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**SUMMARY OF OPINION 4-2005 FROM THE EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS ON THE RIGHT OF CONSCIENTIOUS OBJECTION AND THE CONCLUSION BY EU MEMBER STATES OF CONCORDATS WITH THE HOLY SEE (14 December 2005)**

(I) The Opinion was produced at the request of the EU Commission, prompted by the European Parliament. [This process originated with the All Party Group on Separation of Religion and Politics, which was alerted and briefed by the European Humanist Federation.]

(II) The request arose from a draft Treaty between the Vatican and the Slovak Republic which seeks to implement a provision of the 'Basic Concordat' of 2000 under which Slovakia recognises the right 'of all' to conscientious objection according to Catholic doctrines. If ratified it will be binding on both parties under international law, terminable only by joint agreement - a status that follows from the Holy See being internationally recognised as an independent state.

Although the draft Treaty states that it is to be implemented 'in conformity with' the Slovak legal system, it binds the state to 'preserve the essence and meaning' of the right to conscientious objection, and courts will be bound by the contents of the Treaty. Similarly, although the Treaty will not take precedence over the Slovak constitution, the article of the constitution on freedom of thought, conscience, religion and belief may well be interpreted in the light of the Treaty. The Opinion remarks that in some countries (for example, Italy), concordats are recognised in the constitution, while in others they may supervene over national law but are subordinate to the constitution, needing to be reconciled with it before ratification (as in Spain).

(III.1) The Opinion then reviews many of the concordats in place between the Vatican and EU member states. Only three of these contain provisions about conscientious objection, but in two cases the right is restricted to the clergy and persons in similar roles and in all three the objection is restricted to military service (effectively irrelevant in those states that have abolished conscription). The Slovak proposals therefore break new ground.

(III.2) However, all EU states recognise freedom of religion, and therefore to some extent the right of conscientious objection, and many states have national legislation on the subject. The Opinion reviews such laws in a number of countries: for example, the constitutions of Germany and Portugal give wide recognition to the right of conscientious objection, while in most countries there are laws or less formally recognised rights of conscientious objection in specific sectors, such as teaching or performing same-sex marriages (see annex).

The Opinion concentrates attention on areas of potential conflict for health service staff such as euthanasia, contraception, artificial fertilisation and - especially - abortion. It reports (for example) that there is widespread recognition of a right for doctors and (usually) other health professionals to refuse to take part in abortions (as in Austria, Belgium, Cyprus, Denmark, France, Hungary, Italy, Spain and the United Kingdom) but that the right is sometimes limited (in Denmark medical staff have to apply for exemption, in Italy the right does not extend to caring for the patient before and after the abortion, in Italy and the UK it does not apply when there is a risk to life, in Belgium and France the doctor must inform the patient immediately that s/he will not provide an abortion) and often counterbalanced by an obligation on the health administrations to provide abortions (as in France, Italy and Spain).

(III.3) Looking at the legal principles, the Opinion says that failure to recognise conscientious objection would amount to indirect discrimination under Articles 14 and 9 of the European Convention on Human Rights (ECHR). (The UN Human Rights Committee (HRC), dealing specifically with military service, has made a similar finding under Article 18 of the International Covenant of Civil and Political Rights (ICCPR).) But pre-existing international obligations on a state under (for example) the ECHR cannot be limited by granting unlimited rights of conscientious objection, even if this is provided for in a new international treaty, such as a concordat.

(III.3.2a) The Opinion then explores this area of conflict with specific reference to abortion services. In a previous Opinion, the Network of Independent Experts expressed the view that prohibition or unavailability of abortions would tend to increase the number of clandestine abortions procured. The HRC had examined in 2004 the situation in Poland, where abortions were legal only in limited circumstances and were further restricted by widespread invocation by doctors of their right of conscientious objection. Women wanting abortions were denied their rights, had no effective legal recourse by way of appeal against a doctor's refuse to operate and too frequently put their health at risk by seeking unsafe, illegal abortions. One such case was the subject of a case pending before the European Court of Human Rights, being based on the argument that a state that fails to make abortion available in circumstances where it is legal is in violation of Articles 3, 8, 13 and 14 of the ECHR.

The Opinion states that although no general right to abortion has yet been legally recognised under the ECHR, there is such a right if the pregnancy offers a serious threat to a woman's health (and all EU states permit abortion in such circumstances). It suggests that there is an emerging consensus that the threat to health from illegal abortions in circumstances where legal availability is too severely restricted may be subject to an analogous argument by reference (in particular) to the right to life under Article 6 of the ICCPR. Similarly, the UN Committee on Economic, Social and Cultural Rights has recommended liberalisation of abortion laws by states that are party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Further, Article 7 of the ICCPR (infliction of inhuman and degrading treatment) may be engaged in such circumstances - an argument successfully invoked in a recent case against Peru under the Covenant.

The Opinion suggests that international human rights instruments oblige states both to provide an effective way of challenging a refusal to provide an abortion, and to require doctors and others exercising their right of conscientious objection to refer their patients to doctors without such objections - and indeed to oblige states to ensure that doctors without such objections are available, even in remote areas.

(III.3.2b) Similarly, the Opinion suggests that such arguments can be used to argue that rights to conscientious objection must not be allowed to prevent people from exercising their right to obtain contraceptive supplies - or indeed rights implied by decriminalisation of (for example) euthanasia or assisted suicide or same-sex marriage. The Opinion points to interpretations by UN committees of broad treaty requirements in respect of women's health as requiring family planning services to be available.

(III.3.2c) It also points out that the right to conscientious objection must not be granted in a discriminatory fashion only to followers of one or some religions.

(III.4) The Opinion briefly reviews the recognition of conscientious objection in EU law - particularly in the employment directive which gives limited exemptions to organisations with an ethos based on a religion or belief.

(III.5) It then examines the draft Slovak Treaty in the light of the above principles, noting that some of the most objectionable aspects of the Treaty as originally drafted have been removed or amended as a result of earlier protests.

However, there remain many questionable and objectionable features. The draft Treaty proposes a joint Slovak and Vatican commission with an oversight role to monitor 'individual activities' giving rise to conscientious objection and to comment on proposed legislation and make proposals for legislation and for changes to the concordat. The Opinion says that this Commission would risk contravening Article 6 of the ECHR (right to fair trial) if the Commission commented on pending judicial proceedings.

The Opinion says that the Treaty would risk limiting the right of access to medical services such as (to quote the draft Treaty) 'abortion, artificial or assisted fertilisation, experiments with and handling of human organs, human embryos and human sex cells, euthanasia, cloning, sterilisation or contraception', especially given that it would go beyond individual conscientious objection and debar the Slovak government from directly or indirectly imposing any duty to provide such services on any hospital or facility with a Catholic foundation. The Opinion notes the weakness of the saving clause in the draft Treaty that conscientious objection must not endanger life or health, that there is no obligation to refer patients to practitioners without conscientious objections nor any obligation on the state to provide access to lawful services, counter to international undertakings by the Slovak republic.

The Treaty would moreover put the Catholic church in a privileged position, despite the country's secular constitution, both by its definition of conscientious objection in terms of Catholic doctrine and by its status in international law by contrast with the local agreements envisaged by the government with certain other churches registered with the state. The Opinion notes that there are questions about the equity of the registration procedure and that many persons are not members of any registered church but should still have the right of conscientious objection.

Concluding, the Opinion states that the proposed Treaty would violate the Slovak republic's obligations under the ICCPR, the ICESCR and the Convention on the Elimination of All Forms of Discrimination against Women. Insofar as these breaches affect the rights of women to counselling in the field of reproductive health and access to medical services, they would also breach the state's duties under the EU Directive 2004 /113/EC on equal treatment of men and women in the access to and supply of goods and services.

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