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The Institutional Dimension of Conscientious Objection

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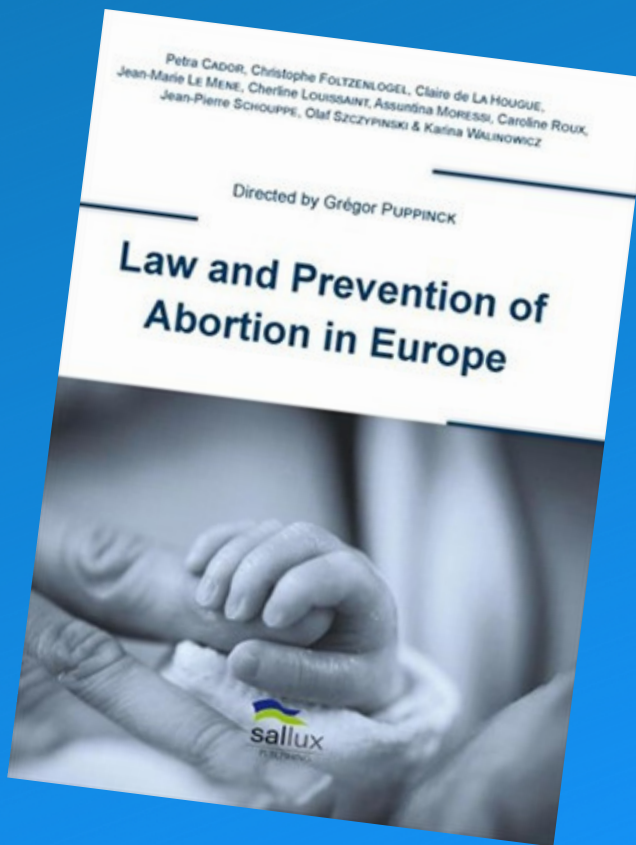

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The concept of conscientious objection having been exposed already,[1] it is now my duty to address the rather controversial question of the theoretical possibility of an institutional dimension of conscientious objection (1). Then the effective legal protection afforded to religious and philosophical advocacy groups and businesses to solve these problems at the institutional level will be reviewed in the light of international and European law on human rights (2) before addressing the issue of the impact of the public-private distinction in some state duties (3).

I. Institutional conscientious objection: a controversial concept

Human rights were born in a liberal and individualistic context. They still wear its print. When it came to recognizing rights to groups (not just individuals component of religious minorities), some renowned lawyers felt concerned. Thus, Jean Rivero feared that the rights of communities might turn against the fundamental rights of individuals and warned in a conference organized in Strasbourg in 1979 "on the rights of communities, the smoke of the crematoria shows its shadow. Community rights are, to human rights, the most serious threats because their

[1] See the work of the UN special Rapporteur on Freedom of Religion or Belief, Professor H. Bielefeldt, in "Conscience, freedom of conscience and conscientious objection" available on the website of the *European Centre for Law and Justice*. See also G. Puppinck, « Objection de conscience et droits de l'homme », *Société, Droit & Religion*, 6, CNRS Editions, July 2016. See also J.-B. d'Onorio (dir.), *La conscience et le droit*, Téqui, Paris 2002; V. Turchi, *I nuovi volti di Antigone. Le obiezioni di coscienza nell'esperienza giuridica contemporanea*, Ed. Scientifiche Italiane, Naples 2009; R. Bertolino, *L'obiezione di coscienza moderna*, G. Giappichelli, Torino 1994; R. Navarro-Valls – J. Martínez-Torrón, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Iustel, Madrid 2011; R. PALOMINO, *La objeción de conciencia*, Montecorvo, Madrid 1994.

recognition might give the seal of the justice to the domination of the strong over the weak"[2] Even if, since then, groups have multiplied in a democratic framework, the risk of weakening of individual rights are still mentioned by some.

During the almost forty years since, the rights of associations, including of religious groups, have been widely recognised by the European Court of Human Rights (hereinafter ECtHR). I recently presented a Law thesis in Paris on this subject.[3] The former European Commission of Human Rights (hereinafter the ECom.HR), on the very same year as the speech of Jean Rivero, started to receive "applicant-churches" in the courtroom. Currently, the ECtHR is being submitted with numerous cases regarding convictional groups. In my thesis, I analysed more than 200 law cases and decisions concerning churches. Yet this evolution in the conception of fundamental rights did not lead to the predicted disasters.

Of course, abuses are still possible, and some happen. The so-called "Church of Scientology", the precise object of the first decision in 1979 is the living illustration of this.[4] But these abuses, rather exceptional, can be prosecuted by the state's jurisdictions.[5] Generally speaking, the convictional groups, and particularly the churches, are precisely in the service of their members, which is not the case of totalitarian regimes, of which Rivero was right to be suspicious, whichever tendency they be, treating individuals as sole cogs, sacrificed to the common ideology.

Thus this leads me to the question: is it justified to speak of "institutional conscience"? Many authors continue to assert the obvious: only a legal person has a conscience and therefore, only the individual has the ability to object for reasons of conscience.[6] The argument appears to prevent any possibility of objection for a group or institution. Added to this is a second argument: in the hypothesis of institutional conscientious objection being accepted, there would be a risk of trivializing conscientious objections or at least relativizing the protection afforded to it. This would result in a relative protection, which is the normal protection on human rights, particularly in the context of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR). However, it is important that the protection of conscientious objection can continue to be priority, even absolute, especially when it comes to negative freedom, that is to say, not to coerce someone to do what he thinks he cannot do in conscience.[7]

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[2] J. Rivero, « Rapport introductif », in G. Cohen-Jonathan (dir.), *Les droits de l'homme : droits individuels ou droits collectifs ?*, L.G.D.J., Paris 1980, p. 18.

[3] Voir J.-P. Schouppe, *La dimension institutionnelle de la liberté de religion dans la jurisprudence de la Cour européenne des droits de l'homme*, Pedone, Paris 2015, preword by E. Decaux.

[4] Com EDH, *X. and Church of Scientology vs. Sweden*, 5 May 1979, n° 7805/77.

[5] In Belgium, the complaints against this group have been declared inadmissible after several years of investigation.

[6] About this, see J. Morange, "La liberté de conscience en droit compare", in J.-B. d'Onorio (dir.), *La conscience et le droit*, Téqui, Paris 2002, p. 29 ; E. Montero, "La loi contre la conscience : réflexions autour de l'objection de conscience", in J. Fierens (coord.), *Jérusalem, Athènes, Rome. Liber Amicorum Xavier Dijon*, Bruylant, Bruxelles 2012, p. 166 ; L. Spinelli, « L'obiezione di coscienza », in R. Botta (a cura di), *L'obiezione di coscienza tra tutela della libertà e disgregazione dello Stato democratico*, Giuffrè, Milano 1991, p. 4 ; J. Hervada, « Libertad de conciencia y error moral sobre una terapéutica », *Persona y Derecho* 11 (1984) pp. 13-53, spec. pp. 43, 48 and fol.

[7] The distinction between freedom of conscience "perfective and preservative" is important in law and ethics. The same applies to medical institutions, which, *a fortiori*, cannot be forced to engage in certain practices that offend the conscience of health care workers and the identity of the institution, e.g. the "morning after pill". Examples of the application of this distinction in hospitals are given in S. Murphy et S. Genuis, « Freedom of Conscience in Health Care : Distinctions and Limits », *Journal of Bioethical Inquiry*, © 21-06-2013, last checked on 22-09-2014 on: http://link.springer.com/article/10.1007/s11673-013-9451-x/fulltext.html

What can one think about this? I agree with both arguments. I personally think that it would be better to keep the use of the expression "freedom of conscience" to legal persons who are the only ones to have a human reason, for conscience is, in the philosophical point of view, the basis of human dignity. In this regard, it is interesting to note that some international instruments such as the Universal Declaration of Human Rights, linking "conscience" and "reason": "Human beings are endowed with reason and conscience" (Article 1). Moreover, it is important to maintain the priority or absolute character, to conscientious objection, and in that aspect, reserving the term conscientious objection to the individual person makes it easier. This ties the position of the Ecom.HR, which declared in 1988, in the case *Verein Kontakt-Information-Therapie Siegfried and Hagen v. Austria*: "With regard to Article 9, the Commission believes that we must distinguish here between freedom of conscience and freedom of religion, which itself can be exercised by a church as such."[8]

But it would not be enough to provide protection to individual freedom of conscience and religion. The lack of such protection derives from individual freedom which apply to members of a convictional group, that is to say, religious or philosophical in the sense that only within the group can what corresponds to freedom of thought, conscience and religion can only be reached, taking into consideration some community aspects that only it is able to provide. It is therefore appropriate to support the need to protect convictional groups and businesses that orbit them- often care centres and educational institutions - usually qualified as "trend" or identity business.[9]

Let's take an example: a mother who wants to give birth to her handicapped child. Her love for the unborn child is strengthened by her conviction that she must keep the child alive, such conviction being based on her religious beliefs. One can here talk of mixt motivation.[10] Yet, how can her conviction and her freedom as a mother be respected if, even the denominational hospital welcoming her tries to convince her to abort, thus openly contradicting the ethical position which, as regards its religious status, should also be its? In such a case, the necessary institutional take over for the respect of her moral and religious conviction will be sorely lacking for the mother. This denominational hospital may appear open minded and be proud of not wanting to impose a confessional moral to anyone: in fact, behaving in this way, it will abdicate its institutional coherence and responsibility towards the patients of this confession, which will thus be unfairly trampled in their intimate convictions. Moreover, this practice will not take more account of patients who do not belong to this religion, but nevertheless go to this hospital precisely because of the ethical position of respect for life which the latter is supposed to stand for. Finally, the practice of abortion may pose ethical problems to some health care workers who may well be asked to take part against their conscience to an act they consider unlawful. This example shows that individual conscientious objection must be complemented by an institutional component.

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[8] Com.EDH, *Verein Kontakt-Information-Therapie and Siegfried Hagen v. Austria*, n° 11921/86, 12 October 1988, *DR* 57, pp. 96-97.

[9] This notion comes from the German Law: *Tendenzbetrieb* (cf. article 81 of the law of 11 October 1952). On its reception in French Law, see I. Riassetto, "*'Entreprise de tendance'* religieuse", in F. Messner, P.-H., Prélot et J.-M. Woehrling (dir.) with the contribution of I. Riassetto, *Traité de droit français des religions*, 2nd ed., Lexis Nexis, Paris 2013, pp. 1211-1230.

[10] See G. Puppinck, « Objection de conscience et droits de l'homme », *Société, Droit & Religion*, CNRS Editions, n°6, July 2016.

It is therefore not surprising that many lawyers as well as many professionals, especially in health and education, have advocated recognition of "institutional objection"[11] concept that ordinary professors of Madrid Navarro Valls Martínez-Torrón, defined as "the legal recognition of conscientious objections that match the institutionalized credo of some religious denominations."[12] Pope Benedict XVI, too, addressed the subject without fear of explicitly defending the institutional objection.[13]

The crux of the question is hence not whether such protections are possible or should be implemented, because the right to exemption for associations already exists in many states. That said, the development of the concept is important. In this regard, I would propose the following summary: technically speaking, institutional exemption is on the borders of individual conscientious objection (Article 9 ECHR) and freedom of association (Article 11 ECHR). Based on the autonomy of each group, it can be presented as an articulation of these two freedoms. The identity of the group is - at least in principle - in line with the conscience of the believers of a church, the nursing staff of a hospital, the teachers of a private school, etc. In this sense, the exemption of the group is at the service of individuals who freely adhere to them and can leave at any time, just as it is at the service of patients and students who are the recipients of organized activities.

Will institutions (church, religious group, identity business...) be declared totally unable to object because of its doctrine or ethics? The problematic aspect of the issue disappears into thin air when one well understands this: if religious or trend or identity groups of the companies may be required to undertake an exemption approach is to ensure the respect of the *doctrinal project or of the ethical code* promoted by the founders of an institution, but also and above all to protect the conscience of the believers or, in the case of businesses, in deference to the convictions of their employees or applicants services. Respect for the individual conscience of

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[11] See R. Navarro-Valls – J. Martínez-Torrón, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Iustel, Madrid 2011, pp. 50, 123, 129, 147, 491 et s.; G. Herranz, "La objeción de conciencia de las profesiones sanitarias", *Scripta theologica* 27 [1995/2] 557-558; F. Toller, "El derecho a la objeción de conciencia de las instituciones", *Vida y Etica*, vol. 8, n. 2 (2007) pp. 163-190, spec. p. 168. Sudre presents the right to conscientious objection as "the right for an individual *(or for a group)* to deliberately remove oneself from one's legal obligations in the name of a superior demand that one perceives in one's conscience" (my italics) (F. Sudre, *Droit européen et international des droits de l'homme*, 8th ed., P.U.F., Paris 2006, p. 484). In Italy, V. Turchi, V., *I nuovi volti di Antigone. Le obiezioni di coscienza nell'esperienza giuridica contemporanea*. Ed. Scientifiche italiane, Naples 2009, pp. 89 et s. Colombian ecclesiastical law expressly recognises freedom of religion and ideological freedom to religious communities. (see V. Prieto, « Dimensiones individuales e institucionales de la objeción de conciencia al aborto », *Revista general de Derecho Canónico y Derecho Eclesiástico del Estado*, 30 [2012] p. 6). As for the American author Bedford, he justifies the use of the term institutional conscience from the classical notion of consciousness while he admits the impossibility that an institution can have a "conscience" in the modern sense, that is in the sense of moral autonomy, which is of course reserved for an individual. However a legal person incapable of autonomy can be made to follow a direction chosen by its founding members and presented as consistent with an objective moral opening the possibility of an erroneous subjective consciousness (E.L., Bedford, « The Concept of Institutional Conscience », *The National Catholic Bioethics Quarterly*, 12 [2012] pp. 409-420).

[12] R. Navarro-Valls – J. Martínez-Torrón, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Madrid, Iustel, 2011, p. 50.

[13] "In order effectively to safeguard the exercise of religious liberty it is essential to respect the right of conscientious objection. This "frontier" of liberty touches upon principles of great importance of an ethical and religious character, rooted in the very dignity of the human person. They are, as it were, the "bearing walls" of any society that wishes to be truly free and democratic. Thus, outlawing *individual and institutional conscientious objection* in the name of liberty and pluralism paradoxically opens by contrast the door to intolerance and forced uniformity." (my italics), Benedict XVI, *Address Of His Holiness Pope Benedict XVI To The Members Of The Diplomatic Corps Accredited To The Holy See*, 7 January 2013, available on the website of the Holy See. Published in French in *L'Osservatore Romano, giornale quotidiano*, 7-8 January 2013, p. 4.

the believers or employees or service seekers, is the raison d'être of institutional objection; it is its strengthening and sometimes necessary complement. Between one and the other, there is a means to end relationship.

In my point of view, the answer to the question at stake is ultimately this: if a corporation, although they have neither body nor soul, can be considered in a legal system like a person under an analogy and a fiction of law, I do not see why a business trend could not be considered an "analogue extension"[14] of personal consciousness. The concept of analogy supposes that two realities have in common some similarities and some differences. Let us then consider the similarities and differences between the individual and the ethical institution. As for the differences, it is clear that a religious (or philosophical) institution is not an individual person, it has no conscience *stricto sensu*, and has neither reason nor desire nor freedom: it does not reach the sphere of morality which is the prerogative of the individual. There is no reason to question these essential differences. As for similarities, as an entity, it has an identity and a mission that commits itself and its members, in moral matters and allows to ask it to explain certain facts. Otherwise, it would not be a church or business identity but a "neutral" entity, provided that neutrality in its purest form may exist. So there is a division or a communion of ethical values between individuals and group. Do not forget that the entity is administered and represented by individuals - its members - which themselves have a conscience. Similarly, health workers or teachers who delivers its services have a conscience as well as the recipients of these health or educational institutions. For these people, it is important that the entity complies with certain ethical orientation and does not betray them while undergoing medical treatment or schooling.

If all professionals conform in principle to the ethical code of the establishment, or at least deliberately agreed to comply with them in the exercise of their professional activities, recipients of the services provided also use it knowingly and often precisely based on that orientation or identity. So much so that these institutions, defending their right and duty to safeguard the specificity of their identity and thereby denying any involvement in activities that are contrary to their "roadmap", even imposed by a civil law, help out those concerned. This is the very idea of "analogue extension" of consciousness of the founders, organs, members and recipients to the so-called "conscience" of the entity - the quotation marks are mandatory - as expressed the words "business trend" or "identity business".
Religious identity of the community also provides support to conscientious objectors by facilitating authentication of sincerity and evidence, at least some, of the consistency of their approach. Hence, a Jehovah's Witness may, in the eyes of the judges, be all the more credible in its refusal of military service as his religion has taken a public position on this subject and will defend him with pugnacity in legal proceedings[15]. The membership to a particular group allows to increase the predictability of certain cases of objection and eventually to formulate safeguards of religious identity and try to get them recognized by public authorities.

But it may happen that individual consciousness does not fully coincide with the "institutional conscience", the latter being more tolerant or, conversely, more rigid than the ethical line

[14] F. Toller, « El derecho a la objeción de conciencia de las instituciones », *Vida y Etica*, 8 (2007/2) pp. 163-190, spec. p. 168.
[15] *Bayatyan v. Armenia*, GC, n° 23459/03, 7 July 2011, the association Jehova's Witness intervened as third party.

advocated by the religion of affiliation. Thus, one of the famous case of the jurisprudence of the US Supreme Court for military service is one in which a practicing Catholic had refused to perform military service, while, paradoxically, Catholicism has never adopted a systematic rejection of the armed service position.[16] In the event of a discrepancy between the two "consciences", if one may say, it is important that judges be attentive by priority to the position of the member and be not influenced unduly by preconceived "patterns", regarding the theoretical moral position of the group because the individual conscience is the true indicator of an objection.[17]

Beyond the conceptual debate, the job of the lawyer is primarily to ensure the effective protection of this institutional right and to work in this direction, ensuring the *technical accuracy of terms*. From this point of view, the words "institutional conscience" do not seem satisfactory, even if they are used by many lawyers, probably because of the attractiveness of their brevity and their mediatized character. It would be more correct to speak of identity safeguards. Hence, in Spain, Article 6 of the Organic Law on Religious Freedom allows denominations to establish "safeguard clauses of their religious identity and own character as well as respect for their beliefs."[18] Other expressions are also acceptable. "Institutional conscience clause", however, would not escape the criticism already expressed regarding the reserved use of the word "consciousness."[19]

Three short remarks will clarify the examined concept. First, conscience clauses are also used - and even primarily - to individual conscientious objection. For example, a department head who has the delicate task of adopting or not an ethical measure involving all health care staff, will first wonder about the existence of a personal cooperation to evil from his part. These institutional clauses therefore also serve individual conscientious objection. Second, they cannot be considered in a purely formal or positivist manner, that is to say, as if, once formulated, they "exhausted" the right to object back to a faith group or identity establishment. Finally, the refusal of such terms (in other words, the rejection of the possibility of an "institutional conscientious objection") would mean that the groups would have no choice between committing a wrong or taking refuge into "collective actions". But such actions, such as civil disobedience or passive or active resistance, correspond to a different approach and can have extremely harmful effects on the stability of the state order; they are possible in crisis situation or general rejection of the legislation; they assume an involvement of the masses and a political commitment to reform which is not always primarily for compelling reasons of conscience... The system of safeguards of institutional identity advocated here thus occupies an intermediate position between objection of individual consciousness and collective actions. By

[16] See *Gillette v. United States*, 401 U.S. 437 (1971).
[17] See R. Navarro-Valls – J. Martínez-Torrón, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Iustel, Madrid 2011, p. 490.
[18] See M.J. Roca, « Derechos confesionales e integración de las confesiones religiosas. Aspectos institucionales y personales: de la autonomía a la objeción de conciencia », in J. Ferreiro (coord.), *Jornadas Jurídicas sobre Libertad Religiosa en España*, Ministerio de Justicia, Madrid 2008, pp. 215-242, spéc. p. 228.
[19] For example, the Roman clergyman Carlo Cardia mentions "structural or collective objection" (C. CARDIA, "Tra il diritto e la morale. Obiezione di coscienza e legge", *Stato, Chiese e pluralismo confessionale, Rivista telematica*, www.statoechiese.it, May 2009, p. 29). A Colombian jurist prefers the expressions "ideological objection" or "institutional ethical objection" (I. M. Hoyos Castañeda, « Objeción de conciencia en materia de aborto », *Persona y Bioética*, 10, n. 26 [2006] pp. 69-84, spec. p. 81).

providing a more moderate alternative to civil disobedience or other forms of collective action, it performs a useful function for the maintenance of social cohesion and political peace.

After these notional and terminological clarifications, one should consider the protection of conscience offered within convictional groups and business identity: is it effective and not reducing?

II. The Necessary Protection of Convictional Groups and Identity Businesses on the International and European Levels.

Article 18 of the International Covenant on Civil and Political Rights does not specifically address the issue of conscientious objection, nor does Article 9 of the ECHR,[20] which is inspired by Article 18 of the Universal Declaration of Human Rights. Observation n° 22 of the UN (1993) brings however useful details: "the Covenant does not explicitly mention the right to conscientious objection, but the Committee believes that such a right can be inferred from Article 18"[21].
The attention of European case law on conscientious objection was long confined to individual conscience objection to compulsory military service (Article 4 § 3b ECHR)[22]. Such an objection is recognized, but, in the eyes of the Court, it does not allow to refuse an alternative civilian service when it is organized by the State.[23] In this area, case law was stuck until the *Bayatyan case* by the Grand Chamber (2011) that - 18 years after the UN Observation n° 22 - explicitly linked conscientious objection to the corresponding provision in the ECHR, namely Article 9 on freedom of thought, conscience and religion, thus offering new perspectives to conscientious objection.[24]

This jurisprudential opening was parallel to the adoption of Article 10, paragraph 2, of the Charter of Fundamental Rights of the European Union (hereinafter the "Charter"), inserted in Lisbon (2007) in the treaties of the European Union by Article 6 of the Treaty on European Union. This provision, which enjoys the same legal value as the Treaties, expressly provides for the possibility of conscientious objection with regard to freedom of conscience, thought and religion: "The right to conscientious objection is recognized, in accordance with the national laws which rule its exercise." It is true that such wording is vague and that it is ready, as some

[20] ECom.HR, *Conscientious objectors v. Denmark*, 7 March 1977: "not […] any right to be a conscientious objector [is] as such included in the rights and freedoms guaranteed by the Convention." ECom.HR *Grandrath v. RFA*, 23 April 1965).
[21] *General Observation n° 22* (48th session, 1993), *Compilation des commentaires généraux et Recommandations générales adoptées par les organes des traités*, U.N. Doc. HRI\GEN\1\Rev.1 (1994).
[22] For a global view on the subject, see J.T. Martín de Agar, « Libertà di coscienza », in P. Gianniti (a cura di), *Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali. La CEDU e il ruolo delle Corti*, Zanichelli, Bologna 2015, pp. 1115-1154.
[23] *Johansen v. Norway*, n°10600/83, 14 October 1985.
[24] *Bayatyan v. Armenia*, n°23459/03, GC, 7 July 2011. I agree with Walter, while welcoming the reversal and highlighting its importance, however, it is difficult to ignore the weakness of this judgment for having fulfilled with excessive lightness of control the legal basis and legitimacy of the law, two pillars that help irrigate the European system of human rights. Such casualness is all the more unfortunate that this is a decision introducing a significant change in jurisprudence (see J.-.B. Walter, « La reconnaissance du droit à l'objection de conscience par la Cour européenne des droits de l'homme. Cour européenne des droits de l'homme (Gde Ch.), arrêt *Bayatyan c. Arménie*, 7 juillet 2011 », *RTDH* 23 [2012] pp. 671-686).

authors have pointed out, at two readings. In a first reading, article 10, paragraph 2, of the Charter would recognizes the right to conscientious objection as a fundamental European right. But in this case it would have been enough to add that the national laws ruling the exercise, while the terms "recognised is, in accordance with" show ambiguity. The current wording could indeed suggest a certain subordination of the right to conscientious objection - of recognition - from the will of the national legislature. According to a second reading, Article 10, paragraph 2, of the Charter would simply make a reference to state law. But in this case, its insertion into the text on fundamental rights would be entirely inappropriate and devoid of purpose[25]. However, despite its limitations, Article 10, paragraph 2, of the Charter has the huge merit to exist. This provision serves as normative support to European case law,[26] but also as support to States that are willing to consider other conscientious objections.

It is appropriate to mention some soft law elements. The European Parliament first adopted in 1994 a resolution intending to emphasize the importance of preserving the freedom of conscience in matters of compulsory military service.[27] The most decisive step was probably the one made by the Directive 2000/78 / EC establishing a general framework for equal treatment in employment and occupation.[28] While underlining the general principle of non-discrimination, Article 4 arranges a special status for the trend businesses. This results in not qualifying some "different treatment" likely to be seen as discrimination as such as regards the specific identity of such businesses. Thus the religious factor is taken into account and result either of the nature of the activities (religious activities) or of its context (ecclesiastical regime as opposed to civil regime). Article 4 provides a religious regime that justifies that religious groups themselves or the public or private businesses with an ethos based on religion or belief, may require their members or their staff to adopt an attitude of "good faith and loyalty to the ethics of the organization" (Article 4, paragraph 2), which, while constituting a difference of treatment compared to the ordinary regime, does not constitute unfair discrimination (Article 4, paragraph 2[29]).

More recently, Resolution 1763 passed in 2010 by the Parliamentary Assembly of the Council of Europe has recognized for the first time the right to *conscientious objection* to *hospitals* and

[25] See R. Navarro-Valls – J. Martínez-Torrón, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Madrid, Iustel, 2011, p. 44 ; J.T. Martín de Agar, « Diritto e obiezione di coscienza », in P. Gianniti (a cura di), *I diritto fondamentali nell'Unione Europea. La Carta di Nizza dopo il Trattato di Lisbona*, Zanichelli, Bologna 2013, p. 985.

[26] By European case law, I mean here both that of the ECtHR (Strasbourg) and that of the ECJ (Luxembourg), both being called to collaborate closely and having a matching position in the field of freedom of conscience, thought and religion.

[27] *Resolution on conscientious objection in the Membres States of the Community*, 14 February 1994, *JOCE* C 44/104-105.

[28] *JOCE* L 303/19, 2 December 2000, 16-22. Its "considering" 23, 24 and 26 pave the way to art 4, along the lines of art. 17 TFUE, itself successor of the former Declaration 11 of the European Union.

[29] "Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, 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 religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground."

institutions on abortion, euthanasia and treatment which may lead to the death of a foetus or a human embryo. It encourages the European States, while ensuring access to care for patients, "to ensure respect for the right of freedom of thought, conscience and religion of healthcare providers."[30] Furthermore, paragraph 17 of Resolution 1728, adopted a few months earlier, concerning discrimination based on sexual orientation and gender identity, provides a possible exemption for religious institutions and organizations.[31]

A brief review of the terminology used in both resolutions reveals that if the first one uses the term "conscientious objection" in its title, on the other hand it avoids the term in the rest of the text. As for the second resolution, it favours the use of the term "exemption". Both documents of soft law, whose principal merit is to promote opportunities for exemption for ethical or religious reasons in the institutions seem not to encourage the use of the term "conscientious objection" for these groups.

Before examining the case law, one must mention the Organization's Guidelines for Cooperation and Security in Europe. They advocate the consideration by States of conscientious objection for individuals and for groups: "There are many circumstances where individuals *and groups*, as a matter of conscience, find it difficult or morally objectionable to comply with laws of general applicability."[32] Several examples of objection are then developed.

The awakening of international courts to identity safeguards was late. The Court of Justice of the European Union (hereinafter the "ECJ") has not yet an abundant case law about this, although this may change in the future.[33] For its part, the ECtHR has a number of positive elements to its credit. Its contribution to institutional ethical aspects is mainly situated in *health care and education fields.*[34] In the absence of a provision of the ECHR recognizing the right to conscientious objection, the ECtHR was initially based on the concept of identity businesses, effective in different States; then it also appealed to the Directive 2000/78/EC aforementioned.[35]

The decision *Rommelfanger v. Germany*[36] of the ECom.HR paved the way in a case where a Catholic orientation clinic had dismissed a doctor for taking a stand in favour of abortion in the media. In that decision, the Commission recognized that the credibility of this denominational clinic was at stake, which justified to impose some *duties of loyalty* to employees. It therefore found inadmissible the doctor's request based on freedom of expression.

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[30] APCE, *Resolution 1763*, "The right to conscientious objection in lawful medical care", 7 Oct. 2010, n° 1 and 4.
[31] APCE, *Resolution 1728*, "Discrimination on the basis of sexual orientation and gender identity" 29 April 2010.
[32] OSCR/ODIHR, *Guidelines for Review of Legislation Pertaining to Freedom of Religion or Belief*, 18-19 June 2004), CDL-AD (2004) 028, p. 16 (on http://www.osce.org/fr/odihr/119675 22 February 2016). My italics. These Guidelines were recommended by the special Rapporteur on Freedom of Religion or Belief at the 61st session of the Committee of Human Rights (CE/CN, 4/2005/61 para. 57).
[33] As regards religion and conscience, the CJEU mainly dealt with cases concerning Labour law, and mainly under individual aspects: E. TAWIL, « La liberté religieuse en droit de l'Union européenne après le Traité de Lisbonne », *Annuaire Droit et Religions* 5 (2010-2011) spec. pp. 232-233.
[34] See my thesis: J.-P. Schouppe, *La dimension institutionnelle de la liberté de religion dans la jurisprudence de la Cour européenne des droits de l'homme*, Pedone, Paris 2015, foreword by E. Decaux, spec. pp. 369-398.
[35] Hence the case of the Grand Chamber of the ECtHR *Fernández Martínez v.Spain*, which will be treated later, quotes this directive of the EU in its point 66.
[36] ECom.DH, *Rommelfanger v. Germany*, n°12242/86, 6 September 1989.

More recently, in 2007, a Swiss case was taken to the ECtHR (*Abaz Dautaj*[37]) concerning the employment of an unemployed "nonreligious" person as a janitor in a Protestant conference centre. Not supporting well the atmosphere of the centre, which he called "fanatically religious, racist and xenophobic", the applicant had abandoned the job on the very day of recruitment. The judges agreed with the evangelical centre, after having considered that, by signing the employment contract, the applicant had freely agreed to work in a company with a fixed orientation despite the difference with his personal convictions, and that he had, thus, assumed certain obligations to adapt his behaviour to the specificity of the place.

As regards education, in which the case law of the ECtHR strongly supports the right of convictional groups to defend doctrinal unity, discipline and ritual that is essential to them, two cases stand out. The first is *Lombardi Vallauri v. Italy*. Although the case ended with a condemnation of the State for not having adequately controlled the existence of procedural safeguards, it is clear from that judgment that the judges have recognized the specificity of a Catholic university and the compulsory nature of the Concordat – an international treaty - between Italy and the Holy See and reaffirmed the right not to renew the annual contract of a teacher who contradicted the religious doctrine of a Catholic university.

Similarly, in the most recent case of *Martínez Fernández* case, the ECtHR held in a Grand Chamber, following roughly the argument of the room, agreed with the Spanish Ministry of Education, the latter having refused to renew the annual appointment of a former priest who bound to celibacy, had gotten married and become father of several children. The applicant claimed to continue to provide Catholic religion classes in public schools, despite the opposition of the diocesan bishop, competent to grant the necessary approval by the creditors, because of his lack of doctrinal coherence and the scandal that it had caused in the media.[38] Although the legal framework invoked in these two cases is not formally referred to conscientious objection - a technically non-existent possibility at the time of the conclusion of the two concordats concerned, that is to say respectively in 1984 and 1978 - the ECtHR found that there was the equivalent of a clause of Catholic identity backup and consequently took into account the specificity of the Concordat procedure for appointing teachers.

Three German cases of dismissal of a lay member of a church or identity business should be mentioned: *Obst*, *Schüth* and *Siebenhaar*. In the first two cases, it was a lay employee of a church (respectively, the public relations director for Europe of the Mormons, and an organist and choir director recruited by a Catholic parish) in situations of conjugal crisis and marital cohabitation and subsequently, in flagrant contradiction with the religious marriage doctrine. Now, in a very disconcerting way, the Court, on the same day, gave two diametrically opposite judgments to these cases: the revocation of the former was considered justified, and that of the second, unjustified. It is risky to pretend to draw a firm teaching of the two cases, although legal

[37] ECtDH, *Abaz Dautaj v. Switzerland*, n°32166/05, 20 September 2007. Food for thought from this case, on the necessity to not protect less "nonreligious" convictions than religious convictions, see L.-L. CHRISTIANS, « Chronique de jurisprudence de la Cour européenne des droits de l'homme », *Annuaire Droit et Religions* 4 (2009-2010) pp. 639-640.

[38] The Grand Chamber judgment, however, implies there might be problems in the future and a greater requirement for procedural safeguards. I have examined these questions: J.-P. Schouppe, « L'autonomie des églises en matière d'instruction dans la jurisprudence de la Cour européenne des droits de l'homme (about the judgment [Gr Ch..] Fernández Martínez v. Spain, 12 June 2014)" Review of public law, No. 2, 2015, pp. 499-524.

argument background is substantially the same in both cases.[39] In the third case (*Siebenhaar*), the ECtHR has clearly upheld the right to institutional autonomy, recognizing the direction of an evangelical kindergarten the right to dismiss the applicant who had hidden his militancy within "the universal Church", a confession incompatible with evangelical religion, making thus himself guilty of a continued lack of loyalty.[40]

III. The incidence of the distinction between private and public at the level of the States.

One needs to finally briefly evoke the subject, while taking into account two significant parameters: first, the public-private distinction; secondly, the issue of public funding which may result in a mandatory public service.

I want to start by saying a word about the system in the United States, where there is *ministerial exception*. Since the approval of Title VII of the *Civil Rights Act* (1964), the ministerial exception is admitted in labour relations occurring within religious groups. Thus, the *Hosanna-Tabor*[41] judgment of the Supreme Court in 2012 is not really new, even if it has, for the first time, acknowledged that the ministerial exception may assert against the latest anti legislation -discrimination and make this exception applicable when a religious group decides to dismiss one of his professors. It was, in this case, a person (Mrs Cheryl Perich), who had been recruited by a religious institution as a "called teacher" function which, unlike the "lay teachers", also implies a religious role. The Supreme Court affirmed the incompetence of civilian judges to assess the reasons given by the religious group in question to ensure that it can maintain control over the selection of its ministers. It thus confirmed the principles of autonomy of religious groups and healthy separation between the State and the Churches. Moreover, this is a *private* and *confessional* institution. In the United States, there is the possibility of identity safeguards for general care centres (*institutional providers*), whether public, private or religious. Nevertheless, in some States, public institutions or institutions that are not strictly religious, are sometimes excluded of such safeguards, as it is the case in California as regards abortion.[42]

In Europe, state rights have extremely diverse features. While a small minority of states refuses conscientious objection, the majority acknowledges some possibilities for objection or exemption at a constitutional or legislative level. Some states recognize institutional safeguards, with in that case, a reference to the public-private distinction. In France, conscience clauses can be formulated for health facilities. The Conseil constitutionnel in 2001 recognized conscientious objection to benefit only individuals, but this does not preclude the existence of

[39] See G. De Beco, « Le droit au respect de la vie privée dans les relations de travail au sein des sociétés religieuses – L'approche procédurale de la Cour européenne des droits de l'homme : *Obst et Schüth v.Germany*, 23 September 2010 », *Revue trimestrielle des droits de l'homme* 22 (2011) pp. 389 and foll.

[40] ECtHR, *Siebenhaar c. Allemagne*, 3 February 2011, n° 18136/02. See J.-P. Marguenaud – J. Mouly, "Les droits de l'Homme salarié de l'entreprise identitaire", *Recueil Dalloz*, 23 June 2011, n° 24, 1638.

[41] See I. Martínez-Ecchevarría, « La discriminazione religiosa fondata sulle leggi antidiscriminazione: un rischio giuridico ormai globale », *Ius Ecclesiae* 24 (2012) pp. 733-744 (note *sub* CORTE SUPREMA DEGLI STATI UNITI D'AMERICA, sentenza *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et al.*, 11 January 2012, n. 10-553, cit. 13 S. Ct. 694, *ibid.*, (2012) pp. 719-732); ID., « The Protection of the Christian inspiration of medical, educational and charitable institutions: the Obamacare », *ibid.*, 25 (2013) pp. 729-751.

[42] See Pamela H. Del Negro - Stephen W. Aronson, « Practice Resource: Religious Accommodations for Employees in the Health Care Workplace », *Journal of Health & Life Sciences Law* 8 (2015/3) Pg. 72, p. 3.

institutional clauses.[43] Section 16.1 of the 1978 Constitution guarantees "freedom of ideology, religion and worship of individuals and *communities*." Although this constitutional provision does not expressly mention conscientious objection for a group, institutional protection, which here takes the form of identity safeguards, enjoys an undoubted constitutional basis.[44] Thus, insofar as "communities" can be considered as holders of freedom of ideology and religion, it seems difficult to deny their right to conscientious objection for ideological or religious reasons.[45] In other countries, like Italy, where there is no constitutional basis, some publicists believe that legislative intervention is required, while others reject the requirement of "interpositio legislatoris" that they see as an unacceptable positivist legalistic[46] type of reflex. It shows the growth of *secundum legem* or conscience objections options from which religious groups and trend businesses are not excluded.[47]

The public-private distinction is often decisive. In many states, private care and education centres that have taken the precaution of establishing identity safeguards manage to prevent many ethical problems. Thus, the Spanish system of identity safeguards has been implemented on several occasions, particularly following the introduction in some university courses, of compulsory lessons about abortion techniques,[48] as well as during a course of "citizenship education". The latter had been imposed not only in primary and secondary schools but also in

[43] In France, health care facilities, under certain strict conditions, can invoke a clause of this kind to refuse abortions to be practiced in their premises (A. Lamboley, « La clause de conscience dans le monde biomédical : un paysage contrasté », in J.-B. d'Onorio (dir.), *La conscience et le droit*, Téqui, Paris 2002, p. 52). The Constitutional Council decision of 27 June 2001 on the law extending the allowed time to ask for an abortion said that conscientious objection is primarily personal and can lead a hospital leader opposed to abortion to admit that abortions are practiced in his department as regards to the principles of equal access to public service. So this is a limitation of institutional conscientious objection related to public order motivations at large (that of Article 10 of the Declaration of 1789) which shows the complexity of a possible institutional objection under French law. For more recent data, see P.-H. Prélot, « Les aménagements juridiques de la liberté de religion », in F. Messner – P.-H. Prélot – J.-M. Woerling (dir.) And the contribution of I. Riassetto, *Traité de droit français des religions*, 2e éd., Lexis Nexis, Paris 2013, pp. 739-783 as well as in I. Riassetto, « Clause de conscience – Droit français » in F. Messner (dir.), *Dictionnaire Droit des religions*, CNRS Éditions, Paris 2010, pp. 153-155.

[44] My italics. Voir L. Ruano Espina, « Objeción de conciencia a la Educación para la Ciudadanía », *Revista General de Derecho Canónico y Ecclesiástica del Estado*, n° 17, mai 2008, p. 58.

[45] See R. Navarro-Valls – J. Martínez-Torrón, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Iustel, Madrid 2011, p. 50.

[46] The case of Italy is particularly surprising that the Constitution was drafted following the horrors committed during the Second World War (including the persecution of Jews by the Nazis) and reflects a net personalist inspiration or *iusnaturaliste*. To overcome this deficiency, some legal experts, based on the jurisprudence of the Constitutional Court, consider that freedom of conscience and the right to object may be regarded as a principle "similar" to the supreme principles underlying the text the Constitution and deducted "by way of interpretation" of several constitutional provisions (including Article 19 on freedom of religion), like the principle of secularism. This interpretation would dispense with the need for interpositio legislatoris (voir G. Dalla Torre, « Obiezione di coscienza », *Iustitia* (2009/3) pp. 269-270 and, more widely, ID., « Obiezione di coscienza e valori costituzionali », in R. Botta (a cura di), *L'obiezione di coscienza tra tutela della libertà e disgregazione dello Stato democratico*, Giuffrè, Milano 1991, pp. 19-61).

[47] In Italy, Professor C. Cardia speaks of "collective or structural objection" (C. Cardia, « Tra il diritto e la morale. Obiezione di coscienza e legge », *Stato, Chiese e pluralismo confessionale*, *Rivista telematica*, www.statoechiese.it, mai 2009, 29 p.). For an overview of conscientious objection in this country, see F. Mantovani, *Obiezione di coscienza fra presente e futuro* », *Iustitia* 64 (2011) pp. 151-156; V. Turchi, V., *I nuovi volti di Antigone. Le obiezioni di coscienza nell'esperienza giuridica contemporanea*. Ed. Scientifiche italiane, Naples 2009, pp. 89 and s. The problem of abortion poses itself in principle not as long as the caregivers continue not to be obliged by law (ibid., P. 69).

[48] In Spain, the introduction of the introduction to abortion techniques in some university training program has provoked strong reactions (see Boletín de Noticias Universidad de Navarra in Pamplona, December 15, 2009 and for the University Foundation San Pablo -CEU in Madrid, Forum Libertas, December 23, 2009).

Catholic schools part of the state school system,[49] despite the incompatibility of some of their content with the identity and Christian educational project, which was a serious attack on institutional autonomy. The question of the existence of *public subsidies* can annex itself to that of the identity of public or private institutions. Subsidized care or educational centres are usually accountable to a *public service*, which adds to the complexity of their situation. However, the method of financing has no impact on the nature of the act (medical, legal, illegal...) to which one objects. Without being able to present an overview of the different systems established in other European States, I still would like to stress the importance of the subsidiarity principle to justify a diversity of solutions as well as pluralism to ensure some autonomy to convictional institutions. The institutional ethical aspects must be respected, including in the framework of a public service. Thus, a university which, without being public, would receive state subsidies might indeed be liable for utility function, but it is only in respect of its institutional specificity it should fulfil such a function. To make the granting of public subsidies dependent on certain practices which are incompatible with the identity of the institution would violate its autonomy and religious pluralism or philosophical. In this hypothesis, then one should wonder whether the state law should not itself be considered discriminatory and not respecting the principle of non-discrimination established by Article 1 of Protocol No. 12 of the ECHR in that it would nullify the right to conscientious objection allowed to convictional groups in favour of an ideology proper to holders of public power forgetful of their duties of impartiality and pluralism.

As far as religious communities and identity establishments comply with public order, safeguard clauses should not be ignored. This explains why a private or denominational clinic having expressly excluded abortion and euthanasia by an identity safeguard clause cannot rightfully be compelled to perform these practices. It is not uncommon that an institution be legally obliged to express immediately its refusal to patients who request it. This requirement poses no ethical problem and seems fair towards patients who then cannot be caught off guard, although this risk appears small in practice because the identity of the care centres is mostly well known to all. A hospital which does not practice abortion and euthanasia should not be required to actively facilitate access to a doctor willing to perform such acts, which, except in the case of therapeutic abortion, can hardly be considered "medical". Even if the hospital is one of public service, its obligations cannot go beyond medical care.

It may happen that the institutions are obliged by law to disclose patient information concerning the name of doctors willing to perform such practices. In this regard, it might seem reasonable that the burden of information would then be based on the state, which took the responsibility of decriminalising these practices which, moreover, remain strictly limited exceptions to the prohibition to kill. No doctor can be forced to perform such acts. It is thus to the State, which decriminalised the act, that should fall the task of organizing an information mechanism on physicians available to care for patients. An intermediate solution was adopted notably in the Belgian and Luxembourg legislations on euthanasia. The doctor who refuses to perform euthanasia is required to inform the patient or person of trust the reasons for its decision (within 24 hours in Luxembourg) and, at the request of the patient or person of trust, he must send the

[49] One can mention for example the "institutional statement" of the University Foundation San Pablo-CEU http://www.forumlibertas.com. The Spanish Confederation of Teaching Centres (CECE) also took a similar position (see L. ESPINA RUANO, "Objeción de conciencia a la Educación para la Ciudadanía" Revista General de Derecho y Canonical ecclesiastico del Estado, No. 17, May 2008, p. 59).

medical file to the doctor appointed by the patient or by a person of trust, which exempts the objector doctor from the duty to communicate the name of a colleague.[50]

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To conclude, it would be desirable to develop the possibilities of identity safeguards that already exist in many states. These provisions complement and reinforce on an institutional level the always priority approach of individual conscientious objection. Faith groups and identity businesses being autonomous in the interpretation of their identity and in translating the ethical requirements thereunder, the decision to object should they be left to them under any circumstance. The ability to object at the institutional level through identity safeguards should not be understood narrowly, as if its scope was strictly limited under the existing provisions. The ability of a religious group or institution to defend its ethical orientation should be considered more comprehensive than the content covered by formulated identity safeguards. This consideration should enable those groups to not get caught in the meshes of positivist formalism. In this regard, an analogy can be drawn, in my view, with the conscientious objection of the individual who cannot be reduced only to cases of conscientious options already developed by legislation, such as the emblematic case of compulsory military service. Similarly, the groups retain the right to stand together to any new situation that may arise as a conflict with respect to their ethical code. In particular they may add subsequent identification safeguard clause or complete a previous clause. Moreover, the institutional identities, whether religious or ideological, are generally widely known by the public authorities. They usually offer a degree of transparency and predictability that is not found at the individual level. Spontaneity, originality and unpredictability of individuals, characterizing the actual conscientious objection, may have on the state legal order a surprising, or even a destabilizing, effect, without it jeopardizing the raison d'être of individual conscientious objections. These various safety valves are all essential elements in a modern and effective human rights system established to ensure the inherent human dignity of every person.

[50] Article 14 of the Belgian Law of 28 May 2002 (*M. B.* June 22, 2002) and Article 15 of the Luxembourg law of 16 March 2009 on euthanasia (*Mémorial*, 16 March 2009, 618). For an overview of the situation in Belgium, see L.-L. Christians and S. Minette, "Abortion and conscientious objection in Belgium", Revista General de Derecho y Canonical ecclesiastico Estado del 23 (2010) p. 20.