

# STABILITY FUNCTION OF BILATERAL AGREEMENTS CONCLUDED BETWEEN THE STATE AND CHURCHES AND RELIGIOUS COMMUNITIES IN SLOVAKIA IN THE FIELD OF GUARANTEEING FREEDOM OF RELIGION AND FREEDOM OF CONSCIENCE

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**Abstract.** By concluding treaties on respect for the principles in the Slovak legal system with the Holy See, as well as registered churches and religious communities in Slovakia, the purpose of Article 10(2) of the Charter of Fundamental Rights of the European Union (in force as EU law since 2009), according to which the protection of conscience is regulated by the Member States in their domestic legal systems (in addition, they include an international treaty or an equivalent legal norm, which is in the Slovak legal environment applies to national agreements) is described in the contribution. The new contractual concept of an agreement with the Holy See on conscientious objections is in accordance with the explanatory memorandum to this provision of the Charter and corresponds to the constitutional traditions and the development of law in the field of protection of freedom of conscience and religion in Slovakia. In its essence, in addition to compatibility with the law of the European Union, as well as the constitutional law of the Slovak Republic, it is a significant stabilizing element in the legal order of Slovakia.

**Keywords:** the Holy See, bilateral agreements with the Holy See, conscientious objections, freedom of religion, freedom of conscience, stability of legal system

## INTRODUCTION

The question of legal stability consists of two assumptions. The first is the mutual integrity of all branches of law of a State and the second is the acceptance of all relevant law of a State by own inhabitants of a country. The second assumption means and includes the exclusion of conscientious conflict of a man concerning State law and personal conviction.

A new special instrument providing for the last request might be also provisions or separate bilateral agreement with the Holy See on conscientious objections.<sup>1</sup>

## 1. CONSCIENTIOUS OBJECTIONS CONCEPT

The Article 7 of the Basic Treaty between the Slovak Republic and the Holy See of 2000, as well as Article 7 of the Treaty between the Slovak Republic and Registered Churches and Religious Communities of 2002, contain special bilateral rules on conscientious objection. The Basic Treaty between the Slovak Republic and the Holy See of 2000 provides: “The Slovak Republic recognizes the right of everyone to exercise conscientious objections in accordance with the religious and moral principles of the Catholic Church.”<sup>2</sup> The 2002 Agreement between the Slovak Republic and Registered Churches and Religious Societies provides: “The Slovak Republic recognizes the right of everyone to exercise conscientious objection under the belief and morality principles of its registered church or religious society.”<sup>3</sup>

These provisions contain an obligation for both parties to conclude specific bilateral agreements; in the first case worded as follows: “[...] The scope and conditions of exercising this right shall be determined by a special international agreement concluded between the parties [...]” and in the second case as follows: “[...] The scope and conditions of exercising this right shall be determined by special agreements concluded between the Slovak Republic and registered churches and religious communities.”

An attempt to fulfil the above-mentioned international and national commitments failed in 2006, as it was a politically excessive burden of social reaction and national and international crystallization of ethical issues. To date, there has not been a strong enough political will in Slovakia to deal with this international and national legal obligations. Also an attempt to use the opportunity of the recent visit of the Holy Father Francesco in Slovakia, was not fulfilled unfortunately. But this could be also an argument to say not to forget the matter.

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<sup>1</sup> See also Moravčíková 2007; Moravčíková and Šmid 2015; Němec 2010.

<sup>2</sup> See also Chizzoniti 2004.

<sup>3</sup> The Basic agreement between the Slovak Republic and the Holy See, signed on 24 November 2000, published in the Collection of Laws of the Slovak Republic under number 326/2001 Coll. Agreement between the Slovak Republic and registered churches and religious communities, signed on 11 April 2002, published in the Collection of Laws of the Slovak Republic under number 250/2002 Coll.

## 2. TIME TO DEFINE CONSCIENTIOUS FREEDOM MORE PRECISELY

It seems that it is the time to define human rights protection in the area of freedom of conscience more precisely. It would be an important step for cultural and spiritual, but also legal integration of social and individual values. I allow myself to note that this area does not fall within the competence of the European Union. In addition, the state regulation of reservations in the conscience is explicitly envisaged in the basic human rights document of the European Union, its Charter of Fundamental Rights.<sup>4</sup>

A clear and sufficiently specific regulation of reservations in the conscience means legislative provision for the implementation of fundamental human rights. Without such implementation, in the changed conditions, the protection of freedom of conscience as a fundamental human right may, in conflict with the constitutional norms of the Slovak Republic and its international legal obligations, become fictitious and means social destabilization. This is evidenced by recent developments in several countries of the Union, especially in France, where ethically and morally sensitive issues are opposed by the population to national law and long-lasting attitudes of resistance or destruction of adoption institutions and social facilities can be expected, in Great Britain and the like.<sup>5</sup>

The description of the system of legal protection of freedom of conscience and freedom of religion points to a relatively complex structure and mechanism, which can be briefly characterized by several elements. At the political level, these are documents of a political nature adopted within the framework of the United Nations (Human Rights Council) as a universal protection of human rights; The Council of Europe, the Organization for Security and Cooperation in Europe, the Organization of American States, the African Union, i.e. within the framework of regional international organizations as regional protection of human rights; the European Union and its institutions and agencies; international and national non-governmental organizations; churches and religious communities at international and national levels; states, state legislative and executive bodies, ombudsmen and the like. At the legal level, these are normative legal acts and acts of law application. Normative legal acts in this sense are multilateral universal and regional international human rights treaties; EU legal acts (legally binding Charter of Fundamental Rights

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<sup>4</sup> Article 10 of the Charter of Fundamental Rights of the European Union (2007/C303/01) reads as follows: "1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance. 2. The right to conscientious objection shall be recognized in accordance with the national laws governing the exercise of this right."

<sup>5</sup> More on this issue see Šmidová 2013.

of the European Union, anti-discrimination directives); constitutions of states, constitutional legal norms; legal and by-law norms of states; but currently also bilateral international treaties concluded between states and the Holy See and bilateral national treaties concluded between states and churches and religious communities. In this sense, decisions and case law of universal and regional international bodies and courts (UN Human Rights Council, European Court of Human Rights, etc.) are considered to be acts of law; Court of Justice of the EU; the constitutional and general courts of the individual Member States; acts of national legislative and executive power.

### 3. REGULATION SYSTEM OF THE PROTECTION OF RELIGION RIGHTS IN SLOVAKIA

Looking back at Slovakia, we can say that the system of protection of freedom of conscience and religion contains all the above elements, which must be taken into account when solving the problem of concluding agreements on conscientious objection.<sup>6</sup> In terms of regional and own state conditions, the Slovak system of the legal status of churches and religious communities must also be implemented into this system. This system contains numerous groups of legal norms. These are documents of an international, transnational and national political nature; acts of international, transnational (EU) and national law application; normative legal acts, namely multilateral international human rights treaties, universal and regional, European Union law (in particular primary law, in particular the EU Charter of Fundamental Rights and EU anti-discrimination secondary law); Constitution of the SR (especially Article 24); Slovak laws (especially Act No. 308/1991 Coll. on Freedom of Religion and the Status of Churches and Religious Societies, but also several special acts according to their material scope, such as the Act on Health Care No. 576/2004 Coll.) and by-laws; the system of international and national bilateral agreements with churches and religious societies and, finally, the reception into the legal order of the Slovak Republic in a sense also part of canon law and the law of other churches and religious communities registered in the Slovak Republic.

At this point, a number of fundamental legal norms in the field of conscience protection should be mentioned as a starting point for further considerations. Article 18 of the Universal Declaration of Human Rights: “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 private or in public, to manifest his religion or belief in teaching, practice, worship, observance (ceremony).” Article 18 of the

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<sup>6</sup> See also Šmid and Moravčíková 2009.

International Covenant on Civil and Political Rights: “Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to profess or accept a religion or belief of one’s choice, and freedom, either alone or in community with others and in public or private, to manifest one’s religion or belief in religious services, worship, observance and teaching.” The relationship between freedom of conscience and freedom of religion is also more clearly documented by the continuation of this text, which also clearly indicates the goal of preventing conflict of conscience. No one shall be subjected to coercion which would impair his freedom to profess or accept a religion or belief of his choice. Freedom of expression of religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public security, order, health or morals, or the fundamental rights and freedoms of others. The States Parties to the present Covenant undertake to respect the freedom of parents and, where appropriate, the guardians, to ensure the religious and moral education of their children according to the conviction of the parents or guardians. Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.” Article 24 of the Constitution of the Slovak Republic: “Freedom of thought, conscience, religion and belief are guaranteed. This right also includes the possibility to change one’s religion or belief. Everyone has the right to be without religion. Everyone has the right to express their views in public. Everyone has the right to manifest his religion or belief freely, either alone or in community with others and in public or private, in worship, practice, practice or instruction. Churches and religious societies manage their affairs themselves, in particular they establish their bodies, appoint their clergy, ensure the teaching of religion and establish religious and other ecclesiastical institutions independently of state bodies.” The conditions for the exercise of the rights under paragraphs 1 to 3 may be restricted by law only in so far as they are necessary in a democratic society to protect public order, health and morals or the rights and freedoms of others. This article of the Constitution is mentioned in its entirety, because each of its parts documents the justification of the legislative regulation of conscientious objections.<sup>7</sup>

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<sup>7</sup> The Universal Declaration of Human Rights, adopted by Resolution 217A (III) of 10 December 1948, published under doc. UN A/RES/217/IIIA. International Covenant on Civil and Political Rights of 1975, published under no. 120/1976 Coll. European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, published under no. 209/1992 Coll. Art. 24 of the Constitution of the Slovak Republic of 1992, published under no. 460/1992 Coll.

#### 4. JUDICIAL VIEW ON THE RELIGIOUS HUMAN RIGHTS MATTERS IN SLOVAKIA

The Strasbourg judicial authorities have subsumed religious expression as well as conscience and include the right to free conscience under the free expression of religion. At the same time, these authorities do not distinguish between the terms “conscience” and “conviction.” The term “conviction” differs from the random “ideas” or “opinions” used in Article 10 of the ECHR and presents opinions that reach a certain degree of strength, seriousness, coherence and importance and have a recognizable formal content; speeches and actions considered must express this belief in any form directly. The term “belief” is identified with the term “faith” under Article 9 ECHR and must achieve a certain level of persuasiveness, seriousness, cohesion and importance.<sup>8</sup>

The expression of conviction falls under the protection of Article 9 of the Convention only if the act is an expression of conviction and is not conduct that is only influenced or inspired by conviction.<sup>9</sup> A “conscientious decision” within the meaning of the German Constitution (Article 4 (3)) is considered to be a very serious decision of a moral nature (including one’s own orientation in the categories of good and evil) by which an individual feel intrinsically bound and to which he is in a certain situation. dependent on the grounds that he cannot oppose this decision on his own without a serious moral dilemma.<sup>10</sup>

Freedom of conscience and freedom of religion are considered to be one right, both legislatively and procedurally; it must, of course, be borne in mind that freedom of conscience is theoretically based on either secular or religious beliefs and moral and ethical systems. Theoretically, because it remains an open question whether it is possible to state such secular principles that are not derived in any way from religious teaching in a culture close to us. In any case, the classical (and currently valid) means of legal protection of freedom of conscience respond in practice to violations of freedom of conscience as a fundamental human right, especially in relation to religious beliefs. This could be a strong argument, especially in terms of the effectiveness of the law, in favour of such a special concretization of the legislation on protection of freedom of conscience, which responds to real and current issues of religious

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<sup>8</sup> ECtHR, *Efstathiou v. Greece*, no. application 24095/94, publ. Reports 1996–VI, of 18.12.1996, paragraph 26, and *Campbell and Cosans v. The United Kingdom*, no. application 13590, publ. A 233, 23.5.1992, paragraph 36.

<sup>9</sup> ECtHR, *Arrowsmith v. The United Kingdom*, 1979 Human Rights Commission RE, application no. 7050/75, res 32 of 12 June 1979, report 1979.

<sup>10</sup> Decision of the Constitutional Federal Court of the FRG (BverfG) no. 1BvL 21/60, cit. BverfGE 12.45 of 20 December 1960, refusal of basic military service, paragraph 2, collection of court decisions of 1960.

moral and ethical nature in connection with the teaching of churches and religious communities.

The dynamics of the human rights concept means the destabilization of the classical concept of freedom of religion and freedom of conscience and the very identity of these basic human rights. In the classical conception, this right is a basic human right (also the so-called core right) with a special higher status and precedence over rights that do not have the nature of human rights, resp. emerging rights and obligations. Consequently, the right to conscientious objection arises because the principle of the inviolability of freedom of conscience prevails over the principle of the generality of the law. This right includes the public dimension of freedom of religion, in particular the application of the principles deriving from religious teaching in this dimension (science, politics, law, culture, economics, etc.) and cannot be replaced by other human rights, such as freedom of assembly, association and nature or speech. Furthermore, this right concerns the individual religious rights and institutional rights of churches and religious communities, which differ from the rights of organizations with a social or philosophical focus and the rights of their members.

The European Court of Human Rights (in the case of future decisions in the field of protection of freedom of religion and freedom of conscience also the Court of Justice of the European Union) decides in accordance with the principle of discretion of states, constantly applying those rules and principles contained in the European Convention on Human Rights and fundamental rights of the European Union. The Court also respects the competences and thus the legislation of individual Member States in these areas, including norms and the application of law, which is found mainly in decisions of constitutional or supreme courts and decides individually in accordance with them, i.e. governed by the principle of subsidiarity. There is a clear argument in this regard in the *Fretté v. France* case:<sup>11</sup> It is clear that there is no common ground on this issue, it is not possible to find uniform principles in the legal and social systems of the Contracting States in these matters where views in a democratic environment they can be reasonably and profoundly different. The Court considers it very natural that state authorities, which in a democratic society are obliged, within their competences, to take into account the interests of society as a whole, should take into account a wide range of contexts when deciding on the above issues. Due to direct and long-term contact with the life forces of their country, national authorities have a better ability than an international court to assess local needs and conditions. As a sensitive issue was discussed in this case, concerning areas where there is little penetration of common views between the member states of the Council of Europe, and in

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<sup>11</sup> *Fretté v. France*, no. 36515/97, judgment of the ECtHR of 26 February 2002, paragraphs 41, 42 and 43 of the judgment.

general, the law is only in a transitional stage, much of the conclusions have to be drawn by the state; he expressed and applied this principle in the case of *Soile Lautsi v. Italy*,<sup>12</sup> decided by the Grand Chamber of the Strasbourg Court in favour of the presence of crosses in Italian public schools (explicit and clear application of the principle of discretion of the States while taking into account the circumstances of the case). According to the court, the presence of the cross in the classroom does not constitute a situation of indoctrination with regard to the school environment and no pressure on children's religious upbringing, as Italy provides for the upbringing and education of children to take into account parents' right to comply with religious and philosophical beliefs.<sup>13</sup> The Court acknowledged that it was, in principle, obliged to respect the decisions of the State in this area, including the place given to religion in Italy, also taking into account that such respect would not lead to any indoctrination of children. According to the court, the presence of crosses in schools falls within the competence of the member states of the Council of Europe, mainly because a unified position has not been created in Europe on this matter.

## 5. THE FUTURE OF JUDICIAL REASONINGS

However, it is possible to ask how the international or Union court will decide in the future as a result of the gradual convergence of the principles of the protection of freedom of conscience and freedom of religion? A contrario to the current situation, if the court finds a unified principle of the necessary majority of European states on a certain issue, it will adopt it and will decide on the merits according to it, probably even in cases where some states do not agree with it due to differing national concept. The unification of decision-making principles looks like a mandate for the transfer of competences in the area of freedom of religion and freedom of conscience from the member states of the Council of Europe and the European Union to the Central International Court of Justice in Strasbourg, resp. in Luxembourg. The decisions adopted in this way will contain and consolidate the principles applicable to all member states of the Council of Europe without distinction, and it is likely to be an irreversible process of suppressing the discretion of the states.

On the other hand, some legal confirmation of the regulation of conscientious objection is provided by Article 10 of the EU Charter of Fundamental Rights, according to which the right to conscientious objection is recognized in accordance with the national laws governing the exercise of this right. This is the first introduction of this term into the legal order of the European Union

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<sup>12</sup> Judgment of the Grand Chamber of the ECtHR in *Lautsi v. Italy*, no. 30814/06 of 18 March 2011.

<sup>13</sup> See also Robbers 2011.



and public international law. Similarly, in the Resolution of the Parliamentary Assembly of the Council of Europe no. 1763 of 7 October 2010 stipulates that the hospital as well as the medical staff have the right to an objection of conscience and must not be penalized in any way for refusing to participate in abortions, euthanasia, embryo handling and the like. They must not be penalized in any way for participating in these matters. The Council of Europe has called on the member states to transpose this rule into their laws.

If we think about the essence of the reservation in conscience, it can be stated that the right to express religious beliefs, profess faith, or live in accordance with one's own religious beliefs has three positions: (a) the right to profess the belief in religious acts, private or public, individually or in association with others; (b) the right to the public protection of the values represented by religion and without respect to which it would not be possible to act in accordance with religious beliefs or to apply the principles of religious doctrine; (c) The right of everyone to refuse conduct which is incompatible with the principles of a particular religious teaching. The third of these positions is the key for conscientious objections. It also corresponds with the content and wording of Article 18(2) of the International Covenant on Civil and Political Rights: No one shall be subjected to coercion which would prejudice his or her freedom to profess or accept a religion or belief of his or her choice.

In accordance with these starting points, everyone should have the right (possibility, not an obligation) without negative legal consequences, a legal sanction against themselves (guarantee by the state law) to refuse a legal obligation (conscientious objection), which is contrary to with such serious principles of teaching a state-registered church or religious society that the fulfilment of it would be a violation of freedom of conscience as a fundamental human right. Conscientious objections are therefore only a matter of legally guaranteeing and stabilizing the possibility of refusing to act contrary to one's own conscience. The regulation of the right to exercise conscientious objection, on the other hand, does not address the question of correctness or inaccuracy of opinions on sensitive moral and ethical merits, such as abortions, euthanasia, same-sex unions, reproductive health, or parenting.

The law of the Slovak Republic could contractually include all reasonable principles concerning conscientious objections, both on the basis of the teachings and norms of all registered churches and religious societies, as well as those reservations not based on religion, if such exist and will be raised in preparation implementation of those contracts. Examples of principles protected by contracts could be: a) the principle of the inviolability of human life from conception to natural death. It would mainly concern healthcare professionals, healthcare institutions and patients. It would be the recommendation, prescription, distribution and administration of pharmaceuticals, the performance or cooperation of activities whose primary purpose is to cause abortion

at any stage or unnatural death; b) the principle of respect for human life and its transmission in its natural peculiarity and uniqueness. It would mainly concern health professionals, researchers, institutions, but also the general public. It would be participation in artificial or so-called. assisted insemination, genetic manipulation, eugenic procedures, embryonic human cloning, sterilization and all contraceptive activities; c) the principle of freedom in the educational process, in counselling and enlightenment. It would mainly concern teachers, parents, children, schools and the general public. This would involve teaching, recommending and preparing activities contrary to the moral principles of the Catholic Church in the field of sexual morality, as well as the teaching of the Catholic Church in the theological field; d) the principle of the protection of marriage as a union between a man and a woman, which aims to create a lasting community of life, ensuring the proper upbringing of children. It would mainly concern lawyers, clergy, adoptive and other institutions, but also the general public. It would be the performance of legal, judicial, guardianship and tutoring activities; e) the principle of the protection of the secret of confession and the entrusted secret which has been entrusted orally or in writing, subject to secrecy, to the person entrusted with pastoral care. It would apply in particular to clergy and persons engaged in similar activities. This would be an obligation to testify before criminal authorities or civil courts; f) the principle of respect for freedom of religion and the use of religious symbols. It would concern in particular the public, shops, the army, schools and other institutions. This would involve the use of religious acts and symbols in public in a negative sense and as an exception to the prohibitions laid down by law.

## CONCLUSIONS

Stability of every legal system depends on a sufficient measure of the concordance of its fundamental elements. Such a measure of the concordance can be confirmed among following elements that are taken into consideration: bilateral agreements with the Holy See including the new contractual concept / draft of an agreement with the Holy See on conscientious objections (based on the internal state regulation applying the principles enacted by bilateral international agreement) – the explanatory memorandum to the EU Charter of fundamental rights – the constitutional traditions and the development of law in the field of protection of freedom of conscience and religion in Slovakia – the law of the European Union as a whole and – the constitutional law of the Slovak Republic. This is the fundament for the conclusion that bilateral treaties with the Holy See belongs into the stability building elements within Slovak legal system.

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