THE RIGHT TO CONSCIENTIOUS OBJECTION

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1. AN ANALYSIS OF THE RIGHT

Conscientious objection is the assertion of moral conviction as a basis for defiance of what the law prescribes. It is an inner feeling of moral obligation not to comply with legal norms which you consider wrong; a refusal to aid, or participate in, acts which to you are morally reprehensible. The conscientious objector re-evokes the words of Henry Thoreau:

'I do not lend myself to the wrong which I condemn'.

It is within this delicate field of conscience and of morality that we have to venture in order to attempt an analysis of the right to conscientious objection. Conscientious objection is a term that lends itself to wide application and it must be stated at the very outset that we shall restrict the meaning of the term to the refusal to bear arms in clear contravention of the law of the country.

This is a conflict situation par excellence. Indeed it is a situation of *acute* conflict for the very physical existence of a society may be put in question. We shall see that the circumstances within which the right to conscientious objection may exist, could be crucial to its legal recognition or otherwise. Thus the problem varies in its gravity according to the context in which it is seen: from peacetime to wartime, from a totalitarian state to a democracy.

Conscientious objection to military service creates, as Ginsberg puts it, 'a tragic situation in which right clashes with right'.[1] It is a direct confrontation between an individual and the society in which he lives, with the individual's only line of defence being his conscience. The mere readiness of a society to consider an argument based exclusively on conscientious objection, truly reveals the unique respect that such society has for this 'inner voice' (as Gandhi used to call it) that exists within every human being. The conscientious objector, by the very stand that he takes, is asserting that his personal moral objections bear more weight than the reasons for obedience of the law. The political source of the law is, therefore, extremely important as a guide while tracking this rugged path of moral reasoning that leads to the final individual

[1] Ginsberg Morris, On Justice in Society (1971), p. 241.

decision. An individual living in a totalitarian society where the law is an imposition, where he does not enjoy any sufficient means to change the government, will find it quite easy to justify breach of the law on the grounds of conscientious objection – without having any qualms of conscience. Though even in this case he may have to distinguish between the duty to defend the fatherland, if such a duty exists, and a refusal to defend a political system to which he does not adhere. The conflict situation in a democratic society is basically different, and even more delicate. Here government rules by will of the majority, and enactment of the law must be seen as an expression of such will. Moreover, in this case, the individual does have means, provided by the law itself, to convince the majority of his point of view and to change the government of his country. A moral justification of disobedience, a balance between the liberty of conscience and the duty to respect the social right, is even more difficult to find in a democratic society.

One solution would be for the conscientious objector to adopt an attitude of classic non-violent passive resistance and break the law accepting the submission of the legal consequences. This would not be a solution found by balancing right with right. This would be an unquestioned preponderance of the social right through the total renunciation of the right of the individual. And the social conscience of most democratic societies is not satisfied by such resolution of the conflict.

On the other hand national communities usually also assert that the defence of the fatherland is a duty incumbent on every citizen. And such defence is the raison d'être of conscription legislation. However, there has developed an attitude that such a duty is not an absolute one and that, in the interest of a more tolerant and just society, the extent of its operation is to be retrenched by the existence of a sphere within which the right to conscientious objection may be exercised. The balance to be reached is a very fine one, and a change in circumstances may immediately unbalance the relationship between the right and the duty.

In view of all this, there seems to be a kind of proportionality between the recognition of the right to conscientious objection and the degree of hazard that such recognition entails for society. Thus it is easier to envisage a right to conscientious objection in peacetime than in wartime, especially if it happens to be a defensive war. Ironically, of course, wartime is the period when the conscientious objection of the individual is most pronounced. Data re-

lating to the states which recognise conscientious objection as a valid basis for exemption from military service, shows that the right has not been exercised extensively. In the Federal Republic of Germany, where there is perhaps the most advanced type of legislation on conscientious objection, the right has been exercised by only 0.8% of those called for service with the armed forces. In Austria, the percentage stands at 0.06%.[2] What would happen if the percentages suddenly soared? The military defence programme of a country could suddenly be gravely hampered if not totally paralysed. The situation seems to be analogous to the question of legality of homosexuality. When homosexuality is at a low level, the hazard of extinction of a society is practically non-existent, just as fear of insufficient defence is unfounded when conscientious objectors amount to less than one per cent of persons called up for military training. Let us now envisage a situation, hypothetical and not likely to occur, where the rate of homosexuality reaches such a peak that the life of that society is endangered: would the right subsist? All this is indicative of the negative pressures that the right to conscientious objection is bound to suffer were it to prove a danger to the existence of the same society within which it functions.

The law of proportionality exists also on another level, that is, between the degree of moral conviction of the individual and the recognition granted by the law to the right of conscientious objection. As will become even more clear in our exposition of the legal situation in particular countries, it is easy to ascertain a blatant tendency to distinguish between the various types of moral arguments raised as a justification for objection. Thus, for objectors to be recognised as possessing the right to exemption from military service, they are usually expected to show conviction of a rejection of armed force. Hardly any country considers conscientious objection to a particular war as a valid ground for exemption.

The reason is certainly not for lack of sincerity, for objection to a particular war can be equally conscientious as that to violence or to destruction: the objector may refuse to participate in a war which he considers as aggressive, or in which nuclear weapons will be used. Indeed, one writer asserts, absolute objection seems

[2]Council of Europe, Report on the Right of Conscientious Objection, Document 2170 (Rapporteur: Mr. Bauer), IV. Explanatory Memorandum by Mr. Bauer, (1967), p. 8.

to be less reasonable than objection to a particular war.[3]

It seems, however, that the case of the total pacifist, or of persons of similar belief, exacts more respect and consequently more tolerance from the social conscience, than the case of other objectors.

Another reason could be that, were governments to allow exemption on the basis of particular conscientious objection, the hazard involved would increase since a great number of people would qualify. Thus we realise that in the case of objectors to particular wars of violence, both instances of proportionality that we have mentioned, come into play. The scales here tend to weigh down in favour of the duty of defence and the social right of self-preservation.

Is our analysis of conscientious objection an attempt to establish the existence or inexistence of a *new* right? Or does the right to conscientious objection exist veiled behind rights already legally recognised by many nations?

'All persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship'. Article 31(1) of the Malta 1964 Constitution states a principle that is endorsed by the Constitutions of many states in the world. The Universal Declaration of Human Rights in article 18 recognises that:

> '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.'

Article 9.1 of the European Convention on Human Rights reaffirms the existence of the right in exactly the same words of the Universal Declaration of Human Rights. As regards the European Convention it is worth noting that in the Parliamentary Conference on Human Rights (Vienna, 18-20 October 1971) the right of conscientious objection was referred to as an additional right to be suggested for inclusion in the Convention.[4] This is, to my mind,

[3] Singer Peter, Democracy and Disobedience.

[4] Council of Europe, Report on the Parliamentary Conference on Human Rights, Document 3078, (Rapporteur: Mr. van der Stoel), (January 1972), pp. 6, 7: paragraphs 13, 14.

incorrect. The right to conscientious objection is but a corollary of the broader right inherent in man: the right of freedom of conscience. Religious belief and its expression does not merely entail freedom of worship in a material way. It entails the right to believe in a set of values, the right to propagate their acceptance and the freedom to live them. Conscientious objection is the result of adherence to values which treasure life to such an extent that aggression, violence, destruction, are plain stark anathema. To dissect the spiritual in man and separate conscience from belief is a task that goes beyond the Herculean. The existence of the right to freedom of conscience and the right to conscientious objection is one and homogeneous. We can thus in reality only speak of conscientious objection as an extension of the right to freedom of conscience, since they are essentially one and the same right. In this conclusion I am, after all, comforted by a resolution of the Consultative Assembly of the Council of Europe itself, which states, *inter alia*:

> '2. This right shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9 of the European Convention on Human Rights.'[5]

The right to freedom of conscience is thus to be regarded as comprising within itself the right to conscientious objection and recognition of the latter is not the creation of a new right but merely an extension of the legal application of the former. Most constitutions guarantee freedom of conscience and this provides a rich source of derivation for the right to conscientious objection.

2. Recognition of the Right

Legal recognition of the right has not as yet become very widespread on the national level, let alone on the international level. Many countries still regard the duty of defence as so overwhelming as to leave no room for exemption to individual convictions to the contrary. We shall discuss the legal situation in four countries primarily: the Federal Republic of Germany, Sweden, Italy and Malta. Of these four, Malta is the only nation without compulsory military service, while the Federal Republic of Germany is the only state

[5] Resolution 337 (1967) on the right to conscientious objection, Consultative Assembly of the Council of Europe.

that has the right to conscientious objection firmly recognised in its Basic Law. Sweden and Italy recognise the right but only through ordinary legislation.

Thus we realise the wide divergence of opinion as regards the protection by law of this right. Even in the countries where protection is given, the degree with which it is given reveals whether the acceptance of the right is a full and mature acceptance or whether social prejudice against objectors still persists.

Let us compare the legal state of the right in Sweden and the Federal Republic of Germany. In Sweden various legislation has been enacted since 1902, the latest being the Law on Unarmed Service 1966. Objectors are not exempted from military service: they are only given permission to do other service as an alternative. Thus their work is regarded as part and parcel of the total defence programme of the state. Though legislation regarding the endorsement in law of the right has existed for a long time, we are here dealing with *ordinary* legislation. On the other hand, the right in the Federal Republic is protected by the Basic Law of the land. Article 4, relating to freedom of creed and conscience, states, in subsection (3):

> 'No one may be compelled against his conscience to render war service involving the use of arms. Details shall be regulated by a federal law'.

Thus recognition to the right is granted by article 4(3) itself, while federal law only serves as a means of its practical application. This specific constitutional recognition reflects a respect for the individual conscience that is equalled only by the Netherlands constitution which contains a similar provision. It is also worth noting here that recognition of the right to conscientious objection comes within the same article that recognises freedom of conscience and religion. This seems to support the contention that one is only an extension of the other.

In countries recognising the right, the difficulty inevitably arises of denoting the persons entitled to it; that is, who are the conscientious objectors? In Sweden the right is given to persons who are sincerely opposed to performing service to such an extent that an attempt to coerce them to do so would lead to a crisis of conscience. Only universal objection to military service is accepted as a ground for alternative service.

In the Federal Republic, application of the term 'conscientious'

is as wide, if not wider. The Federal Administrative Court regards as a conscientious decision, 'any serious moral decision, i.e. any decision distinguishing between "good" and "evil" which in a given situation an individual regards as binding on himself unconditionally, so that he cannot act in contravention of it without experiencing grave moral distress'.[6] The authorities do not decide the righteousness of the objection but simply its genuine conscientious origin. Thus motivation may be philosophic, political or moral, and is, in any case, irrelevant. However the nature of the objection itself does count. The Federal Constitutional Court has decided that conscientious objection must apply to *any* armed service. Thus, like Sweden, 'conditional' objectors eg. to specific wars, or specific enemies, are not exempt from service. Yet it seems that the validity of this statement is not an absolute one, and though the law of proportions we discussed in our analysis of the right is still generally discernible here, it may be that new currents may render its application less universal. Indeed in the United Kingdom, when military service was still compulsory, political objectors eg. individuals who objected to a particular war, were considered as falling within the legal definition of conscientious objectors. The law stating this was enacted in 1941. This is a possible way of development for the West German legislation.

The existence of a conscientious objection has to be ascertained and this obvious need marshalls us into the delicate sphere of evaluation of judgement on that which is most intimate to man: his conscience. It is no wonder therefore that for the just application of the right there is need for a thorough examination of the individual case. Such a preoccupation with justice is reflected in the procedures set up both in Sweden and in the Federal Republic. In both countries the individual has the possibility of appeal so that his case is once more considered and decided upon. In Sweden the examining Committee is presided by an ex-judge while in West Germany the chairman must be a magistrate or senior civil servant who is over thirty-two years old. Composition of the Committees, of course, reflects the seriousness of the issues involved which are

[6]Study on the legal position of conscientious objectors in the member States of the Council of Europe presented by the *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg, Appendix to Report on the Right of Conscientious Objection, Council of Europe Document 2170, (5967), p. 54.

apt to be acutely difficult and where legal experience would be a help. In Sweden the objector may appeal to the King in State Council, which in practice is the Government. In the Federal Republic the protection afforded to the citizen is wider. Against the committee, the conscientious objector has various ways open for him to appeal. He may appeal for a re-examination of his case by the administrating authorities; the second decision is taken by a board adhered to a higher authority, the Kreiswehrersatzamt, the competent District Recruiting and Replacement Office. Appeal to an Administrative Court is then open, and following certain procedure, revision may be sought from the Federal Administrative Court. Finally, there is right of appeal to the Federal Constitutional Court against any violation of fundamental rights in the course of proceedings. Thus we realise that a miscarriage of justice vis-a-vis the conscientious objector is less likely to occur in the Federal Republic where judgement on the issue may be put through a wide process of purification.

In both Sweden and the Federal Republic, objectors who are exempt from military training have to undergo alternative service. Immediately, the query arises: does this mean that recognition of the right is conditional? Is this a penalty inflicted on the objectors in order to exculpate them from the guilt of exemption? Is alternative service, a consequence of recognition of the right?

Once more the duty to defend the fatherland comes into play. In reality, recognition of the right to conscientious objection only means exemption from the rendering of military service to the country. It does not exempt from the duty of rendering service to the country, and alternative service has, in my view, to be seen in this light. The upholding of the right does not automatically mean the discarding of the duty to contribute to the defence of state through national service. Yet the service rendered by the objectors to the country should not be regarded as inferior to that rendered by the members of the armed forces.

Thus the service of the conscientious objectors should correspond to that of regular conscripts. This principle – at least as regards duration – is firmly entrenched in article 12a(2) of the 1949 Basic Law of the Federal Republic. Article 12a was inserted in the Basic Law by federal law of 24 June 1968, and is the article which also speaks of compulsory military service for men who have attained the age of eighteen years. In section (2) it reads:

'A person who refuses, on grounds of conscience, to render

war service involving the use of arms may be required to render a substitute service. The duration of such substitute service shall not exceed the duration of military service. Details shall be regulated by a law which shall not interfere with the freedom of conscience and must also provide for the possibility of a substitute service not connected with units of the Armed Forces of the Federal Border Police.'

This section emphasises the attitude that the work done by objectors has equal value, in the eyes of the community, as that done by the normal conscripts. The situation is different in Swedish law.

In Sweden, the length of non-combatent service is 540 days while the duration of normal military service is 394 days. Conscripts may, however, *voluntarily* do an additional 146 days as part of special units. As regards, non-combatants, therefore, the 146 days are extra and compulsory. This state of affairs reveals a derogatory view of the service rendered by non-combatants. This 'penalty' for enjoyment of the right, is also found in the Italian legislation recognising the right. In Italy until 1972 there was obligatory military service but no recognition of the right to conscientious objection. No mention of the right is made in the Constitution and moreover, the laws relating to national military service left no room for possible exemptions or alternative work for objectors. The Constitution in article 52 says that:

'The defence of the fatherland is a sacred duty of the citizen.'..

An attempt to include a form of exemption in the constitution had been made in the Constituent Assembly, but it was overruled.[7]

Could the right have been legally derived from existing provisions? Article 19 states that:

'Everyone has the right to profess freely his own religious belief in any form, individually or collectively, to preach it and to worship in public and in private, provided this does not involve rites which offend against public morality'.

Besides this, Article 21 affirms:

'Everyone has the right freely to express his thoughts through word, writing or other means of communication'

[7] ibid. p. 80.

Yet, both article 19 safeguarding religious freedom of conscience and article 21 safeguarding a more philosophical freedom of conscience, were regarded in law as not including the right to dissent to military service. The sacred duty of defence of the fatherland was considered as overriding and this was supported by the rejection of attempts to include recognition of the right in the Constituent Assembly. The situation was similar to that in Switzerland where it is held that religious views will not free citizens from their civic duties.[8]

Conscientious objection was considered a desertion of a sacred duty and the lack of legislation affording legal protection to the right reflected a social attitude of distrust and denigration towards conscientious objectors.

The law approved on December 14th, 1972, changed the legal situation. The right to conscientious objection was legally recognised and thus it was realised that the sacred duty to defend the fatherland did not necessarily mean direct military defence. Objectors who satisfy a special tribunal that their case is based on 'profound religious or philosophical or moral convictions' are now granted exemption from military service and are given altemative service. The law has strengthened the practical legal value of articles 19 and 21 of the Constitution.

However the past long experience of rejection of legal recognition of the right have left its imprint on the recognition itself. Thus, as in Sweden, the non-military period of conscription is 23 months instead of 15. The difference in duration is here harsher than that in Sweden, by approximately 94 days. This is undoubtedly a reflection of the unfavourable social view of conscientious objection, a view that, up to a few years ago obstructed attempts towards recognition.

In Malta the situation is a most happy one since military service is not compulsory. This, however, does not mean that there is no place for a discussion of the right to conscientious objection in Maltese law. The right to freedom of conscience is established in article 41 of the Malta Constitution and this is a source of interpre-

[8] ibid. p. 131. In Switzerland, on the first of March 1968, new regulations for the treatment of conscientious objectors came into effect. Provision was made for a judge to end a sentenced conscientious objector's liability for further service and less severe conditions of detention now apply. (Keesings, Contemporary Archives, p. 22550)

tation for the right to conscientious objection, were compulsory military service to be introduced. Article 41 affirms that:

> 'All persons in Malta shall have full freedom of conscience and enjoy free exercise of their respective mode of religious worship'.

Not only is interpretation unhindered by any reference to a sacred duty of defence of the fatherland; it is aided perhaps, by the reference to conscientious objection in article 36 relating to protection from forced labour:

> '36(1) No person shall be required to perform forced labour.
>
> (2) For the purposes of this section, the expression "forced labour" does not include:
>
> (c) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service;'

It would be preposterous to state that there is here an implicit acceptance of the right to conscientious objection. It seems safe to affirm however that the provision sets the stage for acceptance and renders the right less of a novelty to local legislation. Mere mention of the right in the constitution put us legally in a position more advanced than many other countries. The wording of s36(2)(c) is worth comparing with that of Article 4.3(b) of the European Convention on Human Rights. Article 4.3(b) reads:

> '3. For the purposes of this Article the term "forced or compulsory labour" shall not include:
>
> (b) any service of a military character or, in case of conscientious objectors *in countries where they are recognised,* service exacted instead of compulsory military service.'

The legislators of the Convention felt the need to express clearly that here reference was being made to countries which already recognise the right to conscientious objection. Is it not strange that the question of conscientious objection is mentioned in our Constitution where not even military service is compulsory and thus

no need for existence of the right arises? One could perhaps deduce that the legislator of the Constitution was perhaps suggesting the compatibility of the acceptance of the right to conscientious objection with the recognition of the right to freedom of conscience and religion. But this of course remains in the field of speculation. One might safely venture to state, however, that the wording of article 39 somewhat clears the ground and that together with article 41 this is a possible germ from which the recognition of the right might emerge.

We have thus considered the four countries we purported to discuss and though for the picture to be complete we would have to set on a world tour, the four countries we have seen give us a wide spectrum of social and legal environments within which the right to conscientious objection exists.

On the international level it is impossible to speak of legal recognition of the right because such recognition does not exist. International entities and organisations have however acknowledged the existence, or the need for consideration of the existence, of the right to conscientious objection to military service. Amnesty International is a pioneer in the field and its groups have worked for the relief or release of many who suffer because of their conscientious objection. It was also Amnesty International which suggested discussion of the topic to the Council of Europe which in turn took up the challenge and has done valuable preparatory work. The question was discussed extensively in the Council of Europe Consultative Assembly, in the Vienna Conference on Human Rights of 1971, and elsewhere.

In 1967, the Consultative Assembly approved a resolution (Resolution 337) on the right of conscientious objection. The resolution dwells briefly but concisely on the basic principles involved, on procedures to be adopted and on the alternative service. It speaks of the right and its logical derivation from article 9 of the Convention; it also affirms the need for the decision-making body on the conscientious objection to be 'entirely separate from the military authorities', and that the applicant should be allowed to be represented and call witnesses. As regards alternative service, the resolution upholds that:

'1. The period to be served in alternative work shall be at least as long as the period of normal military service.

2. The social and financial equality of recognised conscien-

tious objectors and ordinary conscripts shall be guaranteed.' ...

More emphasis on equality of duration of service should, in my view, have been forthcoming, though one has to bear in mind that suggestions for international agreement have to be of a minimum standard as regards requirements.

In the report on the Parliamentary Conference on Human Rights, *inter alia,* suggestions revolved round a possible definition of a common attitude to conscientious objection, 'with a view to the examination of this question at the United Nations', and also possibly drafting of a European instrument.[9] In the report on action to be taken on the conclusions of the above-mentioned Conference, the view is expounded that consideration of the right should lead more to a common definition of attitude and perhaps the establishment of a European statute for conscientious objectors, then to an incorporation of the right in the European Convention on Human Rights.[10] This reluctance to introduce it directly into the Convention is of course due to the difficulties that radiate from the right to conscientious objection as a right, and from its acceptance within the law. And at present there appears to be not enough common ground among the European states for them to accede on the international level to the obligation of observing the protection and respect of such a right. The need for the delineation of a common sphere of agreement as to what is conscientious objection is a primary one, and also imminent. The drawing up of a statute for conscientious objectors should not be regarded as a final aim. It should be considered as an intermediate step towards the final incorporation of the right to conscientious objection within the European Convention, as an extension of the right to freedom of conscience protected by section 9.

Even in the Universal Declaration of Human rights adopted by the General Assembly of the United Nations on December 10th 1948, no explicit reference is made to the right to conscientious objection. Article 18 however speaks in terms which, as in other instances, leave room for interpretation:

[9] Council of Europe, Report on Parliamentary Conference on Human Rights, Document 3078, (1972 Jan), p. 26, (Appendix III).

[10] Council of Europe, Report on action to be taken on the conclusions of the Parliamentary Conference on Human Rights (Vienna 18-20 October 1971), (Rapporteur: Mr. Grieve), (October 1972), pp. 11, 12.

'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'.

Conscientious objection is nothing less than observance of one's belief, and thus falls within the definition of the right as divulged here. The effect of the Universal Declaration of course is not a legal one and the obligation for its observance is only a moral one.

The major churches too have altered their attitude to conscientious objection and the Second Vatican Council in a resolution urged that 'laws make human provision for the case of those, who, for reasons of conscience, refuse to bear arms'.[11]

The tide towards acceptance of the right seems to be favourable but as yet, on the international level, legal recognition of the right to conscientious objection is still forthcoming.

3. Discrimination in Recognition

Most constitutions which recognise fundamental human rights, including the right to freedom of conscience, also uphold that:

'The enjoyment of the rights and freedoms... shall be secured without discrimination on any ground such as sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

This is taken from article 14 of the Convention on Human rights and is meant as an illustration of similar provisions that exist in national constitutions and international instruments. The principle is embodied in section 33 of the Malta Constitution, in s3 of the Italian Constitution, and in s2 of the Universal Declaration of Human Rights.

It is a fact that in countries where the right to conscientious objection is not recognised, ministers of the Protestant and Roman Catholic churches especially, are usually exempt from rendering military service. This is undoubtedly based on the profession of love and non-violence that such persons manifest through their re-

[11]Hill Christopher, (editor), for Amnesty International, Rights and Wrongs: May Patricia, Conscientious Objection, pp. 121-145.

ligious life. This exemption, however, does not extend to other religious groups of individuals. In Spain, for example, ministers of the Jehovah Witnesses – unlike ministers of the Roman Catholic Church – are imprisoned each time they conscientiously refuse to undergo military training.[12] The same problem arose in the Federal Republic of Germany, that is, in a country where the right is recognised and alternative service is provided. Jehovah Witnesses in that country asked to be granted the same treatment as that accorded to priests of the Protestant and Roman Catholic churches. The Federal Administrative Court held in several judgements that there exists no similarity between the office of the ministers of these cults and that of priests of the two great churches.[13] However convenient this solution may be, it is still, to my mind, a case of outright discrimination. Freedom of conscience and its equal application is here put in issue. In actual fact the exemption accorded to ministers of those churches is based on respect for their beliefs and the expression of such beliefs in their way of living. The right to freedom of conscience is not the exclusive province of some religions: it is the right of all religious cults, indeed of all individuals. If it is recognised for one then it should be recognised for the other.

It would be interesting to consider the situation in Italy, preceding the legal recognition of the right in 1972. A discussion of this pre-recognition state of the law is relevant in that it serves as a guide for any analysis of the legal situation in countries, such as Spain, where the right is not recognised but similar constitutional or other legal provisions exist.

The question of equality draws our attention to two constitutional provisions of great relevance:

Article 3:

> 'All citizens have equal social dignity and are equal in law, without distinction as to sex, race, language, religion, political opinion, personal and social condition.'

We have already expressed arguments that apply also to this section. It is worth noting however that s3 has been used already by the Italian Constitutional Court as a means of modifying existing legal situations considered incompatible with the principles it enunciates. Thus article 781, of the Civil Code, for example, deal-

[12] ibid.

[13] Council of Europe, Document 2170 cit. at (6), p. 75.

ing with donations between spouses and remniscent of the *Lex Cincia* in Roman Law, was declared unconstitutional on 27th June of 1973, one ground being incompatibility with article 3 of the Constitution. The potential in this article is thus amply illustrated.

But perhaps no constitutional article can be as specific and as relevant to discrimination as article 8:

'All religious confessions are equally free in law'.

This means exactly what it says: there is equal freedom for all religious confessions and such equality must necessarily include equal freedom to comply with principles in which adherents to a particular confession believe. What was good for Roman Catholic priests in Italy should also have been good for ministers of other professions. Indeed it should have been good for all individuals who conscientiously objected. Why should we differentiate? Are not they all entitled to freedom of conscience in law?

There are countries which still do not recognise the right to conscientious objection and then adopt this type of half-measures in favour of particular groups. There are also states which recognise the right but, notwithstanding this, give preferential treatment to certain groups. Both classes are guilty of discrimination. Exempting certain religious groups from military training is an implicit recognition of their right to conscientious objection and an affirmation, in their regard, of the right to freedom of conscience. Denying the extension of such exemption is, in reality, denying the equal enjoyment, by other individuals or groups, of the right to express through their lives the maxims in which they believe.

The situation in Malta as elsewhere seems to be safeguarded by section 33 of the constitution which pledges no discrimination on various grounds, including religion. It would be interesting to consider the effect which a declaration that the official religion of the island is the Roman Catholic religion would have were compulsory conscription to be introduced. Would this mean automatic and exclusive exemption to ministers of the Roman Catholic church as priests of the official state religion? This is assuming that no right to conscientious objection is recognised, for all. As regards this part on discrimination in recognition I would like, finally, to touch once more on an argument already expressed. I am referring to the question of alternative service by conscientious objectors, and whether this is to be regarded as a consequence of recognition or as a consequence of a duty to contribute to the social good. Let us ac-

cept the argument that alternative service is the result of the duty towards the existence of the state. This would immediately present us with a picture of sexual discrimination. Alternative service has to be performed only by male citizens. In an age where there is justly, a widespread cry for the emancipation of women and for the removal of sexual discrimination, is not the compulsion of alternative service only on male citizens, an example of discrimination? The duty towards the good of the community is equally shared by both sexes alike and the kind of work allotted to conscientious objectors (eg. hospital work, clerical work) is surely not beyond the physical capacity of female citizens. The duty to defend the state as a duty requiring extra contributions to the community is a duty incumbent on all alike. The impediment for conscientious objectors to achieve this through training in arms, lies in their conscience; that of women lies, it is said, in their nature. Thus both should be given the opportunity to fulfill their duty in ways which they can follow. The discrimination would thus be healed.

4. The Meaning of Recognition

Acceptance of the right to conscientious objection is closely connected to personal attitudes and beliefs about the nature of man. The widespread rejection of armed force by the international community thus reveals a change in attitude that also reflects favourably on the possibility of acceptance of conscientious objection. Unfortunately the idea of aggression as a basic human instinct still exists and as one author puts it, 'refusal to fight is felt, consciously or unconsciously, to be not quite normal, or even cowardly.'[14] Suffice it to quote an Italian military court:

> 'To be and to feel a man is equivalent to feeling the Fatherland within oneself and to be moved by the idea of its value and the will to see it perpetuated.'[15]

Recognition of the right to conscientious objection means a rejection of this idea of man and manlihood. It means an affirmation of the loving qualities of humanity, a declaration of abhorrence to war and violence, an upholding of the pacifist in man. Such recognition would signify a humane development in the law as a reflec-

[14] Hill Christopher, opus cit. at (11).

[15] Council of Europe, Doc. 2170 cit. at (6), p.88. This is taken from a Court judgement in the days when no legal recognition was granted.

tion of a better understanding and greater respect by the social conscience for the freedom of the individual to conduct his life in conformity with what he professes to believe.

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ACTIONS 'IN REM' AND EXCLUSIVE JURISDICTION CLAUSES

J.M. GANADO

IT is my intention in the present Article to deal with one particular aspect of exclusive jurisdiction clauses. As a rule, the Courts have given effect to such clauses, independently of the point as to whether the jurisdiction of the Maltese Courts is thereby extended or derogated from. However, the point has arisen as to whether in the presence of such a clause, the Court still possesses a discretion to exercise jurisdiction, if it considers that the clause is being made use of in bad faith or, at least, in order to try to circumvent the rights of others. This particular point was discussed *ex professo* in a case 'Dr. Edward Fenech Adami noe. vs. Arsemis Christos noe.' which was withdrawn on the 9th June, 1972 before the Court of Appeal as the parties had arrived at an amicable compromise. In the absence of the judgment of the Court of Appeal, it becomes doubly useful to examine in some detail the main points that were discussed in that case.

A consignment of cigarettes had been loaded on a ship with a Panamanian registration for delivery to consignees in Yugoslavia. Plaintiff alleged that the cigarettes had never been delivered to the consignees and, after having obtained from the Court the issue of an impediment of departure against the ship, claimed payment of