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# CONSCIENCE PROTECTION AND THE HOLY SEE

*Robert John Araujo, S.J.*<sup>†</sup>

The sphere of action of the State has grown steadily larger until it now threatens to embrace the whole of human life and to leave nothing whatsoever outside its competence.<sup>1</sup>

## I. INTRODUCTION

My objective in this brief essay is to bring together several elements important to the law and to society. These include: religious freedom, the freedom of conscience, and the role of the Holy See in the international order. For many citizens who live in democratic societies, the legal concepts of religious freedom and freedom of conscience are thought to be well understood and welcome to the exercise of democratic institutions. Moreover, these two freedoms are protected by the law, both domestic and international. The nature and role of the Holy See is most likely less-well known. However, as an international person and sovereign, its role in the international order is also well known, as I have demonstrated elsewhere.<sup>2</sup>

Briefly, the term “Holy See” is based on the Latin *sedes* (see) and refers to the office (literally “chair”) of St. Peter.<sup>3</sup> The term refers to the place where the Pope and the Roman Curia are found, but it is not a synonym for Rome, the Vatican, or the Vatican City State.<sup>4</sup> Although the Holy See does not fall

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<sup>†</sup> Visiting Professor of Law, Boston College.

<sup>1</sup> Christopher Dawson, *Religion and the Totalitarian State*, XIV THE CRITERION No. LIV, 1 (October 1934).

<sup>2</sup> See, Robert John Araujo, *The International Personality and Sovereignty of the Holy See*, 50 CATH. U.L. REV. 291 (2001). For a somewhat different perspective, see also Matthew N. Bathon, *The Atypical International Status of the Holy See*, 34 VAND. J. TRANSNAT'L L. 597 (2001).

<sup>3</sup> The original Latin term Sancta Sedes is therefore translated as “HolySee.” D. P. SIMPSON, CASSELL'S LATIN DICTIONARY 533, 543 (5<sup>th</sup> ed. 1968).

<sup>4</sup> See generally C.G. Fenwick, *The New City of the Vatican*, 23 AM. J. INT'L L. 371 (1929) (distinguishing between the Holy See and the Vatican City State); Gordon Ireland, *The State of the City of the Vatican*, 27 AM. J. INT'L L. 271 (1933).

within conventional norms of international personality and sovereignty, it possesses international personality and exercises a unique sovereignty that is both religious and temporal.

It should generate no surprise that the interests of the Holy See coincide with those of persons who cherish religious freedom and the protection of the exercise of the well-formed conscience. As an international person exercising its unique sovereignty, the Holy See has frequently entered bi-lateral treaties (usually called concordats) with countries in order to protect a broad range of issues falling within the realm of religious freedom within those states. Moreover, the Holy See has also participated in the negotiations of many multi-lateral treaties, and is a party to a number of them. It is at this point that some in-depth study of the Holy See's treaty-making capacity is in order.

## II. THE TREATY-MAKING CAPACITY OF THE HOLY SEE

For hundreds of years, the Holy See has exercised its sovereignty and international legal personality like other sovereigns by entering into treaties and concordats with other sovereigns on a wide variety of matters.<sup>5</sup> These agreements fall into two categories: (1) treaties and agreements dealing with conventional topics entered by States, and (2) concordats.<sup>6</sup>

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<sup>5</sup> For an overview of the Holy See's international personality and sovereignty, see Robert John Araujo, *supra* note 2.

<sup>6</sup> Concordats are agreements between the Holy See and another sovereign that address issues concerning the Church in that State. They have been defined as "[p]ublic treaties or agreements, with the force of international law, between the Church and states, regulating relations in areas of mutual concern." J. A. Abbo, 4 *New Catholic Encyclopedia* 117 (1981). They have "as their object civil or religious or, more commonly, mixed matters (*res mixtae*) compounded of both elements, hence subject to both authorities." *Id.* at 118. The contracting parties are "the universal Church—personified by the Holy See—and a sovereign state." *Id.* When duly ratified and promulgated, a concordat immediately becomes civil as well as Canon law. See *Id.* For a classic and insightful treatment of concordats and their role in international law, see generally Henri Wagnon, *CONCORDATS ET DROIT INTERNATIONAL* (1935). Dr. Wagnon's remarkable work was reviewed in English by C. G. Fenwick, who states that the author traces a close parallel "between the law of concordats and the general law of treaties" because the Holy See "has the requisite capacity to enter into agreements valid at international law." C. G. Fenwick, 30 *AM. J. INT'L L.* 568, 569 (1936) (book review); see also

In the context of conventional treaties and other international agreements, the Holy See has participated in the negotiating, signing, and ratification of major international agreements during three major periods: (1) prior to 1870 in the era of the Papal States; (2) during the period of 1870-1929 after Italy confiscated the Papal States and the resolution of the “Roman Question” by the Lateran Treaty of 1929; and, (3) after 1929 and the establishment of the Vatican City State. One of its more famous agreements was the Concordat of Worms between Pope Calixtus II and King Henry V, concluded in 1122, which addressed a wide variety of subjects including church-state relations.<sup>7</sup>

But as previously noted, the Holy See has not restricted its international agreements to only religious matters or church-state relations. It has participated in the drafting of international agreements dealing with human rights, humanitarian law, disarmament, and other matters of concern to secular sovereigns. For example, the Holy See became an “adhering State” to the agreement reached at the Conference on the Limitation of Armament in Washington, D.C. from November 12, 1921 to February 6, 1922.<sup>8</sup> After the completion of the Lateran Treaty in 1929 but not because of this agreement, the Holy See continued its participation in being a party to international

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Msgr. Roland Minnerath, *The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective: Address Before the Symposium at the Catholic University of America, Columbus School of Law* (April 8, 1997), in 47 CATH. U. L. REV. 467, 476 (1998). Msgr. Minnerath notes that: “By establishing concordats with all types of states, common principles have arisen and are being enforced as conforming to the self-understanding of the Church and the demands of states under the rule of law. There is no question anymore of privileges, but strictly of human rights. Thus, the international character of the Holy See indirectly confers to the parallel agreements concluded between states and other religious communities, the support of an international treaty, as it is the first duty of the state to treat all its citizens equally.” *Id.* This is especially pertinent to the matter of conscience protection developed in the present essay.

<sup>7</sup> Pope Calixtus II, *Concordat of Worms between Pope Calixtus II and the Emperor Henry V, September 23, 1122*, in CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES, 48-49 (Sidney Z. Ehler, LL.D. & John B. Morrall, trans. & eds., The Newman Press 1954).

<sup>8</sup> See Clyde Eagleton, *Neutrality in Naval and Aerial War*, 33 AM. J. INT’L L. 550 (1939).

agreements on both bilateral and multilateral levels.<sup>9</sup> In more recent times, the Holy See has actively participated in negotiations leading to some of the principal 20<sup>th</sup> century international legal instruments.<sup>10</sup> In addition, the Holy See has also entered into a wide variety of modern bilateral agreements.<sup>11</sup>

A brief comment regarding concordats will be offered here. While some commentators have questioned whether they are international agreements, they are, in the words of one publicist, the equivalent of general conventions “by which one State obtains from another an agreement to refrain

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<sup>9</sup> In 1936, an American doctoral candidate at the University of Geneva completed his dissertation on the impact of the Lateran Treaty on the Holy See’s treaty and concordat-making power and diplomatic practice. Whilst the author’s work contained in his published thesis is somewhat dated, it nonetheless provides an important contemporary insight into the impact of the 1929 Agreement between the Holy See and Italy. *See generally* Oliver Earl Benson, VATICAN DIPLOMATIC PRACTICE AS AFFECTED BY THE LATERAN AGREEMENTS (1936).

<sup>10</sup> In this regard, it has signed, ratified, or acceded to such agreements as: The Geneva Conventions of August 12, 1949 (along with the two additional Protocols of 1977); the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958; two of the Law of the Sea Conventions of 1958; the Vienna Convention on Diplomatic Relations of April 18, 1961; the Vienna Convention on Consular Relations of April 24, 1963; the Vienna Convention on the Law of Treaties of May 23, 1969; the Vienna Convention on Succession of States with Respect to Treaties of August 22, 1978; the International Convention on the Elimination of All Forms of Racial Discrimination of December 21, 1965; the Convention on the Rights of the Child of November 20, 1989; the Convention Relating to the Status of Refugees of April 22, 1954; the Convention on Long-Range Transboundary Air Pollution of November 13, 1979; and the Ottawa Convention (Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction) of March 1, 1999. In addition, the Holy See has also assisted in drafting and signing the 1975 Final Act (Helsinki Accords) of the Conference on Security and Co-Operation in Europe (now the Organization for Security and Co-Operation in Europe), and it is a member of the Organization. The Holy See is also a signatory to the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of March 14, 1975.

<sup>11</sup> In the context of bilateral agreements, the Holy See and Spain entered into a variety of treaties involving common interests in the Holy Land (December 21, 1994), economic issues (October 10, 1980 and January 3, 1979), religious assistance to the Spanish armed forces (August 5, 1980), and education and cultural matters (January 3, 1979). Due to their significance, two other instruments involving the Holy See need to be considered. The first is the December 30, 1993 agreement between Israel and the Holy See addressing the issues of freedom of religion and conscience, condemnation of anti-Semitism, protection of sacred places and pilgrims, cultural exchanges, freedom of expression, freedom to carry out charitable works, and provisions addressing property, economic and fiscal matters. *See* the Basic Agreement Between the Holy See and the State of Israel, December 30, 1993, 33 I.L.M. 153 (1994). A second important bilateral agreement is the understanding signed by the Holy See and the Palestine Liberation Organization addressing the questions of human rights and inter-religious dialogue, the respect for a status quo concerning Christian holy places, the freedom of the Catholic Church to carry out its mission, and the Catholic Church’s right to its legal personality. *See* the Basic Agreement Between the Holy See and the Palestine Liberation Organization, Feb. 15, 2000.

or limit the exercise of its jurisdiction over its own citizens.”<sup>12</sup> When carefully examined, it is evident that their content covers issues typical of any agreement between two sovereigns. While it may be argued that concordats cover issues which exclusively concern the Catholic Church and matters situating the other contracting party, concordats include provisions that not only address internal Church matters but also those dealing with moral issues, public religious observance, education, matrimony, and other family issues identified in the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the International Covenant of Economic, Social, and Cultural Rights. Moreover, concordats often deal with State aid to Church-affiliated hospitals and schools in addition to the resolution of property disputes. As Archbishop Roland Minnerath has stated in regard to concordats being agreements of international law, they have legal force because they are treaties between two subjects of international law, each one sovereign in its own sphere, and they are negotiated, executed, and ratified according to the modalities of international practice.<sup>13</sup>

While a detailed discussion could be pursued regarding the similarities and differences between concordats and treaties, an important study by Professor Tiyanjana Maluwa has demonstrated why any distinction between concordats and other treaties is really a matter of form rather than substance.<sup>14</sup> As will be seen, my present discussion will have a bearing on the recent developments within the European Union and concordats between the Holy

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<sup>12</sup> See Horace F. Cumbo, *The Holy See and International Law*, 2 INT’L L.Q. 603, 608 (1948-1949).

<sup>13</sup> See Roland Minnerath, *supra* note 6 at 467-68.

<sup>14</sup> Tiyanjana Maluwa, *The Holy See and the Concept of International Legal Personality: Some Reflections*, 19 COMP. & INT’L L.J. S. AFR. 1, 162-74 (1986).

See and States of the European Union (EU). But it must first be pointed out that there is an important matter of which we need to be aware regarding concordats. While some states have unilaterally walked away from concordat responsibilities and broken off diplomatic relations with the Holy See,<sup>15</sup> the Holy See has scrupulously practiced the revered international legal principle *pacta sunt servanda* (the agreement must be obeyed). The importance of the sanctity of international agreements was reinforced in the Church's own law, the 1983 Code of Canon Law, which expressly states that any provision in the Code, even though it is the most serious of Church law, cannot "abrogate or derogate from the pacts [concordats, treaties, other international agreements, etc.] entered upon by the Apostolic See with nations or other political societies."<sup>16</sup>

Moreover, the International Law Commission (ILC) has concluded that treaties (and concordats) entered into by the Holy See substantiate its status as an international personality which is competent to negotiate and enter into treaties and other international agreements with temporal sovereigns. During the early drafting sessions of the Vienna Convention on the Law of Treaties in 1959, the ILC offered a number of significant observations about the Holy See including its conclusion that even without a significant territorial possession over which it exercised its temporal jurisdiction, the Holy See possesses

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<sup>15</sup> Pope Calixtus II, *supra* note 7 at 355-71.

<sup>16</sup> 1983 Code c.365, § 1. This same canon continues by stating: "[These pacts] therefore continue in force as presently, notwithstanding any prescriptions of this Code to the contrary." *Id.* The Commentary to this canon states that the Code only regulates the "internal life" of the Church, and that: "[I]t does not apply to international legal relations. The activities of the Church among the family of nations and its participation in international organizations are subject to the general norms of international law. Since the Holy See is an international juridic person, it has the capacity to conclude agreements with other such persons, i.e., all sovereign states and international associations and organizations formed by them.... Should there ever be a conflict between the canons and the pacts, the pacts must stand." *Id.* In addition, Canon 365 reminds pontifical legates that they must act in accordance with the "norms of international law." 1983 Code c.354.

treaty-making capacity.<sup>17</sup>

Within the past few years, the Holy See has entered into a number of agreements with other sovereigns on developing issues. A crucial matter falling within the scope of these agreements is the protection of right to conscientious objection for vulnerable classes of citizens that, at least in the theory of international human rights instruments, exists. Prior to considering the concerns that have recently surfaced about the agreements between the Holy See and EU Members and Candidates, it would be useful to examine briefly the matter of conscience (Section III) and then consider the protection of its exercise under international law (Section IV). I will then present the emerging problem dealing with the protection of the exercise of conscience from within the European Union stemming from concordats that the Holy See has entered or is trying to enter with Member and Candidate states (Section V).

### III. WHAT IS CONSCIENCE AND WHY IS IT IMPORTANT?

For centuries, the questions of conscience and whether its exercise would be protected under the law have had a prominent role when conflicts between individuals and the civil authorities have arisen over the extent to which an individual would have to publicly endorse particular views favored by the state.<sup>18</sup> Famous individuals from history like Socrates, Thomas More, and Rosa Parks all objected to something that the state required of them in its enforcement of the law. Each was brought before the law because of the objection they had with some position that the state sought to enforce. While

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<sup>17</sup> INT'L L. COMM'N, *Report of the International Law Commission Covering the Work of its 11<sup>th</sup> Session*, 2 Y.B. INT'L L. COMM'N 96, UN Doc. A/CN.4/SER.A/1959/ADD.1 (June 26, 1959).

<sup>18</sup> For an earlier treatment of these issues by the present author, see Robert John Araujo, *Conscience, Totalitarianism and the Positivist Mind*, 77 MISS. L.J. 571 (2007). The present essay develops some of the discussion in this earlier essay by offering further comments necessitated by post-2007 occurrences.



their respective approaches were different, these individuals all held their ground, relying on the force of reason and the right to conscience that was impartially formed and not unduly influenced by subjectivism. Socrates objected to the state's critique of how he taught the youth of Athens; Thomas More was prosecuted for his refusal to swear to the oath required by the Act of Succession that would separate England and the Roman Catholic Church; and Rosa Parks was targeted for her insistence to sit in any area of public transportation since she paid the same fare as the white passengers. Each of them resisted, in the exercise of conscience, laws that they considered were wrong, not because some inner voice said so but because the objective reason they exercised led to no alternative conclusion.

Conscience is that core of the person who, with the exercise of right reason guided by the quest for objective truth,<sup>19</sup> deliberates and discerns regarding what is right and what is wrong and formulates the belief that guides his path in life. The path chosen and the choices made along the way clearly have an impact on the individual and his life; however, they often have a bearing on the lives of other individuals and communities. The exercise of conscience endorsed here is not one that permits a person to conclude that he or she has the right to do whatever her conscience instructs simply because this conscience decides this. The peril inherent in this practice

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<sup>19</sup> The significance of right or practical reason and the law was relied upon and developed by Thomas Aquinas in his *Treatise on Law*, where he stated, as the first principle of the law, that "good is to be done and pursued, and evil is to be avoided." THOMAS AQUINAS, *SUMMA THEOLOGIAE*, I-II, q. 94, art. 2 (Fathers of the English Dominican Province, trans., Benzinger Brothers 1947). Right reason is a search for truth that is not only conceptual but also practical. The search for truth is inextricably combined with the application or implementation of the truth undistorted. In this way, the rational and the moral merge through the exercise of right reason. For a more contemporary explanation of right reason, see AUSTIN FAGOTHEY, *RIGHT AND REASON: ETHICS IN THEORY AND PRACTICE* 99-101 (6th ed 1976). See also Second Vatican Council, *Guadium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 63 (1965), wherein the Second Vatican Council stated, "the Church down through the centuries and in the light of the Gospel has worked out the principles of justice and equity demanded by right reason both for individual and social life and for international life, and she has proclaimed them especially in recent times."

of conscience is that it is purely subjective and makes no provision for considering, by going beyond the self, the objective truth needed to determine what is right and wrong not only “for me” but for everyone who may be affected by the exercise of individual conscience. Otherwise the exercise of conscience risks confusing falsehood and wrong with truth and right. One has the right to express the view of his conscience to say the other person is wrong. In doing so, the first individual who has sought the objective truth may have to be prepared to be persecuted. But the threat of persecution or the persecution itself is not sufficient to preclude the right of conscience as so understood and practiced. Surely there is a need for public peace and security and the common good, but when properly understood and used, conscience, objectively formed, poses little or no threat to these legitimate objectives.

For the individuals I have identified—Socrates, More, and Parks—and for many others, conscientious objection became the defense that was relied on when the law and its rules went in one direction but the person whose beliefs and positions were based on a well-formed conscience chose to proceed in a different way. In other contexts, it may appear to be a mechanism by which an individual defends resistance to the law in a private or public manner. Let us consider in more detail the case of Rosa Parks. She was like many others in her community; she needed to rely on public transportation such as buses. But as a woman of color, she was required by the law to sit in the back of the bus. If the rear of the bus was crowded, but the front reserved for white passengers was not, could she sit toward the front where there was more room but where she was forbidden to ride? Could she elect to defy convention and the law to make a point and sit in the front to

demonstrate that it is a public conveyance to be used by all members of the public? She quietly challenged the law, and her action was based on the exercise of conscience. There had been a need to demonstrate that the law and its application were wrong, and she and others concluded that she was right in defying the law.

Thomas More exercised his conscience by taking a different tack. He took no action, as did Ms. Parks, in defiance of the law. He merely asked not to do a public act—swearing an oath—which the law required of citizens, especially prominent citizens. Rosa Parks chose action, but Thomas More chose silence. He had no public quarrel with Parliament or the King, and he said nothing about the propriety or impropriety of the Act of Succession until after he was convicted of treason. He recognized that both the King and Parliament had a proper role in the making of law—human law. If Parliament declared that Henry VIII was no longer king, he probably would not have intervened nor registered concern or complaint. But when Parliament said the King rather than the Pope was head of the Church and commanded More to publicly declare his agreement by taking an oath which would conflict with his convictions about the respective authorities of the Church and the King, he could not do this out of conscience for he was also subject to God’s law which said such a declaration would violate the higher law that is beyond the competence of the state.

While societies need law to govern excesses and deficiencies in what people will do on their own, there is a limit to what the law can and should expect of those whom it is designed to serve. This is all the more plausible when we consider that in the western democracies, the state is and must be the servant, not the master, of the citizenry. But when the law reaches beyond

its permissible mandate, wrong may triumph over right. It is in this kind of context where conscience may help develop the law or its meaning through exception or amendment so that the right result prevails over the wrong one.

In the present age, the law is often a means to promote the common good and the general welfare even though it may cause inconvenience to some individuals (e.g., driving a motor vehicle on the prescribed side of the road) or outright frustrations to others (e.g., legal prohibitions against homicide). It is, moreover, often thought that good laws respect human dignity. One does not have to look very far in today's world to realize that many laws are geared to promoting rights and liberties that are to be exercised and enjoyed in an ordered fashion. It is also clear that laws are designed to apply general formulations to specific cases.<sup>20</sup> But as a citizen, lawmaker, administrator, or judge, all come to realize that the enterprise of the law often requires interpretation in applying the general norm to a specific circumstance.

But there is evidence today in the international sphere of the western democracies that obedience to law demands that some persons must compromise on principles that they hold because these principles are grounded in rectitude and virtue. However, the civil authorities are not satisfied in mandating that citizens who wish to object out of their well-formed consciences must simply think that the state's way is correct and leave it at that (for then the person could go on thinking as before). The government authority now insists, "You must do it this way, and if not, you will have to face consequences that are not of your liking." This was the predicament that Thomas More and Rosa Parks faced in the past, and it is the

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<sup>20</sup> H. L. A. Hart, *THE CONCEPT OF LAW* 159-60 (The Legal Classics Library 1990) (1961).

predicament that good men and women with well-formed consciences are beginning to face across the globe including those states that pride their democratic institutions as guardians of human rights, especially those that have been deemed non-derogable under the law. And now, at this point we must consider what international law says about the right to conscience and why this right is non-derogable.

IV. THE IMPORTANCE AND PROTECTION OF CONSCIENCE  
UNDER INTERNATIONAL LAW

One might think that the right to exercise conscience is under no threat in the contemporary democratic societies of the early twenty-first century. After all, the totalitarian state where the exercise of conscience was in peril is a thing of the past, or so it seems. The strongly positivist law of the totalitarian regimes of the twentieth century that crushed conscience does not seem to be on par with any of the restrictive laws that may be found among the western democracies. We need to acknowledge that in virtually all of the democratic societies today, lawmaking is the law that the lawmaker posits. But this method is not positivism where the culture and citizenry have no critical, objective evaluation of what the lawmaker says the law is. Positivism generates a type of human-worship that knows only the mind of the lawmaker and what this person or group sees as the end of the human purpose. It is the “dominant prejudices of the moment” rather than some objective and moral compass that guides society.<sup>21</sup> As the world emerged from the Second World War, it became clear that the dominant prejudices of National Socialism in Germany and the positivist state that it generated led the world into an avoidable conflagration. Moreover, the devastation that this

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<sup>21</sup> CHRISTOPHER DAWSON, CHRISTIANITY AND EUROPEAN CULTURE 127 (1998).

storm left in its wake became the catalyst for the Universal Declaration of Human Rights (UDHR) and its juridical progeny, the International Covenant on Civil and Political Rights (ICCPR).

It is the positivist state, and the mind that guides it, where the law is geared to some end or result desired by the state or ruling party without asking what happens along the way. This approach is the basis of the totalitarian state's legal positivist system. But surely the world of today does not have to worry about such matters, does it, as it did during World War II and its immediate aftermath? And if it did, would not the exercise of conscience, a right identified under the UDHR and the ICCPR (which the latter declares non-derogable) and the ability to object through its exercise as guaranteed by domestic and international laws make this problem disappear?<sup>22</sup>

The opponents of the well-formed conscience may, as Judge Michael McConnell has argued, suggest that the conscientious objector has in mind all sorts of brutal acts that will be detrimental to society, but, in reality, the conscientious objector wants to obey the *fundamental* laws of the state since it is usually a lawful authority that acts within its proper competence as a servant of all the people it serves.<sup>23</sup> A problem arises when the law and conscience are headed on a collision course because the legitimate goals of the

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<sup>22</sup> This point is illustrated by the Massachusetts Supreme Judicial Court in the 2003 *Goodridge* case where a majority of the court asserted that "civil marriage is an evolving paradigm" and redefined marriage to include those between homosexual couples. See, *Goodridge v. Department of Public Health*, 440 Mass. 309, 339; 798 N.E.2d 941, 967 (2003). The majority did state in footnote 29 that, "Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry." *Id.* at 337; 965. But the court's dicta would not impose any restriction on the Massachusetts legislature from enacting a law to this effect.

<sup>23</sup> Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 846 (1998).

law could be achieved in some other fashion and the state's purpose in opposing the conscientious objector is of "a distinctly lesser order."<sup>24</sup>

The protection of the well-formed conscience deals with the critical matter of where no government authority should go—into the innermost convictions of those who are its citizens, subjects, and ultimately masters. Of course, totalitarian regimes do not understand life—both its public and private dimensions—in this way. But for those accustomed to democratic states, government authorities are not and can never become omnipotent; rather, they have limited authority prescribed by the rule of law and the sovereignty of all the people. What the rule of law dictates is for no one individual or authority to determine by itself. An important justification for this vital principle is that the exercise of a well-formed conscience is vital to the robust health of a strong democracy. The state may properly ask for citizens' allegiance on issues of public import affecting the common good, but the state ought not to go any farther. Conscience is a fundamental right, as the law of democratic states and the international order assert. The state does not confer the right of conscience; its source is not the state. Its source is in human nature that is given by the Creator. For those who make no claim to and even deny belief in theism, it is important to recall the inexorable truth that the state did not create us; it is neither our author nor final master. What the state cannot give, the state cannot lawfully retrieve even though it may attempt to do so on occasion. These were issues of concern that the drafters of the UDHR understood well and subsequently addressed in their work.<sup>25</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE DECLARATION OF HUMAN RIGHTS* (Random House 2001); see also, JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING & INTENT* 260 (University of Philadelphia Press 1999).

The substantive discussion concerning conscience in the international legal realm needs to begin with consideration of Article 18 of the UDHR which states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>26</sup> The rights conferred by this article have public and private dimensions. There is the private component of “innermost conviction,” and there is the public expression of it.

Article 18 of the ICCPR duplicates, with some minor adjustments, this provision from the UDHR.<sup>27</sup> Of course, it must be pointed out that unlike the UDHR, the ICCPR contains a limitation on the exercise of the right. Article 18.3 of the ICCPR indicates that there can be some restriction on the right to religion and beliefs that are (1) prescribed by law and (2) “are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” But this limitation must be understood under the “non-derogation” provisions of Article 4 of the ICCPR which specifically applies to the provisions of Article 18, which I submit tempers the meaning of the restriction contained in Article 18.3.

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<sup>26</sup> Universal Declaration of Human Rights art. 18, G.A. Res. 217A U.N. GAOR, 3d Sess., 1<sup>st</sup> plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>27</sup> The article reads in its entirety: “1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.” International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966.



By way of appreciating the meaning of conscience in international law, we need to focus any study on the drafting history of the UDHR. The Lebanese delegate, Charles Malik, who was a principal drafter of the UDHR,<sup>28</sup> argued the position that the article of the UDHR addressing religious freedom and conscience must acknowledge the right of different human convictions “to exist in the same national entity” as obligated by international law.<sup>29</sup> Following the guidance of Malik, the drafters took steps to emphasize that these rights were not only private but also had a civic or public component—i.e., that religious liberty and the right to exercise one’s conscience have little meaning unless they can be exercised publicly with other members of society.<sup>30</sup> The drafters essentially agreed that the substance of Article 18 of the UDHR respects “pluralism and openness to different perspectives.”<sup>31</sup> Nevertheless, the protections afforded by this provision lose meaning if the underlying rights of religious freedom and conscience cannot be outwardly manifested with like-minded believers.

The drafters of the UDHR realized that no one could ever really know what beliefs or thoughts a person had (unless of course they were extracted by unlawful means such as torture), but they also acknowledged that a person’s innermost convictions would mean little if the holder had to endorse in a public forum a contrary position. As Professor Morsink concludes in his insightful study of the *travaux préparatoires* of the UDHR, “Behind this seemingly innocuous right [protected by this Article] lies the profound right

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<sup>28</sup> See generally Glendon, *supra* note 25.

<sup>29</sup> Morsink, *supra* note 25.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

not to be compelled to profess a belief or ideology which one does not hold.”<sup>32</sup> The drafters of the UDHR concurred with René Cassin, a French delegate and member of the drafting committee, that a person should not be compelled to do something indirectly that which one could not be forced to do directly.<sup>33</sup> And this brings the present discussion to a recent development within the EU that, in spite of statements to the contrary, conflicts with these important principles that protect thought, conscience, and religious belief across the world.

#### V. THE EMERGING PROBLEM IN THE EUROPEAN UNION

On December 14, 2005, the EU Network of Independent Experts<sup>34</sup> on Fundamental Rights (Network) issued an opinion, No. 4-2005: “The Right to Conscientious Objection and the Conclusion by the EU Member States of the Concordats with the Holy See.”<sup>35</sup> The European Commission requested the opinion of the Network in July of 2005 on the legal status of religious conscientious objection in existing and future concordats between EU Member States and the Holy See. The European Commission, in its request to the Network, posed three questions: (1) do these agreements take primacy over national law, including national constitutions; (2) what are the means by which concordats produce effects and how might they be terminated; and, (3) do conscience clauses in concordats create incompatibilities with fundamental rights of individuals and the law of the EU? While the first two questions are

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<sup>32</sup> *Id.* at 261.

<sup>33</sup> *Id.*

<sup>34</sup> The Network was established in 2002 by the European Commission in response to a recommendation in a European Parliament’s report on the state of fundamental rights in the EU, (2000/2232 INI). The Network’s membership includes an expert per Member State of the EU.

<sup>35</sup> E.U. Network of Independent Experts on Fundamental Rights, *The Right to Conscientious Objection and the Conclusion by the EU Member States of Concordats with the Holy See*, Opinion N° 4-2005 (December 14, 2005) [hereinafter referred to as “Opinion N° 4-2005”].

important regardless of the context in which they are examined, the last one is crucial to the theme of this essay and will be studied here in some depth. The answers offered by the Network follow in a moment.

But first, the following details must be disclosed about the Network's opinion. First of all, it equates the right of conscience exercised by one person with any other "rights claim" that another person could make, including the "right" to reproductive health services that embrace access to abortion.<sup>36</sup> While giving lip service to the right to conscience of the person to object to specific acts by others including access to abortion, the opinion takes the position that abortion access, which is not mentioned as a "right" in the UDHR, the ICCPR, or any other human rights instrument, is nonetheless equivalent to a person's right to conscientiously oppose abortion.<sup>37</sup>

In making this argument, the Network relies on a peculiar interpretation of the applicable instruments and the UDHR while at the same time ignoring an important aspect of the one right that they specify, i.e., the right to life that surely is the proper claim of any new member of the human family.<sup>38</sup> In the one instance where the opinion mentions the right to life protected by Article 6 of the ICCPR, it does so not in the context of human life *in utero* but in the dangers of "illegal abortions performed in unsafe conditions."<sup>39</sup> The Network insists that there is an "emerging consensus" that there exists a right to interrupt a pregnancy, and this claim is based on the advocacy of the Center for Reproductive Rights in a legal challenge involving

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<sup>36</sup> *Id.* at 27, 30-31.

<sup>37</sup> *Id.* at 34.

<sup>38</sup> *Id.* at 19.

<sup>39</sup> *Id.* at 19.

Poland,<sup>40</sup> a country where a large majority of the population happens to be Catholic. It becomes clear that in the estimation of some “human rights” organizations, the right to life and freedom of religion and conscience are expendable when it comes to the “human right” of abortion access.<sup>41</sup>

With regard to the first question raised by the European Commission and identified earlier in this section, the Network does not establish how it might have the competence to judge whether any treaty, including a concordat, takes precedence over national law. However, the Network offers some opinion on this matter and suggests that concordats can take precedence over national law.<sup>42</sup> By the same token, the Network offers its view that “international law” and EU law can trump the law making authority of its Member States, and this would include the substance of bilateral treaties which Member States enter.<sup>43</sup> Hence, treaties and concordats can, in the view of the Network, be trumped by EU and “international” law as the Network erroneously understands these bodies of law.

Concerning the second question, the Network concedes that the Holy See is a subject of international law and is legally competent to conclude international agreements that have the status of treaties.<sup>44</sup> This should be evident from the analysis provided in Section II, *supra*. Moreover, the Network also concedes that the Holy See’s diplomatic relations reinforce its competence to make treaties or concordats.<sup>45</sup> It would appear to follow that the Network concedes that concordats are binding instruments of

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<sup>40</sup> *Id.* at 19 n.52.

<sup>41</sup> *See, e.g.*, International Humanist and Ethical Union, Proposed Concordat Violates Rights in Slovakia, <http://www.iheu.org/node/2276> (last visited Feb. 17, 2009).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

international law, which a party can breach or terminate in accordance with applicable provisions of international law. Again, this accords with the analysis given in Section II.

It is the third issue, i.e., whether concordats containing provisions protecting the right to religious conscientious objection are compatible with the protection of “fundamental rights” and EU law, which raises serious consequences for the Holy See and the integrity of its concordats. The Network concludes that the concordat clauses it reviewed are incompatible with “international” and EU law and the “fundamental rights” to be enjoyed thereunder.<sup>46</sup>

In making this remarkable assertion, the Network concedes that conscience is a right that is protected under various human rights instruments and the law of the EU;<sup>47</sup> however, it is only one of several rights that are to be legally protected, and the protections accorded to conscience, including claims to conscience based on religious beliefs, are therefore not absolute.<sup>48</sup> The Network asserts that the limited right to conscience based on religious belief must be balanced with other rights that address concerns of other individuals who make claims for recognition of: same-sex unions;<sup>49</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> In early February, 2006, it was reported that a federal panel of judges in Spain rejected the petition of a justice of the peace in Valencia to abstain from presiding at “civil marriages” between same-sex partners. By a vote of 3-2, the federal panel refused to acknowledge the justice’s right to conscientious objection and ruled that “Judges and Magistrates can never exercise the right to conscientious objection, as they are obliged to follow the rule of law.” The justice in Valencia has no other recourse to abstain from presiding at homosexual unions. Last December a justice of the peace in the city of Pinto opted to resign rather than preside at such ceremonies. Interestingly, Spain is a party to the ICCPR. See CatholicNewsAgency.com, Federal Court Orders Justice of the Peace in Valencia to Preside at Homosexual Weddings, <http://www.catholicnewsagency.com/new.php?n=5963> (last visited on Feb. 17, 2009).

“reproductive health rights”; abortion; euthanasia; artificial fertilization; and artificial contraception.<sup>50</sup>

The Network examines the exercise of conscience under many of the EU Members States’ national laws, and it concludes that the protection of conscience is but one consideration in protecting the rights of persons under national and international law.<sup>51</sup> While the Network does not claim the competence of judging legal questions solely under the law of Member States, it asserts the competence to determine how national laws addressing the exercise of conscience are to be interpreted under international law and EU law. In addition to the European Convention on Human Rights (ECHR), the Network further bases its opinion on elements of the two 1966 human rights instruments, the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR); and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>52</sup> In relying on international instruments, the Network spends a great deal of time with Article 18 of the ICCPR and Article 9 of the ECHR, both of which recognize the right of thought, conscience, and religion.<sup>53</sup> With regard to religious beliefs, the Network makes the distinction between internal private belief, which seems to enjoy unlimited protection, and external manifestations where the private beliefs are translated into words or actions, which receive less protection in that these exercises must be balanced with the exercise of other “rights.”<sup>54</sup>

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<sup>50</sup> Opinion N° 4-2005, *supra* note 35 at 22-23.

<sup>51</sup> *Id.* at 16.

<sup>52</sup> *Id.* at 15.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 15-16.

The Network contends that while religious conscientious objection is protected by reasonable accommodation, the protection of this exercise is not unlimited.<sup>55</sup> The Network bases its claim on the argument that the exercise of religious conscientious objection can conflict with other rights that are also recognized under international law.<sup>56</sup> The Network opines that: when rights conflict, a balance between competing claims “must be struck.”<sup>57</sup> The Network then “strikes this balance” when the conscientious claims that emerge from Catholic teachings conflict with other rights.

Relying on the jurisprudence of the Human Rights Committee, which exercises certain functions under the ICCPR, the Network states that it is necessary to determine if the exercise of religious conscientious objection would cause any discrimination infringing on the exercise of some other protected right(s).<sup>58</sup> If there is “discrimination” generated by the claim to conscience based on religious belief, a balancing of the conflicting claims is necessary to avoid conflict between the competing claims asserted by different parties.<sup>59</sup> The Network then looks at religious conscientious objection in the context of access to abortion services that might be affected by respecting a person’s exercise of conscience.<sup>60</sup> What appears to be taking place here is this: the “right” to abortion trumps the right to conscientious objection to abortion. But it must be kept in perspective that the abortion seeker will be able to get her abortion from some provider whose conscience is not bothered by the moral implications of snuffing out nascent human life.

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<sup>55</sup> *Id.* at 16.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 17.

<sup>59</sup> *Id.* at 16.

<sup>60</sup> *Id.* at 17-18.

But the doctors and nurses and other medical professionals who, out of the exercise of their well-formed consciences, seek to avoid complicity with abortion that is designed to destroy human life rather than protect it may not be excused. In both of these contexts, the abortion seeker achieves what she wants but at the cost of the conscientious objector having to sacrifice his or her right to avoid complicity in the taking of vulnerable human lives.

With regard to access to lawful abortion services, the Network begins its “balancing” by targeting “restrictive” national abortion laws.<sup>61</sup> The Network reflects the position of the UN Human Rights Committee, as demonstrated in the latter’s country-specific reports, that countries with restrictive abortion legislation are violating women’s “reproductive rights.”<sup>62</sup> For example, the laws of Poland are subjected to the Network’s probing critique because of that country’s strict regulation of access to abortion.<sup>63</sup> The Network endorses the Human Rights Committee’s determination that Poland “should liberalize its legislation and practice on abortion.”<sup>64</sup> The Network points out that Polish laws dealing with abortion are influenced by “conservative parties linked with anti-abortion policy propagated by the Catholic Church....”<sup>65</sup> A part of this “problem” for the Network is the existence of conscientious objection clauses that are an integral element of Poland’s laws.<sup>66</sup>

The Network is careful to note that the European Court of Human Rights, in interpreting the ECHR, has *not yet* concluded that there is a general

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<sup>61</sup> *Id.* at 18.

<sup>62</sup> *Id.* at 18-22.

<sup>63</sup> *Id.* at 21-22.

<sup>64</sup> *Id.* at 18.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*



“right to seek abortion.”<sup>67</sup> However, the Network does not conceal its preference that “the right to seek interruption of a pregnancy must be recognized to women where the continuation of pregnancy would threaten their health.”<sup>68</sup> In essence, the Network, purportedly relying on “the current state of international human rights law,” asserts that the right to life contained in Article 6 of the ICCPR must be used to protect women who have no alternative but an “illegal abortion performed in unsafe conditions.”<sup>69</sup> No mention is made about extending the same Article 6 protections to the right to life to the child who would be the object of the abortion—be the abortion a legal and “safe” one or not. The more we think about all abortions, the more we come to realize that they are all unsafe for the child whose life will be terminated by the procedure. The Network also asserts that not providing an abortion where it is lawful constitutes an infliction of inhuman and degrading treatment prohibited by Article 7 of the ICCPR.<sup>70</sup> The Network then relies on the recent “report” of the Human Rights Committee involving the matter of *KL v. Peru*.<sup>71</sup>

In that proceeding, The Human Rights Committee concluded that Peru had violated the claimant’s rights under ICCPR Articles 2 (discrimination), 6 (right to life), 7 (torture or cruel, inhuman or degrading treatment or punishment), 17 (arbitrary or unlawful interference with privacy), and 24

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 19.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* The text of Article 7 of the ICCPR reads: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” It is clear that no nascent human life gives his or her consent to a medical procedure intended to snuff out his or her life.

<sup>71</sup> *Id.* at 20. The Report is styled as follows: Human Rights Committee, International Covenant on Civil and Political Rights, Report: *KL v. Peru*, CCPR/C/85/D/1153/2003, 22 November 2005.

(rights of the child—i.e., of the mother but not her baby—under the ICCPR).<sup>72</sup> The claimant in this matter was considered to be a child because she became pregnant when she was 17 (any person under 18 is viewed as a child). The child she was carrying was diagnosed with a fetal abnormality that could lead to an early death of the infant.<sup>73</sup> While one attending physician recommended termination of the pregnancy, the hospital indicated that an abortion was not permitted under the applicable Peruvian law due to the advanced stage of the pregnancy and the conditions under which a termination of pregnancy is legally permitted.<sup>74</sup>

Two of the arguments made by the claimant through her legal counsel, the Center for Reproductive Rights (the same NGO which supplied assistance to the Network in its opinion), addressed the mother’s “right to life” under Article 6 and her “right to protection as a child” under Article 24.<sup>75</sup> At no time did the Committee or legal counsel extend these rights to the baby who, incidentally, survived for four days after her birth. The Committee agreed with the mother’s legal counsel that the right to life “cannot be interpreted in a restrictive manner”<sup>76</sup>—even though her life was never threatened by the pregnancy. The mother’s counsel also claimed that Peru denied her a “safe termination of pregnancy” citing the ground that the fetus was not viable.<sup>77</sup> The facts of the case demonstrate this was not true since the baby was delivered and lived for four days; moreover, the mother breast-fed her baby

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.* at 2-3.

<sup>75</sup> *Id.* at 6-7.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.*

during this period.<sup>78</sup> Although the Committee applied the Convention on the Rights of the Child to the mother, it failed to apply this instrument to the infant who, under Article 6, was also entitled to the right to life; who, under Article 19, was the beneficiary of Peru's law designed to protect children from violence; and who, under Article 23, was entitled to protection as a disabled child. The Committee, moreover, failed to consider Article 41 of the Convention on the Rights of the Child<sup>79</sup> which required Peru to protect the rights of all, not just some, of the children involved in this proceeding.

Here a few words are in order about the efforts of the NGO Center for Reproductive Rights to sabotage the concordat between the Holy See and the Slovak Republic. In its own words, the Center declared:

The Center for Reproductive Rights presented to the Network documentation on the effect such concordats have on women's access to legal abortion. The Network, in its opinion, relied extensively on the Center's analysis of the human rights dimensions of conscientious objection. It concluded that EU member states have an obligation under international human rights law to regulate providers' invocation of conscientious objection so as to ensure that no woman is deprived of an abortion in circumstances where the procedure is legal.<sup>80</sup>

The Center also noted its cooperation with the organizations Pro-Choice Slovakia and Catholics for a Free Choice (CFFC) in its advocacy efforts before the European Parliament.<sup>81</sup> More will be said later about the CFFC. In its self-congratulatory message, the Center announced that these combined efforts led to the issuance of the Parliament's request for the opinion of the

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<sup>78</sup> *Id.* at 3.

<sup>79</sup> The text of Article 41 states: "Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) the law of a State party; or (b) international law in force for that State." Convention on the Rights of the Child, G.A. Res. 44/25, ¶ 41, U.N. Doc. A/RES/44/25 (Dec. 12, 1989).

<sup>80</sup> This quote appeared at [http://www.reproductiverights.org/ww\\_eu\\_slovakia.html](http://www.reproductiverights.org/ww_eu_slovakia.html) in 2005. It has been taken down since that time but most of the quotation can still be found at [http://www.c-fam.org/publications/id.441/pub\\_detail.asp](http://www.c-fam.org/publications/id.441/pub_detail.asp).

<sup>81</sup> *Id.*

Independent Experts vis-à-vis the concordat's compliance with the European Union Charter on Fundamental Rights.<sup>82</sup> In the estimation of the Center, the opinion rendered by the Independent Experts is significant because its views extend beyond the issues dealing with the Slovak Republic and address the question of conscientious objection in all member States of the European Union.<sup>83</sup>

In writing its opinion on the status of concordats, the Network also took into account General Recommendation No. 24 under the CEDAW regime which considers it discriminatory when State Parties refuse to provide “reproductive health services for women.”<sup>84</sup> One reproductive health service is abortion, at least in those States where it is legal. The Network explains how the mosaic of human rights law is to be applied when competing rights claims fundamentally conflict:

In sum, whether the *right to religious conscientious objection* is recognized explicitly in a concordat, or whether it is derived from the guarantee of freedom of religion stipulated in international human rights instruments, in the national Constitution or in specific legislation, this right *should be regulated in order to ensure that, in circumstances where abortion is legal, no woman shall be deprived from having effective access to the medical service of abortion.* In the view of the Network, this implies that the *State concerned must ensure*, first, that an effective remedy should be open to challenge any refusal to provide abortion; second, *that an obligation will be imposed on the health care practitioner exercising his or her right to religious conscientious objection to refer the woman seeking abortion to another qualified health care practitioner who will agree to perform the abortion;* third, that another qualified health care practitioner will be indeed available, including in rural areas or in areas which are geographically remote from the centre. Such a regulation should thus accommodate the right to religious conscientious objection, which is derived from the freedom of religion, while ensuring that the exercise of this right will not lead to others either being deprived of access to certain services in principle available to all in the State concerned, or being treated in a discriminatory fashion.<sup>85</sup>

It is clear from the Network's opinion that the right to claim conscientious objection based on religious belief is at best a qualified right

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Opinion N° 4-2005, *supra* note 35 at 20.

<sup>85</sup> *Id.* (emphasis added).

because all rights need to be considered in the light of competing “rights” that address “reproductive rights,” which appear to have or enjoy a preferred status. Thus, any State law that includes a conscience clause in a concordat with the Holy See is subject to being “corrected” to ensure that no discrimination exists against women who choose to exercise their legal “reproductive health rights.”

With regard to “other fundamental rights,” conscience clauses may also be subject to regulation under the views of the Network. The Network quickly passes over matters involving “euthanasia” and “assisted suicide,” since they have not been declared by the European Court of Human Rights as a fundamental right (for the time being).<sup>86</sup> However, the Network notes that a partial decriminalization of euthanasia and assisted suicide would necessitate the re-examination of conscience clauses dealing with these subjects since no one should be deprived of a right that exists under the law; therefore, it would once again be necessary to “balance” conflicting rights.<sup>87</sup> The grip on the exercise of conscience tightens when the Network states in its opinion that in those States where euthanasia and assisted suicide are “partially decriminalized,” conscientious objectors should not be protected in a way that deprives “any person from the possibility of exercising effectively his or her rights as guaranteed by the applicable legislation.”<sup>88</sup>

The Network also seems inclined to place restrictions on the rights of pharmacists who, based on conscience, claim exemption from selling contraceptives including “morning after” pills.<sup>89</sup> The Network is much clearer

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<sup>86</sup> *Id.* at 22.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 23.

about matters involving sexual orientation. The Network comes close to endorsing the Netherlands position that “any form of discrimination on the basis of sexual orientation... should not be tolerated...”<sup>90</sup> As it stated in its opinion under examination:

The Network would also emphasize that *in no circumstance* could it be justified for a church or a religious organization to discriminate against a person on the basis of his or her sexual orientation, whatever the condemnation of homosexuality, on religious grounds, by those organizations. ... [E]ven where it may be justified to consider religion or belief as a genuine occupational requirement, this may not justify discrimination based on another ground. Neither could [a specified EU conscience] Directive... be relied upon by a church or a religious organization to justify not employing, or otherwise discriminating in employment and occupation, a person on the basis of his or her sexual orientation, whether that sexual orientation is hidden or not. Although churches may exercise rights such as freedom of religion or freedom of expression—and in that sense, among the ‘rights and freedoms of others’, are the rights of those organizations—, any invocation of freedom of religion or of freedom of expression in order to seek to justify discrimination against homosexuals constitutes an abuse of rights, in the meaning of Article 17 of the European Convention on Human Rights.<sup>91</sup>

To reinforce its view, the Network relies on the “Diversity and Equality Guidelines” issued in February of 2005 by the Catholic Bishops’ Conference of England and Wales.<sup>92</sup> In the context of sexual orientation, Guideline 6 states in part: “Only a person’s qualifications and ability to do their job should determine decisions about recruitment, retention and promotion.”<sup>93</sup> The manner in which the Network misreads this text from the English Church would support the view that the Church has the right to insist that a candidate for the priesthood be Catholic; however, it has no right to discriminate against him based on his “sexual orientation.” The fact that the guidelines of the English Church were written in the context of “employment” would probably have little bearing on arguments made by the Church that the ordination of priests is not a question of employment—it is a

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<sup>90</sup> *Id.* at 22-23.

<sup>91</sup> *Id.* at 26 (emphasis added).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

call to a religious vocation. But in the Network's estimation, the only legitimate occupational qualification concerns whether the candidate is a Catholic; the sexual orientation of the candidate would not be a legitimate inquiry for the Church to pursue or consider.

It is relevant to note that the opinion of the Network was requested approximately four months before the *Instruction Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies in view of their Admission to the Seminary and to Holy Orders* dated November 4, 2005 was issued by the Congregation for Catholic Education.<sup>94</sup> In this important document, the Catholic Church addressed the question of "whether to admit to the seminary and to holy orders candidates who have deep-seated homosexual tendencies." The Congregation for Catholic Education concluded that, in light of the Church's teachings, men who "practice homosexuality, present deep-seated homosexual tendencies or support the so-called 'gay-culture'" cannot be admitted to seminaries or be ordained into the priesthood.<sup>95</sup> In presenting this view, the Congregation noted that the Church profoundly respects these men; nevertheless, they cannot be prepared for nor be admitted to holy orders.<sup>96</sup> The Opinion of the Network was released on December 14, 2005, and the Instruction was released on November 29, 2005.<sup>97</sup> While it would be speculative to reach a conclusion about the Network's actual view on the Instruction at this time, the Network's statement quoted

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<sup>94</sup> The Congregation for Catholic Education is the office of the Roman Curia of the Catholic Church, headquartered in Rome, responsible for exercising the Church's authority that pertains to the work of Catholic educational institutions including seminaries.

<sup>95</sup> Cf. Congregation for Catholic Education, *Instruction Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies in view of their Admission to the Seminary and to Holy Orders*, (4 Nov. 2005), n.2.

<sup>96</sup> *Id.*

<sup>97</sup> *See id.* The instruction is also available at [http://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_20051104\\_istruzione\\_en.html](http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20051104_istruzione_en.html).

above regarding the protection of “sexual orientation” strongly indicates how it might deal with the matter of the “legality” of the Instruction should it ever arise. It would be logical to conclude that the Church’s Instruction would, in the Network’s view, violate the law regarding the rights of homosexuals.

The Network concludes its opinions by raising “certain fears” concerning the concordat between the Holy See and the Slovak Republic on conscientious objection by Catholics.<sup>98</sup> After briefly commenting on points it made earlier, the Network states that “the most serious threat” posed by the conscientious objector language in the concordat with the Slovak Republic is “its potential impact on the right to have access to certain medical services” without specifying what these services would include.<sup>99</sup> While noting that both individual Catholics and the Church itself have the right to conscientious objection, the Network places a definite restriction on this non-derogable right in the context of using conscience to deny “certain medical services.” In presenting its perspective, the Network questions the soundness and validity of a 1989 decision by the European Commission on Human Rights enabling a Catholic hospital in Germany to adopt sanctions against one of its doctors who had publicly criticized the Church on its abortion stance.<sup>100</sup> The Network makes the point of saying it could not predict whether the European Court of Human Rights would reach this conclusion today if a similar case were to come before it.<sup>101</sup> But in the estimation of the Network, it appears that this past outcome would likely not be repeated today. The Network asserts that,

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<sup>98</sup> Opinion N° 4-2005, *supra* note 35. See also, BBC.co.uk, Slovak Abortion Move Worries EU, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/4588450.stm> (last visited Feb. 17, 2009).

<sup>99</sup> Opinion N° 4-2005, *supra* note 35.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*



unless the State is able to guarantee alternatives to the patient so that the patient can receive lawful “reproductive health services,” the right to exercise the objection based on conscience “goes counter to the international undertakings” of EU Members.<sup>102</sup> This means that the conscientious objector would probably have to provide information to the patient as to where she could go to receive the services the objector declines to provide. This would make the objector an accomplice to the thing objected to, rather than a participant. But this too would conflict with the right to exercise one’s conscience for such an individual would be contributing to the very thing that his or her conscience objects. In short, the conscientious objector would be required to perform a role in providing access to abortion—the very thing that the conscientious objector seeks to avoid.

The Network casts one final shadow on the conscience clauses that have been incorporated in recent concordats. In its view such clauses can enable State Members of the European Union (and candidate countries such as the Slovak Republic) to violate international obligations (this of course depends on accepting the Network’s interesting but flawed interpretation of international instruments).<sup>103</sup> The alleged violations, according to the Network, would surface from restrictions on access to reproductive health counseling and related medical services including abortion and contraception “which disproportionately affect women.”<sup>104</sup> Although the Opinion of the Network by itself is not a legally binding text, it is a forecast of things that may be in the future. At the least, the Opinion reflects the views of influential voices within the EU today. The Network’s Opinion suggests that coercion, a

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

method used by totalitarian regimes of the not-too-distant past, may be a tool of the modern state or union of states to address and restrict the exercise of conscience. If there is merit to this argument, it would be relevant to consider whether a new form of totalitarianism is emerging in the world of the early twenty-first century, particularly where longstanding rights, such as the right of conscience, are being defeated by claims in support of new “rights.” These new “rights” are, in effect, nothing more than the views of political activists, such as the Center for Reproductive Rights and CFFC, which they wish to force upon the rest of society.

The Network had assistance from other organizations to promote its campaign against the concordat as previously noted. As mentioned earlier, the CFFC sponsored a letter campaign to pressure Slovak government officials to revoke the conscience protection agreement with the Holy See.<sup>105</sup> In its lobbying, CFFC initiated its campaign to lobby officials of the Slovak Republic to “urge them to reconsider this dangerous and unconstitutional Treaty.”<sup>106</sup> The CFFC did not specify what made the concordat dangerous or unconstitutional. Since I have argued earlier that the very subject matter of the concordat is protected under law, CFFC’s claim should be without merit. The CFFC did attach a copy of a suggested letter to send officials of the Slovak government,<sup>107</sup> but several of their assertions about violating the separation of

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<sup>105</sup> See, Letter from Serra Sippel, Director, International Program Catholics for a Free Choice (Feb. 16, 2005), available at <http://www.wluml.org/english/actionsfulltxt.shtml?cmd%5B156%5D=i-156-130318>.

<sup>106</sup> *Id.*

<sup>107</sup> The text of the suggested letter reads as follows:

As religious, women’s rights and human rights leaders from across the globe, we write to express our deep concern about the “Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection of Conscience.” The right of individuals to exercise objections of conscience and not to be forced to engage in actions they consider immoral or unethical is a right we all support; however, we recognize that there are occasions when that right may come into conflict with needs and

Church and state are mischaracterizations. The concordat protects conscientious objection; it does not impose a state-sanctioned or supported religion as the campaign erroneously implies. Nor does the suggested letter acknowledge that religious liberty and freedom of conscience are protected by law which asserts that these rights are non-derogable. It thus appears that the efforts of the Independent Experts and sympathetic NGOs are less of an

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rights of other citizens -including those granted by Slovak law- as well as with their personal ethical values. Our concern is that this specific treaty creates serious legal problems and insufficiently addresses these possible conflicts. We ask you [sic] reconsider plans to sign and ratify this Treaty. The Treaty will set a dangerous precedent in legal history. If ratified, the Treaty will become an "international human rights treaty," taking precedence over both Slovak law and the judiciary. As a result, Catholic teaching may encroach on Slovak law and the judicial process, violating the impartiality of the courts. The Treaty violates the Slovak principle of separation of the state and church. The first article of the Slovak Constitution affirms the separation of the state and church. The ratification of this Treaty would transform The Slovak Republic from a relatively secular state into a state where the dogma of one religion-Roman Catholicism-dominates all public spheres. If the proposed Treaty is ratified, the Holy See-a subject *sui generis* of international law that does not qualify for membership to the Council of Europe because its political structure and its legislation contradict the European Convention of Human Rights-would be able to impose its moral doctrine onto the citizens of the Slovak Republic, regardless of their religious beliefs or faith. If ratified, the Treaty would grant the Holy See the privilege to be a co-legislator in the Slovak Republic. The Treaty violates Slovak commitments to Convention on Elimination of all forms of Discrimination against Women (CEDAW) and the International Conference on Population and Development Programme of Action (ICPD). The Slovak Republic has committed to work on eliminating all forms of discrimination against women and to respect and promote women's sexual and reproductive rights. The moral doctrine of the Catholic church [sic], however, opposes contraception and abortion, even to save the life of a woman. This severely curtails women's basic human rights. It should be noted in the context of the Treaty that for ICPD, several attempts were made by the Holy See to introduce language regarding the right to conscientious objection. These efforts were rejected by the full conference as overreaching and a burden to access to reproductive health services, as they went beyond guaranteeing the right to objection to individuals by seeking to give that right to institutions as well. This Treaty is unnecessary. Article 10 of the Charter of Fundamental Rights of the European Union, which will soon be ratified through the European Constitution [which failed to be adopted by the EU], guarantees the freedom of conscience and of conscientious objection. This will be legally binding on The Slovak Republic. Other less limiting methods of granting the right to conscientious objection are available through legislation, a more democratic root than an international treaty. In the name of the universal right to the freedom of religion, of thought and of conscience, for the honor of the Slovak Republic and for the well-being of the Slovak people, we urge you to reject this Treaty.

exercise of democracy and more of an attempt to impose a totalitarian understanding of acceptable versus unacceptable “human rights.”

#### VI. THE TOTALITARIAN SURGE TO ELIMINATE CONSCIENCE PROTECTION

In large part, the world of international law has become a realm of positive law. One prominent illustration of this is the drafting of modern treaties that become the law posited by the states that engage in the negotiations of treaties (including concordats with the Holy See). This is an accepted way of engaging in the making of international law in democratic cultures. I am not arguing that positive law is necessarily a flawed mechanism for it is the vehicle by which human law is made. Positive law is, after all, the vehicle by which the natural law of right reason and objectivity is implemented. As Professor Blake Morant has argued, human, i.e., positive, law can augment or complement the natural law’s goal of properly ordering society for the benefit of one and all.<sup>108</sup> As he has stated, “positive laws can provide a utilitarian functionality to natural law principles.”<sup>109</sup>

The difficulty that I am attempting to address is that a singular reliance on positive law, unchecked by the application of right reason, leads to positivism, and, this raises the concern addressed by Professor Hart in his discussion of the Nazi regime and post-war Germany where he stated, “[w]icked men enact wicked rules which others will enforce.”<sup>110</sup> Even Hart, a strong advocate for positive law, conceded that in dealing with such an abuse of power and law making authority, obedience is not simply contingent on

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<sup>108</sup> Blake D. Morant, *Lessons from Thomas More’s Dilemma of Conscience: Reconciling the Clash Between a Lawyer’s Beliefs and Professional Expectations*, 78 ST. JOHN’S L. REV. 965, 978 (2004).

<sup>109</sup> *Id.* at 981.

<sup>110</sup> HART, *supra* note 20 at 206.

“legal validity,” it may also require some kind of moral scrutiny that is beyond the official system.<sup>111</sup>

Morant’s analysis comes back into play. But in his study, he did not address Nazi Germany but Tudor England and the conflict between King Henry and Thomas More. Morant argued that More refused to endorse Henry’s positive law that altered or displaced the natural law that previously gave order to society.<sup>112</sup> From More’s perspective, it was not only possible, but necessary, for the law the King and Parliament made to reflect the harmonious relationship between human law and the law of right reason (the natural law). In More’s mind the connection between the two bodies of law was both necessary and compatible. But the Act of Succession, sought by the King and enacted by Parliament, unsettled this balance. More decided to ignore the Act, which would continue on its course without any further expression of opinion from him—as More wisely suggested, exclaiming, “why that thing in my conscience should make any change.”<sup>113</sup> With this statement, More rhetorically asked that if the legitimacy of the Act was no longer in doubt, what could his humble opinion offer at this stage in the political and legal developments of King Henry’s imposition of a totalitarian regime?

Perhaps that would have been to Thomas More’s liking; however the King demanded a public endorsement and therein lay the problem. Not the reason for the law, but rather the King’s and Parliament’s ability to enforce it became the justification to obey the law. As Morant has noted, in a positivist

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<sup>111</sup> *Id.*

<sup>112</sup> Morant, *supra* note 108 at 981-82.

<sup>113</sup> WILLIAM ROPER, A MAN OF SINGULAR VIRTUE 91 (Folio Society 1980).

sense, there is no problem with this approach.<sup>114</sup> But the dilemma begins to emerge when this approach is subject to moral scrutiny. The King and Parliament would not permit this, and they concluded that private views critical of the Act had to be neutralized by public oaths of allegiance proclaimed by the citizens, and certainly those in prominent positions within society like Thomas More. They were intended to prevent More from exercising his conscience and would not let him object in conscience.

The oath that Thomas More refused to take would expose his innermost conviction that the Act was seriously flawed. If no one knew this, the law and More's life could both continue. But when his public allegiance became a crucial element of the Act's success and the uniform belief that King Henry wished to impose, More was then confronted with the mandate to promulgate his conscience objection. In short, Henry's England became a totalitarian state in which conscience was no longer a protection for inner conviction. For the King, this circumstance was "a canker in the body politic, and he would have it out."<sup>115</sup>

In this segment of the investigation of conscience I consider totalitarianism as a type of modern dictatorship that relies on a centralized, universal control of all aspects of life including "innermost convictions."<sup>116</sup> The totalitarian state can conjure up means of ensuring public endorsement of its control, demanding uniform support by all over whom it exercises dominion. In a way, the oath required by the Act of Succession might be

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<sup>114</sup> Morant, *supra* note 108 at 982-83.

<sup>115</sup> *A Man for All Seasons*, Columbia Pictures (1966).

<sup>116</sup> ARENDT, FRIEDRICH AND B, ETC. H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1958, new ed. 1966); C. J. FRIEDRICH AND Z. K. BREZINSKI, *TOTALITARIAN DICTATORSHIP AND AUTOCRACY* (2d ed. 1967); M. CURTIS, ed., *TOTALITARIANISM* (1979); S. P. SOPER, *TOTALITARIANISM: A CONCEPTUAL APPROACH* (1985); H. BUCHHEIM, *TOTALITARIAN RULE* (1962, tr. 1987); A. GLEASON, *TOTALITARIANISM* (1995).

considered an early illustration of this because there could be no departure from disagreeing with the law, and to ensure this, the oath was required. The oath guaranteed the cohesion within society that is an important component of the totalitarian State. Nonetheless, in spite of this effort at universal, central control, there often remain elements of the society that preserve a moral force and function as a counterpoint to the pressure of this state. In the context of Nazi Germany and the Soviet Union there were religious and intellectual groups who served as counterpoints. By pursuing their goals, the members of these groups faced persecution and annihilation if discovered by the state's enforcement mechanisms.

Christopher Dawson, who spent a career studying conscience, religious faith, and public life noted that in more modern times (and much of his work had as a backdrop the totalitarian States of Nazi Germany and the Soviet Union), Christianity needed to become an underground movement.<sup>117</sup> But in reality, Dawson concluded that Christianity as a way of life and the exercise of conscience that accompanies the practice of Christianity cannot always be concealed. He recognized that both the totalitarian state and the modern democratic state may “not [be] satisfied with passive obedience; it demands full co-operation from the cradle to the grave.”<sup>118</sup> In some contexts, this obedience is necessary to avoid being “pushed not only out of modern culture but out of physical existence.”<sup>119</sup> Dawson's investigation of the first half of the twentieth century may be an accurate prophecy for the democracies of the early twenty-first century that exist under the framework of both domestic and international law.

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<sup>117</sup> CHRISTOPHER DAWSON, CHRISTIANITY AND EUROPEAN CULTURE: SELECTIONS FROM THE WORK OF CHRISTOPHER DAWSON 81 (1998).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

The views and beliefs of conscience that are targeted today need not be held by a few isolated individuals since they can and likely are held by many other persons. With regard to the question of the legitimacy of abortion, most western societies find themselves divided by this issue. In this context, the hallmark of the totalitarian regime is its plan to eradicate beliefs and acts that may be held by many individuals and are often considered mainstream but conflict with the views of the state or those political interests that effectively lobby the state in its law-making function. Surely this is the case with perspectives on abortion, same sex marriage/unions, euthanasia, and the “emergency contraception” that are more and more becoming not only the policies, but the requirements of the modern democratic state that is a subject of international law.

In addition to the EU Experts discussed in Section V, *supra*, another organization attempting to subvert the sanctity of concordats and the protection of conscience is an organization called “Concordat Watch.”<sup>120</sup> When one visits its menu listing entitled “About Us,”<sup>121</sup> there is no information that identifies who (either persons, organizations, or both) constitutes “Concordat Watch.” Nonetheless, one statement attributed to a Muriel Fraser states, “The contributors have diverse viewpoints, but we are united in the conviction that separation of church and state is urgently needed to ensure human rights for all.”<sup>122</sup> It becomes clear as one further examines the pages of “Concordat Watch” that its “contributors” are allied with individuals who espouse secular humanism and are opposed to the Roman

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<sup>120</sup> See, generally, Concordat Watch Home Page, [http://www.concordatwatch.eu/showsite.php?org\\_id=843](http://www.concordatwatch.eu/showsite.php?org_id=843).

<sup>121</sup> See [http://www.concordatwatch.eu/showsite.php?org\\_id=843](http://www.concordatwatch.eu/showsite.php?org_id=843) (follow “About Us” hyperlink).

<sup>122</sup> *Id.*



Catholic Church's involvement in the international order. Many of the claims made by these "contributors with diverse viewpoints" display anything but diverse viewpoints. The words chosen to express opinions differ, but they are united in the project of denying the Church its proper role in civil society and the rights of persons who seek conscientious objection protection. The claim of Ms. Fraser that "separation of church and state is urgently needed to ensure human rights for all" is clearly false when one considers the legal protections afforded to religious liberty and conscience that I have previously addressed in this section.

But one further thing is clear, with regard to the proposed concordat between the Holy See and the Slovak Republic, the group earlier identified as "Catholics for a Free Choice" had a hand not only in the EU Experts' Opinion but also in the ongoing campaign of "Concordat Watch." As the "About Us" page states: "...in 2005 the Catholics for a Free Choice helped concerned Slovaks inform the world about plans for an unprecedented 'conscience concordat' which threatened basic freedoms there."<sup>123</sup> What in fact is really the case is that those opposed to the Slovak Republic concordat were those ones who "threatened basic freedoms there." An objective examination of the website will disclose the strident animosity toward the Holy See and to those who have supported the conscientious objection provision of the proposed Slovak Republic concordat. Access to "reproductive health" services is unfettered but the protection of conscience becomes questionable.

One of the more scurrilous contentions of "Concordat Watch" is that the proposed concordat with the Slovak Republic was of "a new kind" that was "audacious" but "led to protests both inside and outside Slovakia, and on

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<sup>123</sup> *Id.*

6 February 2006 caused the fall of the government.”<sup>124</sup> A connection is then made to the “Catholics for a Free Choice” in a letter, bearing the address of this organization in Washington, D.C., that is the source of the protests.<sup>125</sup> The president-emerita of “Catholics for a Free Choice” is listed as a signatory. Notwithstanding these developments, neither the Holy See nor the new government have abandoned efforts to promulgate the conscientious objector protection in a concordat; however, these efforts have been described by “Concordat Watch” as “steady pressure” to implement a “morality pact.”<sup>126</sup> As negotiations proceed, it will be important that the right to conscience of all will be protected. Contrary to the implications of “Concordat Watch,” those who wish to participate in morally offensive activities will be able to continue on their paths; however, those who object to them need not be compelled into doing something to which they object out of conscience. And this is something that “Concordat Watch” and those behind it do not seem to understand. But if they do, they apparently do not want this protection to exist as it would conflict with their totalitarian objective of “reproductive health rights” first, conscience second, if at all. Uniformity with their views rather than protection of the legitimate right to the exercise of conscience is what is at stake.

## VII. CONCLUSION

If society today would approve of the doctor who, in the exercise of his conscience, refused to conduct some scientific experiment upon an unwilling subject that is encouraged or required by the law of the state, why would that

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<sup>124</sup> See [http://www.concordatwatch.ed/showsite.php?org\\_id=849](http://www.concordatwatch.ed/showsite.php?org_id=849) (follow “Slovakia” hyperlink).

<sup>125</sup> See, Letter c/o Catholic for a Free Choice, to Mr. Mikuláš Dzurinda, Prime Minister of the Slovak Republic (April 20, 2005) (on file with author), available at [http://www.concordatwatch.ed/showsite.php?org\\_id=849](http://www.concordatwatch.ed/showsite.php?org_id=849).

<sup>126</sup> See *supra* note 124.

same society disapprove of the doctor who, also in the exercise of conscience, refused to terminate a life at its early stages or a later stage? Put simply, this society's action would make no sense if it insists on being called democratic and liberal. It would be guided by subjective whim and caprice. It would, notwithstanding its democratic claims, be a totalitarian society. As Pope John Paul II once said, "the value of democracy stands or falls with the values which it embodies and promotes."<sup>127</sup> What values are being promoted today by Western "liberal democracies" within the realm of international law that provide the guarantees of conscience and its protection? Are they truly consistent with the principles, including the right to conscience, that undergird them?

Thomas Aquinas's first principle of the law is to do good and avoid evil, and it offers a foundation to answer this important question.<sup>128</sup> Of course, it is crucial to identify correctly the good associated with the proper exercise of conscience. Otherwise, as Dr. Edmund Pellegrino has stated, errors of conscience can occur when individuals or groups relying on the conscience defense misidentify the good.<sup>129</sup> If the good is misidentified, the subsequent acts based on conscience, be it an active or passive exercise, can also be flawed. But even when the identification of the good can be debated by moral individuals who rely on an objective rather than subjective determination of the good, there may still be disagreement about whether the underlying good has been correctly identified or not. It may be, then, that some proper measure of prudence is needed before the claim to conscience is

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<sup>127</sup> John Paul II, *Evangelium Vitae*, n.70. In his earlier encyclical letter *Centesimus Annus* of 1991, he made a related observation: "As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism." *Id.* at n.46.

<sup>128</sup> AQUINAS, *supra* note 19.

<sup>129</sup> Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 *FORDHAM URB. L. J.* 221, 227 (2002).

made and that the law reserves to itself some flexibility in assessing the legitimacy of the claim and whether a right to conscientious objection exists and should be protected.

Recognizing that there can be a potential problem in justly dealing with claims of conscience, some cases offer clear distinctions about competing claims to the good and the exercise of conscience that follows. For example, the highest court of the United States declared in 1973, that the physician, in the exercise of his professional judgment, could determine if nascent human life could be taken or sacrificed. Some would applaud this as a legitimate exercise of conscience. However, others would assert that this exercise is flawed because of the result being mistakenly identified as a good when it is in fact not a good from the perspective of the baby who is aborted. But what would happen to the second physician who, in the exercise of her professional judgment and conscience, concluded “I cannot take this life?” This is the issue at stake in the concordat that was subjected to the withering critique of the EU’s Independent Experts. The society and its regime of “human rights” that these experts have in mind has begun its metamorphosis toward becoming a totalitarian society. In this case, the admonition attributed to Edmund Burke needs to be taken into account: “All that is necessary for the triumph of evil is that good men do nothing.”<sup>130</sup>

Some may view my labeling the liberal democratic state which removes conscience protection under the argument of “international human rights” a harsh and unsubstantiated conclusion. But is this labeling unfair when one considers that this type of state may be pursuing a well-crafted plan that dictates which convictions and actions based on those convictions are

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<sup>130</sup> A quotation often attributed to Edmund Burke but not found in any of his works. See <http://www.bartleby.com/73/560.html> (last visited Feb. 17, 2009).

permitted and which are not? When the modern state begins to insist on a uniform view on controversial subjects such as abortion, same-sex marriage, and euthanasia, has not the state engaged in dictating what all must believe and do with no opportunity for dissent? When reason declares that people may differ about the propriety of abortions, same-sex unions, and the permissibility of assisted suicide, should the state demand in these circumstances that all must comply with its rules on these subjects knowing that there are those who will offer, even gladly, these services to which others object through the exercise of objective reason and conscience?

In the early twenty-first century we seem to be remote from the attitude of the German camp guard or camp commander who, when asked, “Where was your conscience?” replied that he was simply following orders. We may not be so removed from this circumstance as we might like to think. Physicians may begin to wonder that if they raise objections to whatever the state mandates of them, would they be given a license at all? And, if they have a license, would it be stripped from them when they refuse out of conscience to engage in these procedures?

But again, the problem does not stop here. Let us assume that the state is willing to respect the exercise of conscience of this physician but then insists that this doctor provide the patient with the identity of those physicians willing to perform the services to which the first doctor objects on conscience? The physician’s conscience has still been violated, but this time indirectly because the doctor is mandated to compromise his or her conscience indirectly rather than directly. It is one thing for the physician to turn over a file to a patient who requests its release; it is quite another for the physician to

be required to search for the doctor who will perform the objectionable procedure.

The “liberal democracy” continues on its path, either by itself or after heavy lobbying by special interest groups such as CFFC or the Center for Reproductive Rights, of mandating compliance with a uniform regime. As the “liberal democracy” becomes more totalitarian in its outlook, all will have to comply whether this is necessary or not. In the case of performing abortions or euthanasia, assisting in state-sanctioned suicides, distributing poisons to destroy nascent human life, sanctioning same-sex unions (be they in the name of God or of the state), there can be no diversity or tolerance of opposing views—there is insistence that all comply whether the need for universal compliance is necessary.

Today’s reality demonstrates this. In the context of abortion, euthanasia, assisted suicide, morning-after cocktails, or same-sex unions, there are people willing to comply with the expectations for services to which others object.<sup>131</sup> But the totalitarian state insists universal compliance simply because there can be no different voice, there can be no diversity of opinion on matters that previously one could hold as a matter of conscience.

In the past experience of the twentieth century, one totalitarian state demanded adherence to the view that not all persons were equal on fundamental points of human nature—some were subhuman and could be annihilated. But reasoned opinion said otherwise. That is why the international community responding by promulgating the UDHR and its recognition of the need to protect conscientious objection. This was and

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<sup>131</sup> See Nina Totenberg, *Harry A. Blackmun: The Conscientious Conscience*, 43 AM. U. L. REV. 745 (1994) (wherein author discusses the “conscious” of Justice Blackmun who authored the majority opinion of *Roe v. Wade*).

remains the objective of the Holy See's efforts to promulgate conscientious objector protection in concordats. If it cannot stop morally problematic medical procedures that destroy life, should it not be able to protect those who, in the exercise of well-formed conscience, choose not to cooperate in them?

The views that are suppressed by the totalitarian-democratic state need not be unpopular ones. In fact, they may demonstrate that a society is deeply divided on certain issues—such as abortion, euthanasia, morning after pills, and same-sex unions. The views that are the subject of the suppression may be widely held, even by a majority of the polity.

Thomas More demonstrated the essence of his identity as a prudent man whose final act must be guided by a well formed conscience. On the one hand, he searched for ways of remaining the faithful citizen, but on the other, he knew well there was a boundary beyond which he could not pass, for if he did a far more basic law binding all humanity would be crossed. And for Thomas More, crossing that law would be against his nature and his conscience. He was quick to point out that by exercising his conscience, he could not demand how others should exercise theirs.<sup>132</sup>

It was the style of More to keep his exercise of conscience an individual, even private, matter by not advocating others to follow his example. But on the other hand, his life was a very public act that had great impact on others. His silence proclaimed where he stood when the law demanded what his conscience would not permit: to profess the oath that betrayed his well-formed conscience. Thomas More understood well that he must be prepared to meet his final judge.

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<sup>132</sup> *Id.*

Conscience, therefore, was not exercised for the convenience of the continuation of his earthly life; it was exercised to determine the righteousness of how he would live this life as he prepared for the eternal one. His guidance may just be what the world needs to avert the totalitarianism that beckons the present age and threatens the legitimate exercise of conscience, which still retains its legal protection that must not be compromised for the sake of all.