embracing not only general agreements dealing with all the aspects of Church life, but also concise instruments concerning specific affairs, whatever the *nomen iuris* (convention, agreement, *modus vivendi*, protocol) may be.

The earliest concordats meant a peaceful settlement between the Pontifical power and the Secular one. They mixed secular and religious matters, since the Pope enjoyed political-secular power as well. These initial concordats reflected (and this characteristic is still in force)¹⁵ the lasting Church effort to prevent secular intervention from impinging on the Church's freedom (*libertas ecclesiae*). In this sense, concordats and the "freedom of the Church" have been «a check on the pretensions of State power for centuries, whether that be the power of feudal lords, absolutist monarchs, or the modern secular State. Where the Church retains the capacity to order its life and ministry according to its own criteria, to preach the gospel, and to offer various ministries of charity to the wider society, that very fact constitutes an antitotalitarian or, to put it positively, a pluralist principle in society. According to that principle, there are spheres of conviction and action where State power does not, or ought not to try to, reach. However confusedly the various popes may have sought to assert this principle theologically or to secure it practically, the fact remains that the *libertas ecclesiae* was a crucial factor in creating the social space in which other free institutions could form over the centuries»¹⁶.

It may be argued that concordats promote a privileged position before the State, unavailable to other Religious communities. This may have been the case concerning concordats signed before the Twentieth Century, but currently this aim has changed completely. The change is due in part to the new direction that the Second Vatican Council gave to Church-State relationships. According to the Council Declaration *Dignitatis Humanae*, the Church requests from States «freedom for herself in her character as a spiritual authority, established by Christ the Lord, upon which there rests, by divine mandate, the duty of going out into the whole world and of preaching the Gospel to every creature. The Church

¹³ Concerning the international legal ability of the Holy See, G.R. Watson, "Progress for Pilgrims? An Analysis of the Holy See-Israel Fundamental Agreement", *Catholic University Law Review* 47 (1998), 499-506.

¹⁴ J.T. Martín de Agar, *Raccolta di Concordati 1950-1999*, Editrice Vaticana, Città del Vaticano 2000, p. 26.

¹⁵ R. Minnerath, "The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective", *Catholic University Law Review* 47 (1998) 468.

¹⁶ G. Weigel, "Papacy and Power", *First Things*, n. 110 (February 2001), p. 20.

also claims freedom for herself in her character as a society of men who have the right to live in society in accordance with the precepts of the Christian faith»¹⁷, being aware that «where the principle of religious freedom is not only proclaimed in words or simply incorporated in law but also given sincere and practical application, there the Church succeeds in achieving a stable situation of right as well as of fact and the independence which is necessary for the fulfillment of her divine mission.»¹⁸

According to authoritative opinions¹⁹, the latter assertion would lead to a new situation in which bilateral agreements between the Catholic Church and the democratic States (in which religious freedom is recognized) were no longer necessary. Instead of those agreements, unilateral legislation would be enough to protect religious communities' legal needs.

But, in spite of abandoning these agreements, the Catholic Church still persists in producing new legal ties with different democratic States. And it is important to note that a significant part of these new compacts were signed with non-Christian countries²⁰.

Let us summarize the two previous ideas. The Catholic Church requests from the States for herself only this: *freedom* for accomplishing her mission in the World. To achieve this aim, unilateral legislation from the States might be enough since the State law could guarantee *per se* freedom of religion or belief. At the same time, however, in recent years we have witnessed an increasing number of concordats (more than sixty conventions of various titles with more than twenty-seven different countries!). Is there any legal explanation for this paradox? From my point of view, there is no paradox at all. The reason for maintaining the concordatarian practice is twofold: (i) sometimes democratic States do not completely religious freedom (especially those States which started the democratic experience recently), or cannot adequately determine religious needs; (ii) concordats work in the same way as unilateral legislation on

¹⁷ Declaration on Religious Freedom *Dignitatis Humanae* on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious, Promulgated by His Holiness Pope Paul VI on December 7, 1965, n. 5. Original text in AAS 58 (1966), 929-946, n. 13.

¹⁸ *Ibidem*.

¹⁹ P.A. D'Avack, "La Chiesa e lo Stato nella nuova impostazione conciliare", *Atti del Congresso Internazionale di Diritto Canonico "La Chiesa Doppo il Concilio"*, Milano 1972, 351-380.

²⁰ Let us understand under this term (non-Christian countries) those States and Governments without a Christian historical tradition. For an account of these and other agreements, see R. Astorri, "Gli Accordi concordatari durante il pontificato di Giovanni Paolo II. Verso un nuovo modello?", en *Quaderni di Diritto e Politica Ecclesiastica*, 1/1999, pp. 23-36.

religious freedom, going even *beyond* that legislation. In other words, concordats themselves promote religious freedom.

The role of concordats promoting religious freedom has two different stages.

In their inner or *internal stage*, concordats report patterns of actions connected with the religious freedom of individuals and communities. For instance, Article 7 of the concordat with the Republic of Kazakhstan²¹ establishes the following:

“The Republic of Kazakhstan in conformity with its national legislation shall give the Catholic Church the possibility of acquiring through ownership or lease, corresponding to the needs of the Church, buildings and plots of land for the construction of the buildings necessary for the pastoral service of the Church, such as Churches, parish houses, houses of residences for the performance of religious, sociocultural, catechetical, educational and charitable activities”

With this wording, the concordat offers a different formulation of the right contained in the “Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief”, Proclaimed by General Assembly resolution 36/55 of November 25, 1981, Article 6²²:

“In accordance with article I of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

(a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes [...]” (emphasis added)

Article 12 of the concordat with the Polish Republic of 1993 provides²³:

“1. Riconoscendo il diritto dei genitori all’educazione religiosa dei figli e il principio della tolleranza, lo Stato garantisce che le scuole pubbliche elementari e medie, nonché i centri prescolastici, gestiti dagli organismi dell’amministrazione civile o autogestiti, organizzino, in

²¹ J.T. Martín de Agar, *Raccolta di Concordati 1950-1999*, cit. (footnote 14), p. 613.

²² R. Navarro-Valls, R. Palomino, *Estado y Religión.- Textos para una reflexión crítica*, Madrid 2000, 192-196.

²³ J.T. Martín de Agar, *Raccolta di Concordati 1950-1999*, , cit.(footnote 14), p. 689 (official Italian version).

conformità alla volontà degli interessati, l'insegnamento della religione nel quadro del relativo programma di scuola o prescolastico”

With this phrasing, the text repeats part of Article 5 of the “Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief”, adopting its meaning to the specific situation the Parties are deciding on:

“1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.”

The inner or internal stage of concordats promotes specific aspects of religious freedom, according to the particular circumstances of each agreement. Each concordat in which religious freedom is specifically regulated transposes into legal terms a religious and secular understanding of religious freedom, making it possible for government agencies and to non-religious officials (e.g. judges, etc.), to *recognize* in the legal text a *legal and secular translation* of religious conduct.

At the same time, concordats contribute to some extent to the system of relationships between religious groups and the State. This is what I call the *external stage*, in which concordats contribute to the religious freedom of other religious groups and communities. The Catholic Church has played a significant role in forging the cooperation system²⁴. As a result, the State supports religious groups in several topics (e.g. education, tax matters, direct funding) and removes obstacles which hinder the action of religious groups in other matters (e.g. chaplainry in hospitals or prisons). Frequently Governments use *legal agreements* (as in Spain, Italy and Portugal) to put this co-operation into effect. It often happens that these legal agreements follow the structure and content of the concordats (this is very apparent in the Spanish case). Recently, scholars have pointed out that agreements with religious groups could be particularly useful in four situations. First, in the implementation of religious freedom in countries with no written Constitution, or where the Constitution does not adequately religious freedom, if these agreements include a *minimum* religious rights

²⁴ W.C. Durham, “Perspectives on Religious Liberty: A Comparative Framework”, *Religious Human Rights in Global Perspective.- Legal Perspectives*, cit.(footnote 1), p. 20-21. For a comparative analysis of co-operationist regimes in Spain and Italy, see J. Martínez-Torrón, *Separatismo y Cooperación en los Acuerdos del Estado con las minorías religiosas*, cit. (footnote 1).

description²⁵; second, in the solution of problems related to the position of the respective religious communities in the absence of a general treaty on religious rights; third, in the effective fulfillment of the 1992 U.N. “Declaration on Minorities” (especially concerning the obligations of the States)²⁶; and fourth, in preventing and solving situations in which both the State and the religious groups foresee future religious conscientious objections or religious scruples that oppose facially neutral laws or State laws and regulations in general.

3. - The role of formal bilateral agreements to protect liberty: State bilateral regulations as “containers” of future religious conscientious objections

The Welfare State has developed specific features concerning legislation which might be summarized as follows: i) speedy processes of implementation and abrogation, ii) “motorized” regulations (i.e. a complex legal system with many different types of legal instruments centred in several different specific cases and situations, displacing the former role of private contracts), iii) micro-systems of regulation for specific problems, situations or groups and iv) implementation of laws and regulations stemming from a previous process of negotiation with citizens, unions, companies, associations, groups, etc²⁷.

In this context it makes sense to envisage that a particular sector of social activity, the religious or belief social area among others, could be regulated by the State in those issues with a significant legal dimension. This is a particularly common trend throughout all of Europe according to which “[A] religious sub-sector is singled out within the public sector. This may be understood as a ‘playing field’ or ‘protected arena’²⁸.

Parallel to this characteristic feature of a special legal sector, it creates the problem of how to deal in legal terms with conscientious objection: lawyers still wonder themselves and ask the legal system how to

²⁵ S. Ferrari, “The Fundamental Agreement Between the Holy See and Israel and the Conventions Between States and the Church since the Vatican II Council”, *Catholic University Law Review* 47 (1998), p. 406.

²⁶ For the content and implications of this Declaration, N. Lerner, “The 1992 UN Declaration on Minorities”, *Israel Yearbook on Human Rights*, vol. 23 (1994), p. 111-128.

²⁷ A. Motilla, “Notas sobre problemas fundamentales del Derecho Eclesiástico contemporáneo”, *Anuario de Derecho Eclesiástico del Estado*, vol. V (1989), p. 218.

²⁸ S. Ferrari, “The New Wine and the Old Cask. Tolerance, Religion and the Law in Contemporary Europe”, *Ratio Iuris*, vol. 10 n. 1 (1997), p. 77.

manage conscientious objection in a consistent fashion with its specific nature²⁹.

It is important to remember that conscientious objection is the refusal, due to conscientious scruples of different sources (philosophical, religious, etc), to perform certain acts which the State law or regulations compel us to perform³⁰. Conscientious objection is the radical outcome of the freedom of a human being to act according to her/his inner dictates. That is why some scholars describe conscientious objection as a “right to refuse a legal duty in the name of individual conscience”³¹. “[A] minimum standard for conscientious objection is belief that one should submit to penalties that society (or any decent society) has deemed appropriate rather than perform the obligation. In other words, a true conscientious objector must think it would be morally preferable not to perform a required act even if no exemption were afforded for conscientious objectors and enforcement against him were certain”³². And, according to the historical experience, conscientious objectors do not seek radical changes in the law or the government (since conscientious objection is not civil disobedience) or serious social turmoil (conscientious objection by definition implies inactivity, a “not-to act”, with a low degree of social danger³³).

Several legal systems and scholars address legislation as the basic tool to deal with conscientious objection. According to them only conscientious objection *secundum legem* (i.e. conscientious objection with prior legal regulation) should be recognized and protected. Other countries and scholars maintain that the judiciary in its role of guardian and keeper of constitutional rights may properly protect conscientious objection. This may be true, especially in those cases which occur more frequent than it seems at first glance in which conscientious objection is exercised by minorities. In any case, everybody agrees that conscientious objection is not a general right. Conscientious objection is limited to specific duties and

²⁹ For an in-depth analysis see R. Navarro-Valls, J. Martínez-Torrón, *Le obiezioni di coscienza. - Profili di Diritto Comparato*, Giapichelli editore, Torino (1995), pp. 23-37.

³⁰ This definition does not differ very much from the definition of the Draft Treaty between the Slovak Republic and the Holy See: Article 3 (5). For the purposes of this Treaty, "objection of conscience" means an objection raised in conformity with the principle of the freedom of conscience according to which anyone may refuse to act in a manner that he deems incompatible in his conscience with the teaching of faith and morals.

³¹ J. Sousa de Brito, “Conscientious Objection”, *Facilitating Freedom of Religion or Belief: A Deskbook* (T. Lindholm, W. Cole Durham, B. G. Tahzib editors), Martinus Nijhoff Publishers (2004), p. 273.

³² K. Greenawalt, *Conflicts of Law and Morality*, Oxford University Press (1987), p. 313.

³³ F. Onida, “Contributo a un inquadramento giuridico del fenomeno delle obiezioni di coscienza”, en *Il diritto ecclesiastico*, 1982, p. 229.

issues. Otherwise conscientious objection would mean the denial of the fundamental nature of the State³⁴. This is the reason to reject some sort of a general “Code of Conscience” to regulate the different forms of conscientious objection³⁵.

Conscientious objection and bilateral agreements, or legislation with previous negotiation, could complement each other for a successful legal solution. 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. 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 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 conscience³⁶. In sum, this kind of agreement functions as a big “container” to protect effectively, and legally, religious conscientious objection.

This idea is not as new as it may seem. For instance, it clearly applies to a specific problem which is normally regulated in agreed legal instruments: the protection of religious communications³⁷. The immense

³⁴ As the Spanish Constitutional Court puts it, “Se trata, ciertamente, como se acaba de decir, de un derecho que supone la concreción de la libertad ideológica (...) Pero de ello no puede deducirse que nos encontremos ante una pura y simple aplicación de dicha libertad. La objeción de conciencia con carácter general, es decir, el derecho a ser eximido del cumplimiento de los deberes constitucionales o legales por resultar ese cumplimiento contrario a las propias convicciones, no está reconocido ni cabe imaginar que lo estuviera en nuestro Derecho o en Derecho alguno, pues significaría la negación misma de la idea del Estado”. STC núm. 161/1987 (Pleno), de 27 octubre, Fundamento Jurídico n. 3.

³⁵ See R. Navarro-Valls, R. Palomino, “Las objeciones de conciencia”, en *Tratado de Derecho Eclesiástico del Estado*, Eunsa, Pamplona (1994), p. 1089.

³⁶ D. Llamazares Fernández, “Prólogo”, en A. Fernández-Coronado, *Estado y Confesiones Religiosas: Un nuevo modelo de relación*, Civitas, Madrid (1995), p. 19.

³⁷ Article 8 of the Basic Agreement between the Slovak Republic and the Holy See, November 24, 2000, AAS (2001) 136-155: 1. *Il segreto confessionale é inviolabile. L’invioiabihtá del segreto confessionale comprende il diritto di rifiutare la deposizione davanti agli organi statali della Repubblica Slovacca. 2. La Repubblica Slovacca garantisce anche l’invioiabilitá del segreto d’informazione, affidato oralmente o per iscritto sotto la condizione di riservatezza alla persona incaricata della cura pastorale.*

majority of democratic States legally protect the secret of religious communications. They do this after a process of legal dialogue and agreement with religious groups³⁸, or in some cases after situations of systematic and/or unintended violations of freedom of conscience³⁹. And this fact reveals that secular States, in one way or another, adopt special regulations regarding a specific topic for the sake of protecting freedom of conscience.

And this is why the Draft Treaty between the Slovak Republic and the Holy See on the Right to Objection of Conscience is an interesting legal tool, because it shows in its radical cleanliness the very purpose of State-religious groups agreements in a modern democratic secular country, and because it demonstrate the basic purpose that justifies this sort of legal instruments in which liberty and equality blend together in a creative fashion.

4.- The “umbrella” for conscientious objectors and the role of a religious group in protecting conscientious objection.

Some remarks here may help shed some light on the legal implications of the Draft Agreement.

The Draft Agreement is not a blank-cheque mechanism to avoid the law. Not every potential conflict between religious norms and State law becomes a real conflict of law and morality. It would be naïve to think that each and every catholic Slovakian citizen will hide him/herself under the Draft Agreement to evade conscience scruples. Thinking in this manner would be to misunderstand what conscientious objection really is. It also

With a different wording, Article II.3. of the Agreement of July 28, 1976, between the Holy See and the Kingdom of Spain: *In no case may a clergyman or member of a religious order be enjoined by Judges or other Authorities to give information concerning persons or subjects that they may have obtained in the course of their ministry* (English text from *Spanish Legislation on Religious Affairs* [A. de la Hera, R.M. Martínez de Codes, editors], Ministerio de Justicia, Madrid [1998], p. 49).

³⁸ Article 3. 2 of the Agreement of Cooperation Between the State and the Federation of Evangelical Religious Entities of Spain: *Those ministers of Churches belonging to the FEREDE are not obliged to divulge information revealed to them in the exercise of their duties of worship or religious assistance.* (English text from *Spanish Legislation on Religious Affairs*, cit.(footnote 37), p. 79).

³⁹ On this topic see M.S. Ariens, R.A. Destro, *Religious Liberty in a Pluralistic Society*, Carolina Academic Press, North Carolina (1996), pp. 927-938, which reflects somehow the ability for unilateral accommodations adopted before judicial experience on the topic. OSCE/ODHIR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the European Commission for Democracy through Law, *Guidelines for Review of Legislation pertaining to Religion or Belief* [on line] [ref. 02.06.2006] available in web http://www.osce.org/publications/odihhr/2004/09/12361_142_en.pdf, p. 16.

implies a prejudice against believers: they might be considered implicitly as “machines” of blind-obedience... The State, however, must avoid this kind of implicit judgement or else the State would be discriminating against a group of citizens because of their beliefs.

It is important to note as well that religion does not always provide a pre-defined basis from which to assess the right to manifest a belief⁴⁰. It would be even be reasonable to say that in many cases religion is basically a source of inspiration for further reflexion⁴¹. “In the narrowest sense, one might say that a genuine conflict between law and morality exists only when, after all claims have been properly weighed, moral reasons require action that is contrary to what the law demands”⁴². For some catholic citizens, there would probably be no conscience problems at all, despite the official Catholic teachings; for the Church, they would be sinners, but for the State this qualification as sinners or outcasts is not necessarily relevant. For other catholic citizens, it might be more advantageous to obey the law of the State or to perform certain de-criminalized acts (i.e. performing abortions using the health-care system in order to maintain one’s job or particular position without any kind of civil disability, co-operating in euthanasia, concluding on behalf of the State same-sex union, etc.) than to follow the dictates of conscience. Finally, for other Catholic citizens, there might be a real conflict between certain acts which the law requires and their conscience, according to the religious teachings of the Catholic Church. And in this later case, it is important to stress that these kinds of conscientious scruples would exist *with or without* an Agreement. And it is similarly important for a democratic State to take into serious consideration this conscientious scruples *with or without* an Agreement. Otherwise, democratic States would be recognizing a freedom of conscience without a real and significant meaning.

Viewing the situation from this perspective, what is the role of the Agreement in this and other cases?

As we have seen earlier, agreements between religious groups and the State are “containers” of conscientious objection in order to prevent and solve future conflictive situations. The Agreement is only a lighthouse that

⁴⁰ L. M. Hammer, *The International Human Right to Freedom of Conscience.- Some Suggestions for its Development and Application*, Ashgate, Dartmouth (2001), p. 159.

⁴¹ *Ibid.* p. 160. Recently English Courts faced a case of this pattern: Shabina Begum’s religion does not establish jilbab dress as mandatory; however Shabina considered jilbab more consistent with their convictions as a Muslim teenager. See *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants)*, [2006] UKHL 15; *R (Shabina Begum) v Governors of Denbigh High School* ([2005] EWCA Civ 199; [2005] 2 All ER 396).

⁴² K. Greenawalt, *Conflicts of Law and Morality*, *cit.* (footnote 32), p. 26.

guides the State law in the unpredictable sea of a pluralistic society. The Agreement indicates for the State some external indicia related to the *sincerity* or consistency of the conscientious objector's conduct. Let us consider, for instance, conscientious objection to military service or conscription: “[W]ere an exemption cast in other religious terms, religious ties might still be used as evidence of sincerity and as a means of constructing the views of inarticulate claimants”⁴³.

From a different perspective, scholars point out that “demonstrating one's sincerity towards personal moral beliefs is quite difficult. The problem is that due to the subjective nature of a conscientious belief, one may have to demonstrate sincerity by bearing the negative consequences of an action that the believer took to avoid a breach of conscientious belief. Such a test then creates a tautology since it undermines the very freedom that one is striving to protect by forcing and individual to demonstrate their sincerity”⁴⁴.

One may wonder whether this “sincerity evidentiary” function of certain religions is discriminatory towards those religions or beliefs which do not enjoy an Agreement. It couldn't necessarily be the case. Since the right to religious conscientious objection is not grounded in the Draft Agreement itself, but in the Slovakian Constitution of 1992⁴⁵, any citizen could invoke conscientious objection, not only in the field of military service ((which is nor longer compulsory)⁴⁶ regulated in Article 25 of the Slovakian Constitution⁴⁷, but in other fields akin to those regulated in the Draft Agreement.

5.- Concluding remarks

⁴³ *Ibid.* P. 321-322.

⁴⁴ L. M. Hammer, *The International Human Right to Freedom of Conscience.- Some Suggestions for its Development and Application*, cit. (footnote 40), p. 155. See also M. Walzer, *Tratado sobre la tolerancia*, Paidós, Barcelona (1998), p. 81.

⁴⁵ Article 24 (1) Freedom of thought, conscience, religion and faith shall be guaranteed. This right shall include the right to change religion or faith and the right to refrain from a religious affiliation. Every person shall be entitled to express his or her opinion publicly.

⁴⁶ See War Resisters' International, *Slovakia: Refusing to Bear Arms 2005 revision*, [on line], [ref. 05.06.2006], available in web <<http://www.wri-irg.org/co/rtba/slovakia.htm>>. And CIA World Factbook, *Slovakia* (military service age and obligation), [on line], [ref. 05.06.2006], available in web <<http://www.cia.gov/cia/publications/factbook/geos/lo.html#Military>>.

⁴⁷ Article 25. (1) The defence of the Slovak Republic is the honourable privilege and duty of every citizen. (2) No person may be forced to perform military duties if it is contrary to his or her conscience or religious faith or conviction. Further details shall be specified by law.

According to the considerations above, the Draft Agreement promotes freedom of religion or belief in a cooperative legal environment like the Slovakian one. It offers valid mechanisms to set up a regulatory system for religious conscientious objection. It doesn't create a blank-cheque for disobeying the law, but a very valuable hint for the State law to find out the religious scruples and conscientious needs of the citizenry. As far as I know, it is a unique Agreement due to these specific features. Once enforced, if it happens, it will be a very interesting legal tool to protect freedom of conscience and to prevent conflicts. I am sure that legal scholars will follow the potential implementation with real interest.