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THE INSTITUTIONAL DIMENSION OF THE CONSCIENTIOUS OBJECTION

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The concept of the conscientious objection has been fully detailed, it falls to me to approach the controversial question of the theoretical possibility of institutional dimension of the conscientious objection<sup>1</sup>. I will afterwards analyze the effective legal protection that religious, philosophical groups, as well as confessional groups benefit to solve this type of issue from an institutional point of view, in the lights of the International and European Human rights and of some States.

I. Remarks on a controversial concept: the institutional conscientious objection.

Is it accurate to talk about an “institutional conscientious”? Many writers keep affirming the evident: only a physical person has a conscience and by so has the ability to object in the name of this conscience. This argument seems to prevent any group or institution from objecting. To me, it would be preferable to guarantee the expression of “conscientious objection” only to physical persons as they are humanly reasonable: “*human beings are endowed with reason and conscience* » (Universal Declaration of Human Rights, Art 1). So it would be easier to preserve the primary (and often absolute) aspect of the conscientious objection. Besides, it meets with the ancient European Commission of Human Rights which in the case *Verein Kontakt-InformationTherapie and Siegfried Hagen v. Austria* in 1988 declared: “*Insofar as Article 9 (Art. 9) is concerned, the Commission considers that a*

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<sup>1</sup> See J. MORANGE, *La liberté de conscience en droit comparé (Conscientious objection in comparative Law)*, in J.-B. D’ONORIO (dir.), *La conscience et le droit (Conscience and Law)*, Téqui, Paris 2002, p. 29 ; E. MONTERO, *La loi contre la conscience : réflexions autour de l’objection de conscience, (The Law against conscience : reflexions about conscientious objection)* in J. FIERENS (coord.), *Jérusalem, Athènes, Rome. Liber Amicorum Xavier Dijon*, Bruylant, Bruxelles, 2012, p. 166 ; L. SPINELLI, *L’obiezione di coscienza*, in R. BOTTA (a cura di), *L’obiezione di coscienza tra tutela della libertà e disgregazione dello Stato democratico*, Milano, Giuffrè, 1991, p. 4 ; J. HERVADA, *Libertad de conciencia y error moral sobre una terapéutica*, in *Persona y Derecho* 11 (1984) 13-53, spec. 43 et 48 et s.

*distinction must be made in this respect between the freedom of conscience and the freedom of religion, which can also be exercised by a church as such*"<sup>2</sup>.

But I must add that it would not be sufficient to guarantee a protection to individual freedom of conscience and religion. This insufficiency of such a protection comes from the freedom of convictional group members, that is to say religious or philosophical, in that the plenitude of the contents corresponding to the freedom of conscience, thoughts and religion shall only be infringed by considering some community group aspects. That is to say, the rights of the group itself. Therefore, the necessity of the protection of the convictional groups and their gravitational organizations (they are often care centers and educational centers) must be assured, they are often qualified of "tendencies" organizations or "identity" groups<sup>3</sup>.

Let us take an example: a mother is willing to give birth to her disabled child. Her love for the child to born is comforted by her conviction that she must keep her child alive, this is a personal moral conviction nourished by her religion. We can talk about a mixt motivation. How her conviction and freedom of mother will be respected if even the confessional groups she belongs to influence her to have an abortion, openly contradicting the ethical position it should have in consideration with it confessional aspect. In such a case, the necessary institutional support to make her moral and religious conviction respected will be cruelly missed. This confessional hospital will be able to give itself the aspect of a very open minded policy and argue its respect to everyone by not imposing anyone a confessional moral: in reality by doing so it would abdicate its institutional coherency and its responsibility toward patients of this confession, whose convictions would be unfairly violated. Furthermore, such a practice would not either take into consideration those coming to this hospital without particular belief but precisely because of its confessional identity. Besides, practicing an abortion might go against ethical convictions of the medical staff, who might have to collaborate against their conscience. This example shows that the individual right to conscientious objection must be combined with an institutional framework.

Therefore, it is not surprising that many jurists but also professionals from medical and educational fields recommended the acknowledgment of "institutional objections"<sup>4</sup>. Thus, ordinary teachers from Madrid, Navarro-Valls and Martínez-Torrón define this concept as "the legal recognition of conscientious objection corresponding to the institutionalized credo

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<sup>2</sup> COM, *Verein Kontakt-Information-Therapie et Siegfried Hagen c. Autriche*, 12 oct. 1988, req n° 11921/86, DR 57, 96-97.

<sup>3</sup> This notion comes from German Law: *Tendenzbetrieb* (cf. article 81 of the Law 11 of October 1952). Also see I. RIASSETTO, « 'Entreprise de tendance' religieuse, in F. MESSNER, P.-H., PRELOT et J.-M. WOEHLING (dir.), with the contribution of I. RIASSETTO, *Traité de droit français des religions*, 2° éd., Lexis Nexis, Paris 2013, pp. 1211-1230.

<sup>4</sup> See R. NAVARRO-VALLS – J. MARTÍNEZ-TORRÓN, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Madrid, Iustel, 2011, pp. 50, 123, 129, 147, 491 et s.; G. HERRANZ, *La objeción de conciencia de las profesiones sanitarias*, *Scripta theologica* 27 [1995/2] 557-558; F. TOLLER, *El derecho a la objeción de conciencia de las instituciones, Vida y Ética*, vol. 8, n. 2 (2007) 163-190, spec. 168; F. SUDRE, *Droit européen et international des droits de l'homme*, 8° éd., P.U.F., Paris, 2006, p. 484); V. TURCHI, V., *I nuovi volti di Antigone. Le obiezioni di coscienza nell'esperienza giuridica contemporanea*. Ed. Scientifiche italiane, Naples, 2009, pp. 89 et s. Also see E.L., BEDFORD, *The Concept of Institutional Conscience*, in *The National Catholic Bioethics Quarterly*, 12 [2012] 409-420; V. PRIETO, *Dimensiones individuales e institucionales de la objeción de conciencia al aborto*, in *Revista general de Derecho Canónico y Derecho Eclesiástico del Estado*, 30 [2012] 6).

in some religious confessions”<sup>5</sup>. Pope Benedict XVI also evoked the issue without fearing to give his approbation to institutional objection<sup>6</sup>.

Therefore, the nerve of the issue is not to know if such protections can be practicable or should be practiced because they already exist. The elaboration of the concept is however very important. In this respect, I will suggest the following synthesis: we are witnessing an articulation between conscience freedom, thoughts and religion of every individual (Article 9 of the European Convention on Human Rights) on one side, and on the other side the freedom of association (Article 11 of the European Convention on Human Rights), which assumes the acknowledgment of an ethical relative autonomy of the group. From this point of view, the respect of the identity of a religious group and a confessional organization, far from constituting a danger for the conscience of the individuals, looks more like a requirement born from the individuals, who are themselves wishing to respect their conscience which in principle correspond to the project of the institution. The identity groups, that are to be distinguished from the public entities, therefore appear to be an essential mean in order to effectively protect the individuals conscience that compose it but also a way to insure the respect the doctrinal project or the ethical code promoted by the founders of an institution.

To me, the answer to the issue is the following: if a moral entity, even if it has no soul or body, can be considered in juridical system in the same way as person is in the name of an analogy and a fiction of the law, I do not see why a confessional entity could not be considered as an “analogical extension”<sup>7</sup> of the personal conscience. Beyond the conceptual debate, to me it seems imperative to ensure the protection of this institutional right and keep working for it being attentive on the precision of the technical terms employed. From this technical and juridical point of view, the terms of “institutional conscientious” are not satisfactory even if they are used by many jurists, maybe because of its concision and the public interest on the expression. It would however be more correct to talk about identity protection clause. Thus, in Spain, the Law on Religious Freedom allows confessions to establish “*clauses of protection of their religious identity and specific character, and the respect to their beliefs*”<sup>8</sup>. Other expressions are also acceptable but the “institutional conscientious clause” would not escape from the critic already made about the specific use of the term “conscience”. Ultimately, what really matters is not the terminology but the effective protection of the consciences inside convictional groups: with is connatural to this entities. Besides, we can make the hypothesis that they will have to respect the public order to benefit from a protection. This being clarified, we can now analyze the effective protection provided to convictional groups and identity groups.

## II. The necessary protection of confessional organizations and identity groups

### 1. The international and European framework

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<sup>5</sup> Also See R. NAVARRO-VALLS – J. MARTÍNEZ-TORRÓN, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Madrid, Iustel, 2011, p. 50.

<sup>6</sup> See Benedict XVI, *Discours à l’occasion de la présentation des vœux du Corps diplomatique accrédité près le Saint-Siège*, (Speech to the accredited diplomatic community to the Holy Seat for the wishes 2013) 7 of January of 2013, *l’Osservatore Romano, giornale quotidiano*, 7-8 of January 2013, p. 4.

<sup>7</sup> F. TOLLER, *El derecho a la objeción de conciencia de las instituciones*, *Vida y Ética*, 8 (2007/2) 163-190, spec. 168.

<sup>8</sup> See M.J. ROCA, *Derechos confesionales y integración de las confesiones religiosas. Aspectos institucionales y personales: de la autonomía a la objeción de conciencia*, in J. FERREIRO (coord.), *Jornadas Jurídicas sobre Libertad Religiosa en España*, Ministerio de Justicia, Madrid 2008, pp. 215-242, spec. p. 228.

The Article 18 of the *International Covenant on Civil and Political Rights* does not directly deal with the issue of conscientious objection, not more than the article 9 of the European Convention on Human Rights<sup>9</sup> who took its inspiration from the article 18 of the *Universal Declaration of Human Rights*. However, the Observation n°22 of the UN (1993) brings useful precisions: “The Pact does not explicitly mention a right to conscientious objection, but the Committee considers that such a right can be deduced from the article 18”<sup>10</sup>.

The attention of the jurisprudence regarding conscientious objection has only been considering the individual conscientious objection when related to compulsory military service (article 4 § 3b ECHR)<sup>11</sup>. This objection is acknowledged but for the Court, it does not allow to refuse an alternative civil service<sup>12</sup>. The jurisprudence is blocked until the case *Bayatyan* of the Great Chamber (2011), which 18 years after the Observation n°22 of the United Nations will expressly link the conscientious objection to the corresponding disposition in the European Convention, that is to say the Article 9 of the European Convention on Human Rights on the freedom of thoughts, conscience, and religion. It thus offered new perspectives to the conscientious objection<sup>13</sup>.

This jurisprudential opening was adopted simultaneously with the article 10 § 2 of the Nice Charter, inserted in Lisbon (2007) in the European Union Treaty by the article 6 of the EUT. This disposition enjoys the legal value of treaties, expressly states the possibility of a conscientious objection in term of freedom of conscience, thoughts and religion. Its formulation yet remains vague and ambiguous: “the right to conscientious objection is recognized in accordance to domestic laws encoding it”<sup>14</sup>.

In spite of its limits, the Article 10 § 2 of the Nice Charter has the huge merit of existing. Its dispositions are the normative bases for the European Jurisprudence<sup>15</sup>, but also support the States which might consider other conscientious objection.

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<sup>9</sup> Com, *Groupe d'objecteurs de conscience c. Danemark*, 7 mars 1977, req. n° 7565/76 : « Aucun droit à l'objection de conscience ne figure au nombre des droits et libertés garantis par la Convention » (Com EDH, *Grandrath c. RFA*, 23 avril 1965).

<sup>10</sup> *General Observation n° 22* (quarante-huitième session, 1993), *Compilation des commentaires généraux et Recommandations générales adoptées par les organes des traités*, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

<sup>10</sup> For an overview, see J.T. MARTÍN DE AGAR, « Libertà di coscienza » in *Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali. La CEDU e il ruolo delle Corti* (a cura di P. GIANNITI), Zanichelli, Bologna 2015, 1115-1154.

<sup>11</sup> See J.T. MARTÍN DE AGAR, « Libertà di coscienza » in *Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali. La CEDU e il ruolo delle Corti* (a cura di P. GIANNITI), Zanichelli, Bologna 2015, 1115-1154.

<sup>12</sup> See, *Johansen v. Norway*, 14 of October 1985, n° 10600/83.

<sup>13</sup> See ECHR (Gr. Ch.), *Bayatyan v. Arménie*, 7 of July 2011, req. n° 23459/03 (voir J.-B. WALTER, *La reconnaissance du droit à l'objection de conscience par la Cour européenne des droits de l'homme. Cour européenne des droits de l'homme (Gde Ch), arrêt Bayatyan c. Arménie, 7 juillet 2011*, in *RTDH* 23 [2012] 671-686).

<sup>14</sup> Some authors made the remark that there are two possibilities: if it is a European fundamental right, it must be recognized by the Charter but it would have been enough to add that they are encoded by domestic laws. However the terms of “in accordance” are ambiguous. The current formulation allows a relative space to subordination of the law to conscientious objection – and its acknowledgment- to the domestic legislator's will. In the second hypothesis, if the sense to give to the disposition is only a reference to domestic law, its being inserted in a fundamental Charter would be irrelevant and inappropriate. (See R. NAVARRO-VALLS – J. MARTÍNEZ-TORRÓN, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Madrid, Iustel, 2011, p. 44 ; J.T. MARTÍN DE AGAR, *Diritto e obiezione di coscienza*, in P. GIANNITI (a cura di), *I diritti fondamentali nell'Unione Europea. La Carta di Nizza dopo il Trattato di Lisbona*, Zanichelli, Bologna 2013, 985).

<sup>15</sup> By European Jurisprudence, I refer to this of the two Court (in Strasbourg and Luxemburg), they intimately collaborate and have a similar position regarding freedom of conscience, thoughts and religion.

In terms of soft laws, the most decisive step saw taken by the *Directive 2000/78/CE* creating a general framework in favor of equal treatment in employment and work<sup>16</sup>. The article 4 underlines the general principle of non-discrimination and also prepares a particular status for the confessional organizations allowing that some “difference of treatment” risking to be considered as constituting discriminations are not considered like so because of the specificity of an identity organization. Thus, the religion aspect is being considered and is the consequence of the nature of its activities (religious activities), or the context (ecclesiastical regime in opposition with civil regime). The article 4 provides for a religious regime that justifies that religious groups or public or private organizations whose ethic is based on a religion or on a conviction is allowed to require from their members or their staff an attitude of “Good Faith and loyalty toward the ethic of the organization” (Article 4, 2), which constitutes a difference of treatment from the general regime is not constitutive of an unfair discrimination (Article 4, 1).

More recently, the Resolution 1763 voted by the Parliamentary Assembly of the European Council recognized for the first time the right to conscientious objection for hospitals and health facilities in relation with abortion, euthanasia and treatments that might cause the death of a fetus or a human embryo. It encourages the European States Members while ensuring the access to cares for patients, to “guarantee the respect of the right to freedom of thoughts, conscientious and religion of the medical practitioners”<sup>17</sup>. Besides, the Article 17 of the Resolution 1728 adopted a few months before concerning the discriminations based on sexual orientation and gender identity provides for a possibility of exemption of institutions and religious organizations<sup>18</sup>.

Before analyzing the jurisprudence, it is left to mention the Guidelines of the Organization for Security and Co-operation in Europe. They prescribe that the States should take into account the conscientious objection for individuals and groups: “In many cases, individuals and groups, for conscientious reasons think difficult or morally reprehensible to comply with certain laws of general enforceability”<sup>19</sup>. Several examples of objections are given below.

The awareness of the International norms to identity protection clauses was late. The Justice Court of Luxemburg does not have a furnished jurisprudence on that field, even if it might change in the future.<sup>20</sup>

As for the European Court in Strasburg, it counts with many positive elements on its side. Its contribution to the institutional ethical aspects is more in the fields of *medical cares and instruction*<sup>21</sup>. Lacking a disposition of the Convention on the conscientious objection the European Court of Human Rights first based its work on on the notion of confessional

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<sup>16</sup> JOCE L 303/19, 2 of December 2000, 16-22. Its « recital » 23, 24 et 26 announce the article 4, in the line of article 17 TFUE, inheriting itself from the former Declaration n° 11 of the European Union.

<sup>17</sup> Resolution 1763 « Le droit à l’objection de conscience dans le cadre des soins médicaux légaux » (*The right to conscientious objection in the legal medical care framework*), 7 of October 2010, n° 1 and 4.

<sup>18</sup> Resolution 1728 « Discrimination sur la base de l’orientation sexuelle et de l’identité de genre » (*Discrimination based on sexual orientation and gender identity*), 29 of April 2010.

<sup>19</sup> OSCR/ODIHR, *Guidelines for Review of Legislation Pertaining to Freedom of Religion or Belief*, 18-19 of June 2004), CDL-AD (2004) 028, p. 16 (consulted on the website <http://www.osce.org/fr/odihr/119675>)

<sup>20</sup> E. TAWIL, « La liberté religieuse en droit de l’Union européenne après le Traité de Lisbonne » (*Religious freedom in the European Union law*), *Annuaire Droit et Religions* 5 (2010-2011) spec. 232-233.

<sup>21</sup> See J.-P. SCHOUPE, *La dimension institutionnelle de la liberté de religion dans la jurisprudence de la Cour européenne des droits de l’homme (The institutional dimension of freedom of religion in the ECHR jurisprudence)*, Pedone, Paris 2015, spec. pp. 369-398.

organization in vigor in several States, and afterwards was able to use the Directive 2000/78/CE quoted earlier<sup>22</sup>.

The Statement *Rommelfanger v. Germany*<sup>23</sup> of the former Commission opened the way: a clinic of Catholic orientation dismisses a doctor for defending abortion in the media. The Commission acknowledges that the credibility of this clinic is questioned, which justifies a duty of loyalty from the employees. It therefore states that the complaint of the doctor based on freedom of speech is ineligible.

Closer in time, in 2007, the European Court for Human Rights heard a case from Switzerland (*Abaz Dautaj*<sup>24</sup>) regarding the employment of a a-religious unemployed man as doorman of a protestant conference center. The compliant abandons his job the first day, he could not bear the atmosphere of the center which he qualifies as being “fanatically religious, racist and xenophob”. The judges gave reason to the evangelical center because when he signed his work contract the compliant freely agreed to work for an organization with specific orientation in spite of his different personal convictions, this was supposing he would assume some obligation of adaptation of behavior linked to the specificity of the place.

In the educational field, in which the jurisprudence of the European Court of Human Rights supports the rights of convictional groups to defend the doctrinal, disciplinary and ritual unity that are essential to them, two cases are to be put aside. *Lombardi Vallauri v. Italy and Martínez Fernández v. Spain*. In both cases it is about the dismissal of a teacher, university teacher in the first case and a secondary teacher in the second case, according to the doctrinal catholic orientation sustained by an arrangement having bilateral international treaty value. In the Spanish case, it is a Statement of the Great Chamber. For the Italian case, the fact that a violation was finally declared does not question the principle of institutional autonomy, but concerns a lack of verification of the conditions of a legal trial by Italy<sup>25</sup>. In the same way, the Statement *Siebenhaar v. Germany* acknowledged the right for an evangelical kindergarten to dismiss the compliant that had been hiding her activism inside the “Universal Church”, of an incompatible confession with the Evangelical religion, and was therefore guilty of a persistent lack of loyalty<sup>26</sup>.

## 2. The Incidence of the distinction between the public and private fields at the States level.

Before I briefly analyze the right in some European States on that matter, I would first like to say something about the system in vigor in the United States where the *Ministerial exception* is applied. Since the title VII of the Civil Right Act (1964) has been approved, this ministerial exception is admitted in the work relations inside religious groups. The famous

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<sup>22</sup> The Statement of the Great Chamber of the ECHR also quoted this directive from the European Union in the chapter *Fernández Martínez c. Espagne*, § 66.

<sup>23</sup> COM, *Rommelfanger v. Germany*, 6 of September 1989, n° 12242/86.

<sup>24</sup> ECHR, *Abaz Dautaj c. Suisse*, 20 of September 2007, n° 32166/05. Also see L.-L. CHRISTIANS, « Chronique de jurisprudence de la Cour européenne des droits de l’homme », *Annuaire Droit et Religions* 4 (2009-2010) 639-640.

<sup>25</sup> See J.-P. SCHOUPPE, « L’autonomie des églises en matière d’instruction dans la jurisprudence de la Cour européenne des droits de l’homme (à propos de l’arrêt [Gr. Ch.] *Fernández Martínez c. Espagne*, 12 of Juin 2014) », *RDJ*, n° 2-2015, pp. 499-524.

<sup>26</sup> ECHR, *Siebenhaar c. Allemagne*, 3rd of February 2011, n° 18136/02. Voir J.-P. MARGUENAUD – J. MOULY, « Les droits de l’Homme salarié de l’entreprise identitaire », *Recueil Dalloz*, 23rd of June 2011, n° 24, 1638.

Statement *Hosanna-Tabor*<sup>27</sup> (2012) therefore is not totally new. Its specific innovation is about the recognition for the first time that this ministerial exception can also be valid in front of the more recent legislation on non-discrimination, which in virtue of the mentioned exception cannot be applied when a religious group decide to dismiss one of its teacher: Madam Cheryl Perich who was teaching in this confessional institution was holding a “called teacher” position which in difference with the “lay teachers” has a religious implication. The Statement alleges that civil judges are incompetent to appreciate the motivations invoked by the religious group which could have loose its control over its minister if the decision had been different. It thus confirms the sane separation between the State and the Churches. Besides, we must underline this is about a private confessional institution. Therefore, in the United States exists the possibility of identity protection clauses for care facilities in general (institutional providers), might they be private, public or religious, but in some States, public institutions and some institutions that are not specifically religious are excluded from this possibility, it is the case in California concerning abortion<sup>28</sup>.

In Europe, the domestic laws are very different. A little minority of States refuses the conscientious objection. The major part recognizes some possibilities of objection or exemption at a constitutional or legislative level. Some accept institutional clauses, with a reference to the distinction between public and private. Thus, in France, the Constitutional Council recognized in 2001 the conscientious objection for the profit of individuals only, but it does not prevent the existence of institutional clauses<sup>29</sup>. I already give the example of the Spanish Constitution of 1978 that guarantees “the ideological, religious and cult freedom of individuals and communities”. Even if this disposition does not expressly mention the objection by a group, the institutional protection has a form of an identity protection clause and benefits from an undeniable constitutional basis<sup>30</sup>. In other States, Italy for example, where there is no constitutional basis, some publicists think the legislator’s intervention is imperative but others reject the requirement of a “*interposition legislatoris*” which they consider as being an unacceptable reflex of legalist positivism<sup>31</sup>. We observe a multiplication of objections including objections *secundum legem* or conscientious options, including for groups<sup>32</sup>.

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<sup>27</sup> See I. MARTÍNEZ-ECHEVARRÍA, “La discriminazione religiosa fondata sulle leggi antidiscriminazione: un rischio giuridico ormai globale”, *IE* 24 (2012), 733-744 (note *sub* CORTE SUPREMA DEGLI STATI UNITI D’AMERICA, sentenza *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et al.*, 11 January 2012, n. 10-553, cit. 13 S. Ct. 694, *ibid.*, (2012) 719-732); ID., “The Protection of the Christian inspiration of medical, educational and charitable institutions: the *Obamare*”, *ibid.*, 25 (2013) 729-751.

<sup>28</sup> See PAMELA H. DEL NEGRO et STEPHEN W. ARONSON, “Practice Resource: Religious Accommodations for Employees in the Health Care Workplace”, *Journal of Health & Life Sciences Law* 8 (2015/3) Pg. 72, p. 3.

<sup>29</sup> For France, see P.-H. PRELOT, « Les aménagements juridiques de la liberté de religion », in F. MESSNER – P.-H. PRELOT – J.-M. WOERLING (dir.) and the contribution of I. RIASSETTO, *Traité de droit français des religions*, 2<sup>e</sup> éd., Paris, Lexis Nexis, 2013, pp. 739-783 and in I. RIASSETTO, « Clause de conscience – Droit français » in F. MESSNER (dir.), *Dictionnaire Droit des religions*, Paris, CNRS Éditions, 2010, pp. 153-155.

<sup>30</sup> See L. RUANO ESPINA, *Objeción de conciencia a la Educación para la Ciudadanía*, in *Revista General de Derecho Canónico y Eclesiástica del Estado*, n° 17, May 2008, 58.

<sup>31</sup> For Italy, see G. DALLA TORRE, *Obiezione di coscienza* », in *Iustitia* (2009/3), 269-270 et, plus amplement, ID., *Obiezione di coscienza e valori costituzionali*, in R. BOTTA (a cura di), *L’obiezione di coscienza tra tutela della libertà e disgregazione dello Stato democratico*, Giuffrè, Milano, 1991, pp. 19-61).

<sup>32</sup> In Italy, Professor C. Cardia talks about « collective or structural objection » (C. CARDIA, *Tra il diritto e la morale. Obiezione di coscienza e legge*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica, [www.statocchiese.it](http://www.statocchiese.it), May 2009, 29 p.). For an overview of Conscientious objection see F. MANTOVANI, *Obiezione di coscienza fra presente e futuro* », in *Iustitia* 64 (2011) 151-156; V. TURCHI, V., *I nuovi volti di*

About the distinction between the public and private fields I mentioned earlier, is often crucial. In many States, care facilities or private educational centers, which previously took the precaution of establishing identity protection, can prevent many problems. Thus, the Spanish system of identity protection clauses was applied several times, notably in relation with the compulsory introduction of technical method of abortion in some university programs<sup>33</sup> as well as some “education to citizenship” classes. It was imposed not only to primary and secondary public schools but also to private catholic schools integrated into the national scholarship system<sup>34</sup>, in spite of its content in opposition with the identity and educative Christian project.

To the issue of the private or public nature of identity institutions can be added the issue of the existence or not of public subventions. However, the funding mode of the organization does not have any impact on the nature of the act it is objected to. The care facilities or educational centers are dependent to the public service, which makes their situation even more complex. I do not have enough time to consider all the different status in other European States Members, however I would like to emphasize the importance of the principle of subsidiarity to justify a relative diversity among the existing solution as well as the pluralism which in each State guarantee a relative autonomy to the convictional institutions. The institutional aspects in relation with ethic must be respected, including in the framework of a public service. Thus, a university receiving funds from the States, without being a public university, could be obliged in a function of public utility, but this function should be developed respecting its own institutional specificity. Subordinating the granting of public funds to the condition of some special practices going against the identity of the center would infringe its autonomy and violate the principle of religious or philosophical pluralism. As long as the entities respect the public order, the identity protection clauses should not be ignored. This explains why a private or confessional care center shall not be forced to practice abortion or euthanasia if it is excluded those practices by an identity protection clause. However, in many States the care facilities have the legal obligation to express straight away their refusal to patients asking for such practices. If it is clear that the care facilities cannot be forced into exercising those practices, it should not either be forced to facilitate the access to a doctor agreeing to practice them (except for the therapeutic abortion, those practices can hardly be considered as being medical practices). Some legislation require such forms of cooperation which are illicit from an ethic point of view.

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I will end this brief presentation by calling for a balanced development of the existing possibilities of identity protection clauses which complete institutionally the individual and primary process to conscientious objection. The convictional groups and the identity organizations are autonomous in the interpretation of their identity and the effects it has on ethic requirements. The decision to object should therefore be under their discretion in any circumstances with no other limit than public order, and above all with the guarantee that the

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*Antigone. Le obiezioni di coscienza nell'esperienza giuridica contemporanea.* Ed. Scientifiche italiane, Naples 2009, pp. 89 et s.

<sup>33</sup> See *Boletín de Noticias Universidad de Navarra*, in Pampelune, 15 of December 2009 and, for the University Foundation of San Pablo-CEU in Madrid, *Forum Libertas*, 23 of Decembre 2009).

<sup>34</sup> We can mention the «Institutional Declaration» of the University Foundation of San Pablo-CEU <http://www.forumlibertas.com>. Also see L. RUANO ESPINA, *Objeción de conciencia a la Educación para la Ciudadanía*, cit, 59).

State shall never claim an “exhaustion” of institutional objection limited to the existing protection clauses. In that aspect we could consider that the institutional objection is wider than the identity protection clauses, which should allow to the groups – in a similar way than the conscientious objection of the physical person – not to be locked into a positivist formalism. They preserve their faculty to face every situation that might appear to be conflictual with their ethic code, notably but not only, by adding new identity protection clauses if the situation require it.