

CONSCIENCE CLAUSE AND INSTITUTIONS

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What is at stake therefore is an essential right which, precisely as such, should be acknowledged and protected by civil law. In this sense, the opportunity to refuse to take part in the phases of consultation, preparation and execution of these acts against life should be guaranteed to physicians, health-care personnel, and directors of hospitals, clinics and convalescent facilities. Those who have recourse to conscientious objection must be protected not only from legal penalties but also from any negative effects on the legal, disciplinary, financial and professional plane.

John Paul II, *Evangelium Vitae*, 74

(and Cf. *Veritatis Splendor*, August 6, 1993, 56)

It is a difficult undertaking to not be able to protect honor except by going against the law and accepting to become suspicious.

Jean Guéhenno

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The so-called conscience clause is analyzed in a faculty to refuse to perform services, which in principle are professional, even if it can be envisaged in a private context (e.g., in marriage, a condition to educate future children in a certain religion; compare Canon 1125-1), perhaps in a marginal way.

Such refusal is provided for and even sanctioned by positive law, especially penal or business law, which forbids the refusal to sell or provide a service to a consumer, or discriminatory refusal, illicit agreements, some non-competition clauses...Should these be described as conscience clauses? If their cause is economic, certainly not. They are business games. If it is racial, ethnic, political, sexual, etc., in the terms, for instance, of article 225-1 of the (French) Penal Code, there would not appear to be a positive movement of the conscience; quite the contrary, but some cases are on the borderline. So it is with the refusal by reason of belonging to a “given religion”, motivated by what appears to the subject to be an imperative of his own religion. It will be answered that it is a religion of

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exclusion, but whether or not he is aware of it, the interested party will adopt his position according to his conscience.

By its cause the refusal merits being described as an exercise of a conscience clause. The one who refuses invokes values higher than those of his partner or of a group. There is a conflict of values such that it causes rebellion against an act that is requested, if not ordered, because it conforms to the values of the group or co-contractor, which may even be written into positive law. There is no conscience clause if values are not involved and a conflict, because if there is no conflict, the person continues to act within a legal and social framework that leaves him/her free to protest. The person is simply exercising a right.

There must also be a situation of possible refusal, which presupposes a previous request or order. A “neutral” situation would only open the subject to a theoretical, doctrinal contestation that may be dissimulated in a totalitarian environment, an act of resistance, but not a conscience clause *stricto sensu*.

Having stated these preliminary conditions, we add that the term “clause” should not be taken in its contractual meaning. The conscience “clause” is not necessarily a stipulation of a contract. On the contrary, if it appears in a convention, its difficulty would vanish by that very fact. Instead, the word has more to do with the antiphrasis because said clause is part of the opposition and not the contractual agreement. Whether or not it is a contractual relation, it is an assertion of opposition. “Clause” is a common language facility¹.

It can be inferred at this first stage of the presentation that there is a search, an assertion of a rebellion that lets a negative aspect of this behavior be seen. First of all, isn't there a risk of destabilizing the social body in the name of individual values that may be different? Second, isn't the clause an instrument of anarchy (“It is forbidden to forbid”) that will bring the group to worse evils than those expressed in the name of natural law? Its study, if not its defense, cannot escape the criterion of proportionality in its implementation so that it can stay oriented to the common good,² the measure of which will come from the virtue of prudence. Not only disorder should be avoided, which, according to Goethe, implicitly produces injustices and not only, but also a drift towards the recognition of might.³ Lastly, if there is rebellion, it is with regard to a prescription. The subject who protests in speech or writing against an order or an iniquitous law when he has still not been enjoined to cooperate in its application is not making use of a conscience clause in the proper sense, even if he exercises a liberty—sometimes restrained and dangerous—of expression and criticism. The clause will only appear if he is warned about his expressions and receives an order or even advice to put an end to or moderate them. This is why the journalist's so-

¹ See the remarkable thesis by Mrs. Laszlo-Fenouillet, *La conscience*, LGDJ ed. 1993, preface G. Cornu.

² St. Thomas Aquinas, *STh*, Part II, sect. 1, quaest. 96.

³ L. Labrusse-Riou, “Conflits de conscience” in *Ethique et soins hospitaliers*, AP-HP ed. 2001, p. 88.

called “conscience” clause in French law is improperly termed...It pertains to situations of resistance close to the conscience clause, but which, strictly speaking, are not fully comparable to it. In any case, said clause supposes that an institution imposes its (counter) values on the one who protests. This institutional phenomenon delimits the clause’s field of application: a dispute of “Docteurs graves” is only a doctrinal controversy. This is how we see the clause at first, but forgetting that the institution itself can claim its freedom before an overall order that deprives it of its values. It is to this aspect that we will link—and limit—our reflection.⁴

In the area of life, which admittedly covers the environment, veterinary law that is all too often neglected,⁵ food law, city planning law, etc., the word “institutions” refers instinctively to health care institutions, mainly the public and private health care establishments. It can also be a reference to the State, the first institution within which the others act, but it too is interlinked with unions or federations.

I. THE HEALTH CARE INSTITUTIONS

Their juridical forms vary according to the health care systems and the material means. Here it is not a matter of presenting a comparative law of these institutions. Quite simply, and based on the system we know less poorly, we will try to take out some main ideas that could, all particularism aside, be common ideas.

A. Variable fundamental principles

1) The published principles

The public hospitals established by the State or territorial groups that are run with public funds and employ public agents (including doctors) are called to accept all patients regardless of their opinions or beliefs. This is a mark of public service. Even though the law in France requires them to reflect on the ethical questions raised by accepting and taking medical responsibility for patients (art. L. 6111-1 C. public health)--which is not a reflection on medical ethics or the values of the health system--, and while in other countries the law requires them to create ethics committees (most often of a clinical kind), they have the duty to display an ethical neutrality, the counterpart of accepting a public of citizens—or foreigners—with varying convictions. This does not mean that they are not confronted with requests from patients, as observed in the cases of strictly observant Muslim patients. It is not that the patients’ beliefs are not recognized there; on the contrary, they are all treated, protected and regulated in their expression equally. The last version of the Charter of the

⁴ Regarding the clause of the individual, we take the liberty of referring to: “Bioética y objeción de conciencia” in *Vivir y morir con dignidad, temas fundamentales de Bioética en una sociedad plural*, EUNSA ed. 2002, Prologue A-M Gonzalez, p. 131, and ref.

⁵ Cep. C. Halpern, B. Pietcho, *Le droit vétérinaire*, Eska ed., 2006.

hospitalized person (circular DHOS/E1, 2006/90, March 2, 2006) attests to the principle of respect and the principle of neutrality:

“The health care establishment must respect the beliefs and convictions of the persons accepted. In the public health care establishments, everyone must be put in a position to take part in the practice of his religion (recollection, presence of a minister of his religion, diet, freedom of action and expression, funeral rites...).

“However, the expression of religious convictions must not harm the functioning of the service, the quality of the care, the rules of hygiene or the tranquility of the other hospitalized persons and their close relatives and friends.

“All proselytism is forbidden, whether by a hospitalized person, a visitor, a member of the personnel or a volunteer”.

However, these public establishments function in respect for the fundamental principles of the health care system taken as a whole, hence respect for the dignity of the sick (art. L. 1110-2 C public health) and the prohibition of forms of discrimination (art. L. 1110-3 C. public health).

Having said this, the subject does not expect respect from the public hospital for particular values beyond the basic principles of deontology and medical law which, I might add, can lead very far and suggest a dialectic of protection of the patients' rights and demands for means to ensure this protection; and the institution's clause appears on the horizon if norms of objective law impede this, for example, by restricting the principles of the freedom of prescription, free choice, secret...Moreover, the neutrality of the public service already guarantees the person that his convictions will not be offended if they are not contrary to public order. The private hospitals are not held to this neutrality. In fact, many do not display any particular ethic or philosophical or religious orientation; they are “simply” commercial enterprises that may or may not be grouped into “chains”, with their own clientele making the “global” or even a “dismembered” hospital contract, and they function with a main, legitimate concern for profitability. Others, on the other hand, present a precise *a priori* orientation.

In France, regardless of their juridical status, these are Christian, often Catholic, but possibly Jewish or Muslim religious institutions (we lack information on how these are distributed). The sign seems precise, or at least unambiguous, and gives the patient making his choice some first information: this is a Jewish or a Catholic clinic, and it presents itself as such! If it can be said in this way, the “religious fact”, which P. Coulombel speaks about, turns into an advertising instrument--let's say the word--publicity, just like advertising the treatments offered and specialties.⁶ This constitutes a decisive element in the conclusion of the hospital contract by the sick person if he himself belongs to the denomination advertised. The statement that it is a Catholic establishment enters, in the words of J.-L.

⁶ Cass. Civ. I, 14 Oct. 1997, Dalloz 1999, somm. 391, obs. J. Penneau; RDSS 1998, p. 336.

Aubert, “into the contractual area”. The same holds for advertising a private teaching establishment when it says it is denominational. The clients (the parents of the students) expect a pedagogy in conformity with the precepts of the Church, not indifference and catechetical vacuity, a gap between what is advertised and what is taught.

The advertisement can constitute willfully misleading publicity given that the public that chooses a clinic for a denominational reason is not an “average consumer” imagined *in abstracto*, but a particular consumer whose confidence is captivated by an essential element of the contract and appreciated *in concreto*.⁷ There is deception regarding one element of the service offered; the user-consumer believes legitimately that only medical services in conformity with the requirements of the Magisterium—and which neither the direction nor the doctors of the clinic can be presumed to not know—will be carried out. If this is not the case, and if, for example, the establishment lets abortions, research on embryos and MAPs be practiced within its walls, the client who is not involved in these activities will have been deceived and can ask about the real ethics of the health care center. Without going as far as to sue for the crime of fraud, which makes the action penal, he can be inclined to annul the contract for willful misrepresentation (we will leave aside the practical usefulness of this strategic choice for possible discussion later), because the deception takes on this civil tendency, or simply by mistake regarding the person if it is to be thought benevolently that the directors were not aware of this misrepresentation. In fact, the contract with the clinic is full of *intuitus firmae*,⁸ and the error regarding the (religious) references of this contractual partner generates the relative nullity. Admittedly, proceedings for false advertising and the annulment of the hospital contract are matters for scholastic hypothesis, but we can see that business law pushes the denominational clinic towards a kind of coherence on which it can more solidly base claims in relation to third parties of its conscience clause.

2) The margin of freedom

The duty to show coherence between the health care institution’s well-considered principles and action enjoys in compensation the freedom to give witness to this coherence, even if the supports we have discovered are only slightly doctrinal.

If we look, first of all, at the case of the establishment as such, before imagining the individual case of its agents, it must be considered that in French law some acts are reserved for authorized clinics (e.g., biomedical research, art. L. 1121-3 C. public health; PMA, art. L. 2142-1 C. public health; prenatal diagnosis, art. L. 2131-1 C. public health). Abortion can only be practiced by a doctor in a health care establishment or in the framework of a convention between the practitioner and an establishment of this kind, which allows a doctor to come from outside the establishment both to respect the principle of free choice

⁷ See in Lamy, *Droit économique*, No. 3117, 3118.

⁸ Cep. G. Kostic, *L’intuitus personae dans les contrats de droit privé*, Thesis in Law, Paris V, Oct. 14, 1997, No. 239.

and to compensate for the hypothetical refusal of all the personnel of the clinic (art. L. 2212-2 C. public health). But all the public hospitals with surgical or maternity services must be equipped with *ad hoc* means.⁹ The fact is that abortion is presented as a public health service that cannot be interrupted.¹⁰ If it is a public service, there is a public need; hence the duty to respond to it and the prohibition to oppose it. We can also read a skillful balancing in the law. On the one hand, the private establishment can refuse to practice abortions on its premises. On the other hand, if it asked to take part in carrying out the public service or has made a contract conceding such service, it can only express its opposition “if other establishments are capable of responding to the local needs” (art. L. 2212-8 C. public health). It could not have been written better, even if the word “need(s)” is common in health care law, which the legislator intends to satisfy as a priority, and it is a “need” because it responds to the exercise of a “right” of a woman or of women. From the law of exception of January 17, 1975, we have gone with the July 4, 2001 law to a one of promotion and demand, which the preparatory work for this law demonstrates. It should be pointed out that at the beginning of 1985, the woman who was the Minister of Social Affairs answered that “abortion remains juridically an offense undermining respect for life except in two cases based on the state of need”.¹¹ In 1987, she repeated: “This law was conceived of for difficult situations. I shall not return to everything we have already said on this subject”.¹² Since then, an institution’s refusal is necessarily limited, while its display of catholicity makes it its duty.

Here we will not repeat what everyone knows: namely the teaching of the Magisterium regarding abortion. To confine ourselves to our subject, we will quote from some precise texts. In his letter of November 1986 to doctors, Cardinal Lustiger wrote the following:¹³

“The Catholic hospitals and clinics must thus be in the forefront in the fight for respect for human life. With the greatest rigor, no deliberate act of death must be made in the Catholic institutions. No regular ease in practice must be introduced into them, even if there are situations in which the conscience is tempted to flinch.

“This lofty requirement can seem heavy, and in some cases unbearable. However, I remind you that you have to give it its central place in your consciences and in the deontological rules you make in order to follow them in the Catholic establishments for which you share responsibility. This constitutes a moral condition of the truth of your position before humanity and before God, and a requirement of your common witness as care-giving Christians”.

⁹ Decree of Sept. 27, 1982, JO 29 Sept. 2982, p. ...

¹⁰ Circular DGS, June 26, 1991; circular Ministry of Employment, November 17, 1999; Mrs. Guigou, Ass. Nat. November 29, 2000, CR. Analytique 3e séance, p. 6.

¹¹ Response, JO Ass. Nat. January 28, 1985, p. 346, No. 57606.

¹² JO Senate, October 10, 1987, p. 3099.

¹³ See *L’Homme nouveau*, No. 913, December 7, 1986.

In *Evangelium Vitae*, Pope John Paul II conferred universal value on this requirement before calling for the exercise of conscientious objection to procured abortion and euthanasia (No. 89):

No. 73 – “Abortion and euthanasia are thus crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection” (etc.).

No. 74 – “In order to shed light on this difficult question, it is necessary to recall the general principles concerning cooperation in evil actions. Christians, like all people of good will, are called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are contrary to God's law. Indeed, from the moral standpoint, it is never licit to cooperate formally in evil. Such cooperation occurs when an action, either by its very nature or by the form it takes in a concrete situation, can be defined as a direct participation in an act against innocent human life or a sharing in the immoral intention of the person committing it. This cooperation can never be justified either by invoking respect for the freedom of others or by appealing to the fact that civil law permits it or requires it. Each individual in fact has moral responsibility for the acts which he personally performs; no one can be exempted from this responsibility, and on the basis of it everyone will be judged by God himself (cf. *Rom* 2:6; 14:12)”.

No. 82 – “We need to make sure that in theological faculties, seminaries and Catholic institutions sound doctrine is taught, explained and more fully investigated. May Paul's exhortation strike a chord in all theologians, pastors, teachers and in all those responsible for catechesis and the formation of consciences. Aware of their specific role, may they never be so grievously irresponsible as to betray the truth and their own mission by proposing personal ideas contrary to the Gospel of life as faithfully presented and interpreted by the Magisterium”.

In reality, as John Paul II explains, to disobey these civil laws is not disobedience because these texts are illegitimate and have no binding force. They are unjust laws.¹⁴ On February 22, 1987, the Instruction *Donum Vitae*, signed by Cardinal Ratzinger, called for recognition of the conscience clause with regard to the “morally unacceptable civil laws”.¹⁵ In the meantime, on August 6, 1993, *Veritatis Splendor* offered an unambiguous teaching (aiming at Canons 803 and 808) in paragraph No. 116:

“A particular responsibility is incumbent upon Bishops with regard to *Catholic institutions*. Whether these are agencies for the pastoral care of the family or for social work, or institutions dedicated to teaching or health care, Bishops can

¹⁴ St. Thomas Aquinas, *Summa*, Part. II, sect. I, quaest. 96.

¹⁵ *Donum Vitae*, LEV 1990.

canonically erect and recognize these structures and delegate certain responsibilities to them. Nevertheless, Bishops are never relieved of their own personal obligations. It falls to them, in communion with the Holy See, both to grant the title ‘Catholic’ to Church-related schools, universities, health-care facilities and counseling services, and, in cases of a serious failure to live up to that title, to take it away”.

Of course, it is not within the power of the Church or a secular “moral authority” to put an end *in practice* to the behaviors in question. On the other hand, the Church has the faculty to make known the incoherency of the behavior of the concerned clinics. In the present state of (French) law, the establishment would only regain its freedom by renouncing to take part in the public hospital service, which would not be free from restraints.

As to the hospital directors, they are not held by law. And yet, when the first version of this law was being prepared, their fate seemed to be reserved. The conscience clause seemed to be provided expressly in their favor,¹⁶ but it was abandoned for an “editorial reason” that was not explained further, but on which Minister Jean Foyer might be able to shed some light. In the end, the health care professionals only keep their right to withdraw on a personal basis (art. L. 2212-8 C. public health), and cannot oppose the creation of an autonomous VIP service, as the State Council judged, which obviously does not cover an institutional clause.

It will not be without interest to see how certain conflicts are settled: in a private clinic, an anesthetist invokes his conscience clause, which in fact impedes a gynecologist-obstetrician colleague from practicing abortions. The second doctor is compensated by the clinic, which did not put at his disposal the means needed to perform actions.¹⁷ Here we have a technique for getting around the clause which attests, on the one hand, to a lack of reflection on natural law in this case, and on the other, the decidedly individual character of the right to reserve. It is true that the gynecologist-obstetrician would not have been able to sue the clinic if it had used its own clause.

Lastly, we cannot fail to recognize the situation of one important health care institution: namely, the Order of Doctors. When this body prepares the deontology Code, it has to conform to the legislative provisions in force, since the Code is only a decree (now contained in the regulatory part of the Code of public health). This does not prohibit it from publishing its own opinions. It is well known that when the law of January 17, 1975 was being drawn up, the National Council of the Order of Doctors in France took a position against the legislative bill. This was held against it when two legislative proposals were deposited in the fall of 1978 aimed at its abolition, and when the phenomena of refusing to pay dues grew. The sanction had to be heavy for those who did not want to share the “single thought”: it had to disappear.

¹⁶ Cf. Mézard, JO Senate, December 14, 1974, p. 2859; Mrs. Veil, JO. Senate December 15, 1974, p. 2949.

¹⁷ C. Appel Poitiers, November 23, 2004, Rev. Gen. Dr. Med. 20/2006, p. 358.

Would institutions in the biomedical area and ethical committees have been more reserved? Without retracing their history here, let us remember that they are established on the two principles of pluri-disciplinarity and (ethical) pluralism and must allow respect for the freedom of choice of each group or individual according to his private conscience, with practical life only being the result of a consensus. This, which necessarily leads to a procedural ethic, is not without links to the North American philosophy whereby a group of “people in good taste”, observing strict formal rules, come to define a truth.¹⁸ But it also implies that the members of the group accept beforehand to back down on the terrain of their principles and to nuance them in order to let the adverse opinion be expressed. Pluralism requires the theologian-ethicist to renounce his “heritage” in part,¹⁹ and it is admitted that the resolution of ethical problems presumes that individuals will radically revise their own convictions to the benefit of a personal or collective conversion, with the compromise saving only social coherence.²⁰ This requirement, whose realization is facilitated by the committee’s lack of vote and the (relative) lack of published dissident opinions, is the opposite of the conscience clause, and a totalitarian process. The paradox (Is it a paradox or a logic?) is that the ethical committee needs a conscience clause!

Today the issue is mainly about abortion and research on living embryos. We do not know if it is prudent to focus the reflection on these two behaviors. Euthanasia is also on the agenda, as well as the sterilization of the institutionalized mentally ill (art. L. 2123-1 sq C. French public health). Admittedly, the texts recognize the individual conscience clause of doctors.²¹ The (modified) Dutch law on the interruption of life on demand, the Argentinean law 26.130 on surgical contraception...keep individual objection. But all the manipulations of the human being are to be dreaded again, and since they are dressed in therapeutic pretexts, they call for and will call for the cooperation of the health care institutions. An expanded, non-hypocritical conscience clause must be demanded in their favor. You can be sure the State will not force a hospital *manu militari* to let its personnel perform revolting acts such as those condemned at Nuremberg in 1947. It will not run the risk of a breakdown in the health care system, but it will use effective, indirect forms of coercion of an administrative or financial nature that impede disobeying at the risk of closing the services. The state of war of the powerful against the weak denounced by Cardinal Ratzinger,²² who was already thinking of “a possible document on the defense of human life”, is not for tomorrow and beyond! We are already at war.

¹⁸ See J. Cerdras, *La justice pénale aux Etats-Unis*, 2nd ed., Economica, 2005.

¹⁹ G. Durand, *Introduction générale à la bioéthique, histoire, concepts et outils*, FIDES/Cerf 1999, p. 44.

²⁰ D. Roy, I. Williams, B. Dickens, J.-L. Baudoin, *La bioéthique, ses fondements et ses controverses*, ERPI Ed. 1995, p. 36.

²¹ Art. L. 2123-1 cited earlier; art. 14, Belgian law of May 28, 2002, holding “no other person” other than the doctor; Cf. G. Schamps, *La réglementation belge relative à la fin de vie: l’euthanasie, les soins palliatifs*, Rev. Gén. Dr. Méd. 20/2006, p. 291.

²² *Osservatore Romano*, French edition, April 9, 1991, p. 6.

II. THE STATE

The contemporary mindset reproaches States for not being able or not knowing how to protest against abominable measures described in tragic times. These States are summoned to repent and...to make compensation.²³ Who cannot guess the logic, or at least one of the logics of these political demands? It holds in the retrospective affirmation of a conscience clause of the States, which they would have been unaware of, in the affirmation that a State cannot order everything, and, as decided at Nuremberg, that a citizen has the duty to disobey iniquitous laws (an aspect of the decisions that is not highlighted very much). The State cannot cut itself off from the demands of natural law.

It can be forced into doing this through its belonging to a group in whose hands it delegates the choice of its values. Within the State itself, some very classical political difficulties can be found.

A) The State in a group

The phenomenon of bioethical statements by the World Medical Assembly, the CIOMS, UNESCO, establishes that belonging to groups (the AMM is juridically a world “group” of doctors) supports an ethical claim and enables it to write up its principles that could pass into international practice. But when the State is part of a collectivity by federation or confederation, isn't it held to bend to the collective wishes?

1) The integrated State

The hypothesis is that of the State Member—regardless of the juridical status—of a group of States from which a collective body through the delegation of sovereignties, gets the power to enact ethical norms in particular, directives or rulings with supranational jurisdiction. If we assume that the values of respect for life are predominant in the State—which is not necessarily compatible at all with bioethical laws or an organized development of this discipline—and if we presume that the enacting body contradicts these values or even tries to impose them on those who are contrary to them, can the State invoke a conscience clause that will enable it to not apply the norms imposed? Of course, one may think that it is easy for the State to denounce the treaty and leave the group that has gone beyond its powers and acts like a totalitarian body. But this response overlooks the multiplicity and indivisibility of the respective interests of the group and the State beyond the particular difficulty that has come up. The solution could be laden with negative

²³ E.g. Trib. Adm Toulouse, June 6, 2006, Dalloz 2006, IR p. 1773: SNCF and transports of deported Jews. V.P. Bruckner, *La tyrannie de la penitence; essai sur le masochisme occidental*, Grasset ed. 2006, with some reservations.

consequences for the State targeted, which risks becoming even more so following its isolation.²⁴

The hypothesis raised is not scholastic. Lastly, the European Court of Human Rights, the interpreter of the humanistic values of the Europe “of Strasbourg”, was able to open the ways for the French Court of Cassation to return to its very controversial “Perruche” decision of November 17, 2000 by indirectly imposing the counter values of that decision, helpful to the Court of Cassation that persisted in its first opinion. The technique was to find in the law of March 4, 2002, which limited the perverse effects of the November 17, 2000 sentence, a contradiction to the right to a debt considered as an (immaterial) asset of the victims, the parents of children born handicapped. France had caused property damage, according to article 1 of Protocol No. 1 of the European Convention,²⁵ which avoids bringing a moral judgment while actually tearing down a part of the wall panel raised against this decision of “wrongful life”. And the Court of Cassation, as well as the Council of State, could transpose this interpretation into internal law—apparently as damage to property—to revive the action of wrongful life,²⁶ even if only on a transitory basis. The commentators mentioned earlier write at the end: “...an observation that stresses once again, if it was necessary, the considerable influence that article 1 of Protocol No. 1 of the Convention can exercise on our internal law of responsibility”. And we dare to add, on the dangers of undermining human dignity that threaten it.²⁷ The reasoning delights the specialist in property law. To the specialist in medical law it reveals the subtlety of reversals of principles. And that is not all.

First, an EEC Resolution of March 12, 1990, regarding the voluntary interruption of pregnancy, aimed at requiring Ireland to legalize abortion; later the sentence of October 4, 1991 of the CJCE put the discussion in the area of the free performance of services: “The interruption of pregnancy, as legally practiced in many State Members, is a medical activity normally provided for payment”, and it refused to moderate this description through a moral judgment. While the State that is judged is recognized as being entitled to forbid the dissemination of information about the VIPs practiced in other States, on the contrary it would not be so entitled if the publicity had come from service providers themselves. Mr. Dubouis interprets the sentence in this way: “an implicit stand in favor of the freedom recognized to the State to forbid or regulate the practice of VIP on its territory”, but it also obliges it to accept certain publicity contrary to its national principles. While not going as far as the Resolution, the ruling is sensitive to the strict freedom with which a State can keep control within a community or an alliance, even when some fundamental lines of its ethics are in discussion. Building an international ethic is both a delicate and a desirable task, but

²⁴ This paragraph is inspired by our report: “La clause de conscience de l’Etat en bioéthique” in *La bioéthique au pluriel. L’Homme met le risque biomédical*, J. Libbey/Assoc. Descartes ed. 1996, Budapest Symposium, p. 45 and ss.

²⁵ CEDH, October 6, 2005, JCP 2006, 10061, Note A. Zollinger.

²⁶ Cass. Civ. I, January 24, 2006, 10062, Note A. Gouttenoire and S. Porchy-Simon.

²⁷ See Card. B. Panafieu, “Les racines éthiques de l’Europe: l’héritage chrétien” in *Les racines éthiques de l’Europe*, Libr. Univ. Aix-en-Provence ed. 2006, p. 83.

the concurrence of markets and values is difficult. “The EEC treaty has the objective to create a common market, not a common morality. Ethics concerns it as an economic activity” (L. Dubouis). Of course, the European Community Law includes that of the European Convention of Human Rights, but it is very easy to imagine the influences that pull a State on all sides out of its ethical strongholds and risk deforming the medical act into an economic act.

As to this law of the convention, it permits the sentence mentioned earlier of October 29, 1992 to censure Ireland (which spoke out through a referendum on VIP), surely with more nuances, and reflection on the right to life of the conceived child by invoking the principle of proportionality (art. Convention).

As to the European Court of Human Rights, its sentence B/France of March 25, 1992 censured France for putting the interested party—a transsexual—in an overall situation incompatible with the respect due to private life. Subsequently, and subject to better authorized commentaries, it seemed to require the State to remedy this violation of private life when our law does not make these questions a problem of private life, but of human bodily integrity and personal status. Mrs. Leonoir, like other authors, noted this divergence between the privacy sustaining the doctrine of the court and the elements of our civil law tradition. There again, and even if the sentence grants the States a margin of autonomy, a supranational order undermines this base of public order and must raise to the States—and their judges—the problem of choice when norms are confronted in this way that more or less protect the integrity of the human being. We can see that on this level there is a choice in the conscience clause between two rules in favor of the one that protects the subject the most, and an international Convention no longer fulfills its role when it is oriented towards less protection: “As to the fundamental solutions, unification is neither possible nor desirable if it must lead to an alignment on the smallest common denominator”.

In the Charters and Treaties, must the State’s right to its bioethical public order be affirmed? Withdrawal from the community or the alliance must not constitute the only way to safeguard the States’ values. A kind of express or implicit protection clause needs to be thought up while remaining within the group. So documents in the spirit of the “Luxembourg Compromise”, for example, would be useful.

Different techniques can be imagined. We know that the “reservations” that go along with signing a convention constitute one of these. When France ratified the International Convention on the Rights of the Child, she felt she had to make the reservation to not put her legislation on abortion up for question (which protects the child less by hypothesis)...And the opposite?

To date, no one has recommended the institutionalization of ethical committees in black Africa, which was proposed before the XVI World Congress of Medical Law (Toulouse, August 7-11, 2006). This is not to suggest invoking a conscience clause; it is to encourage a

new triangular trade, a new colonization,²⁸ a response given to the objection that the State which is the subject of research will profit overall from its consequences, which may not be impossible, but it subjects the State to the economic forces of the West and requires it to qualify its citizens as subjects of research without protecting them from it (on this point, the opinion formulated is personal and does not commit the Academy).

It is true that a conscience clause of a State cannot have meaning unless it is oriented towards greater respect for the dignity and life of its subjects. It cannot be used as a curtain to hide the inhuman activities committed on its territory with the tolerance or even the authority of the State. The paradigm is that of the dealings that had their epilogue in Nuremberg and had been foretold not only in *Mein Kampf*, but also in the publications, for example, of Binding and Hoche,²⁹ the 1932 proposal of the Prussian Regional Health Council, the law of July 14, 1933, the decision of September 1, 1939...Would the free nations have felt the need for an intervention only in the name of protecting ethical values that were radically jeopardized by these measures and the exterminations that followed, if they had had a fully enlightened conscience before 1945, which in itself continues to be a subject of controversy?

We have never really seen a war declared for the defense of values! And yet, the subject of the somewhat totalitarian State (we mean that substantially the State was formally democratic) to compromise the dignity, integrity and life of its citizens through forms of discrimination according to their stage of development, quality of life, and social belonging, is entitled to expect some assistance from the international community. There will be sensitivity to this in times when some denounce “a new eugenics...that is at the same time mild, soft and insidious” (J. Testard), and when satanic doctrines are not necessarily making a comeback through the ways in which one pretends to see them. Müller-Hill writes, “Perhaps the reification of human beings in the Western democracies has already gone rather far...”. In any case, “the recognition of human rights as a principle of international law involves a restriction of the States’ right to self-determination” (T. Mertens).

The simplest and most peaceful technique is jurisdictional recourse, which we suppose will be international presuming the insufficiency of internal conflicts. But this supposes that the State of origin has agreed to include a system of this kind, and it is only effective if the State bends before the sentence, which can only come about under the pressure of a very strong international public opinion.

Now the difficulty looks like it will be in terms of an infringement on State sovereignty. A State can limit this voluntarily through accession to conventions regarding bioethics or the protection of human rights or against torture. It can also commit itself to what Prof. Torrelli calls “the normative offensive in the name of humanity”, by accepting the principles of

²⁸ See in general, B. Lugan, *God Bless America*, Carnot ed. 2003.

²⁹ As we know, these were translated by M. Schooyans and K. Shank, Le Sarmant ed. 2002.

humanitarian law *jus in bello*. Lastly, it can authorize humanitarian interventions by NGOs or private organizations on its territory, but it is not very likely that the kind of State we are concerned with will agree to do this willingly, and the problem does not lie in these forms of self-limitation, but in interference in the affairs of a State against its will. In short, do bioethics invite humanitarian interference? (Aid to the victims of natural catastrophes or emergency situations of the same kind, the object of Resolutions from 1988 to 1990, does not come within this discussion.)

Together with the problem in principle of allowing interference without political stakes and the imposition at bayonet point of our conceptions of freedoms in other countries, the problem of useful measures is raised. How can a guilty State be brought to abrogate, for example, a eugenic or an eliminatory law? How, and through what court of law can the offenses to the person be sanctioned? The procedure of public disapproval by the scientific or juridical Community is not insignificant. For example, on February 8, 1995, the International Conference of Orders reprovved cruel and degrading corporal punishment. But what is the repercussion of this? Isn't there a risk of "blocking" the receiver of the critical message on his positions, who, in turn, believes or pretends to believe that his "values" are attacked? We in turn quote Pascal: "Justice without power...".

In the present state of the international conscience, we look poorly on armed intervention invoking fundamental bioethical principles. The participation of international forces to protect threatened peoples has shown its limits, and, I might add, a rule of proportioned reason exists here too: namely, to begin a conflict, even based on "good" reasons, causes new evils and difficulties whose progression we are unable to gauge. The remedy that multiplies the perverse effects is always by right inadvisable. And here these effects are only too obvious! This particular research stops at the very limit of the efficacy of public international law itself, and the practicable ways are principally awakening the conscience by teaching medical law and ethics, and encouraging participation in drawing up and implementing international bioethical Conventions, but, and we return to our departure point, with the imperative condition that these will rise to the highest common denominator. Otherwise, they will be of no use at all.

Isn't a State dependent above all on its leaders?

B – Statesmen

Monsignor Schooyans has reminded politicians about the rules of action in conformity with *Evangelium Vitae*, in particular, the moral rule in general,³⁰ and he has even raised the hypothesis of their cooperation in the crimes of euthanasia and abortion.

It is well known that eminent statesmen have invoked their conscience clause to not be associated with the promulgation of texts that clash with their convictions. The most famous example was that of King Baudouin I in 1990 when he refused to sign the law regarding the interruption of pregnancy at the risk of creating a new constitutional crisis.³¹ The head of State invoked the right that belongs to every citizen. In France, in 1996, the President of the Republic opposed the promulgation of ordinances of social law in the name of his conscience. The stakes were not that of the Belgian law. The alleged ethics were political. In any event, we see a head of State put forward his innermost convictions in order to refuse to recognize a text of “law”. The conscience clause could come into play again logically and, in any event, serve as an example for other politicians.³²

This is not only of interest to Catholic politicians. It is for all those who are disturbed by the multiplication of “supra-Nazi” texts.³³ Some members of parliament who write without reference to a theology suggest the conscience clause, even if it has to be erased later from the legislative bill.³⁴ And this interest is not doctrinal. On the occasion of the preparation and then the signing of the French law of July 17, 1975 (VIP), we heard and read about officially Catholic, high ranking politicians (Minister of Justice, Prime Minister, President of the Republic) who presented and made a text official to which they had proclaimed their consciences rebelled. Their signatures are engraved in letters of fire and recall the judgment of Pius XI (in *Casti Connubi*, December 31, 1930):

“Those who hold the reins of government should not forget that it is the duty of public authority by appropriate laws and sanctions to defend the lives of the innocent, and this all the more so since those whose lives are endangered and assailed cannot defend themselves. Among whom we must mention in the first place infants hidden in the mother's womb. And if the public magistrates not only do not defend them, but by their laws and ordinances betray them to death at the hands of

³⁰ M. Schooyans, *L'objection de conscience en matière de santé: Le cas des hommes politiques*, Rev. Rech. Jur. 2005-1, p. 505 et ss.; *Le terrorisme à visage humain*, Coll. A.-M. Libert, Preface Card. L. Trujillo, F.-X. de Guibert ed., 2006, especially p. 116 and ss.

³¹ See the text of the royal letter in X. Dijon, *Droit naturel précité*, p. 153; X. Dijon, *Baudouin Ier et l'enfant à venir* in *Liber Amicorum Marie-Thérèse Meulders-Klein*, Bruyland ed. 1999, p. 181.

³² E. Sgreccia, *Manuel de bioéthique. Les fondements et l'éthique biomédicale*, Mame-Edifa 2005, Preface Card. Barbarin, transl. R. Hivon, p. 499 and ref.; See also M. Casini, *Il diritto alla vita del concetto nella giurisprudenza europea*, CEDAM ed. 2001, Pres. F. Mantovani and ref.

³³ The term “supra-nazism” belongs to Msgr. M. Schooyans; See *Maîtrise de la vie, domination des homes*, Le Sycomore ed. 1986, and *La derive totalitaire du libéralisme*, Ed. Univ. 1991; especially *Bioéthique et population: le choix de la vie*, Fayard ed. 1994, p. 116 and ss.

³⁴ See A. Claeys and C. Huriet, The application of law No. 94-654 of July 29, 1994...Report Ass. Nat. No. 1407, Senate No. 232, February 18, 1999, p. 139: “It would be necessary moreover to allow the conscience clause to come into play for the doctors who would refuse to carry out research that goes beyond the direct interest of the unborn child”.

doctors or of others, let them remember that God is the Judge and Avenger of innocent blood which cried from earth to Heaven”.

Would electoral counts prevail—and God knows in what inconsequential short term!—over the affirmation of some values (which is surely almost heroic in the information from opinion polls and councilors’ suggestions)? And yet it is the conspicuous affirmation of these values that gets these people their votes and their election, to be followed by an opposite policy in the facts. This deceit regarding the quality of the elected goods can proceed with dignity based on the distinction between the ethics of conviction and the ethics of responsibility, or, to borrow from Max Weber, without dwelling on the consideration of the goodness of the ends, which makes it possible, in this analysis, to go beyond the reflection on the means. It is not a question in Western bioethical politics of orienting the reflection on this possible goodness or malfeasance. Some important authors give their opinions in favor of the ethic of responsibility and reproach the ethic of conviction for not taking into consideration “potential consequences of its choices”.³⁵ The formal artifice of the therapeutic description of legalized acts involves this goodness of the end and dispenses with examining it. This allows the grandiloquent affirmation of one’s convictions in order to seduce the electors fraudulently, and then virtuous, democratic reservations that put them back on the tattered poster before presenting the unjust texts with their hands on their hearts. It will not be necessary, even if references exist, to specify any further the existing facts of French law.³⁶ This behavior constitutes the antithesis of invoking the clause and exemplifies submission to the “single thought”, or perhaps to a group discipline in itself very legitimate. The clause in question requires getting out of this discipline at the risk of political marginalization. And what marginalization is it? Only the marginalization decreed by a party or a government because the mass of electors “will recognize their own” and give back their confidence to the coherent *homo politicus*.

Evangelium Vitae confirmed as a declared need the principles of political action. Paragraphs 72, 73 and 74 are known which invoke conscientious objection (Cf. above). They only give a suggestion regarding action to build dykes against evil to the extent specified in paragraph 73, which is authentically interpreted by the “Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life” of November 24, 2002, of which paragraph 4 addressed to citizens cannot be omitted:

“As John Paul II has taught in his Encyclical Letter *Evangelium Vitae* regarding the situation in which it is not possible to overturn or completely repeal a law allowing abortion which is already in force or coming up for a vote, «an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at *limiting the harm* done by such a law and at

³⁵ Sic. N.-J. Mazen, *La démarche d’éthique appliquée, contribution à l’analyse du processus de décision*, Et. Hosp. –EPHE ed. to appear in 2007, p. 51).

³⁶ Some are in our report, “Il y a des lois bioéthiques!” in Rev. Gén. Dr. Méd. No. special *Dix ans de lois de bioéthique en France*, 2006, p. 49 and ss.

lessening its negative consequences at the level of general opinion and public morality.

“In this context, it must be noted also that a well-formed Christian conscience does not permit one to vote for a political program or an individual law which contradicts the fundamental contents of faith and morals”.

We do not know if this injunction has been brought to the knowledge of “the rank and file” in terms to which it is sensitive.

For a politician, this means refusing to cooperate in drawing up or putting into practice iniquitous laws without giving in to making laws of compromise.³⁷ Otherwise, he exposes himself, or should be exposed to canonical sanctions, as excellently deduced by Msgr. Schooyans.³⁸ To the example given by M. Schooyans (Msgr. Weigand, January 22, 2003), we add that of Msgr. Levada,³⁹ if I am not mistaken. Now, we observe in many, and without exception, the opposite phenomenon in the name of political or parliamentary neutrality which, moreover, is a contradiction of democratic principles. Besides, surprising turnarounds come about. We are thinking of the case of a Deputy, a well known opponent of abortion, who after becoming the Secretary of State, supported vehemently correctional proceedings with regard to members of the “anti-VIP commandos” (we express very respectful reservations about their action) and stated: “I have never had the least intention to put the so-called Veil law of 1975 up for question, and I will not”.⁴⁰ The implementation of the clause by the *homo politicus* is easy and will only be judged by the electors presumed to be aware of this need for coherence. It is only a matter of not giving in to short-term temptations, without fearing anything for a lasting situation. Xavier Dijon writes, “Who will agree to be ‘the other’ of the majority, thereby permitting the democracy to go forward without its primary purpose?”⁴¹ Some others are content to say that the laws of the republic are applicable...

Is it begging the question of democracy, an *a priori* principle, support for the free expression of thought, only if it is against the dominant thought? If a lay reference is needed, Hayek clearly understood its practical insufficiency and its totalitarian potentialities. Alas, the “Social Contract” is filled with them. This is not a question of political choice but, in the political order, of individual resistance. The Nuremberg decisions concealed this teaching while condemning juridical positivism.⁴² It has been taken to a higher level: “It is thus essential for the States to create, regarding these complex

³⁷ A. Rodríguez Luno, “Lois imparfaites et lois iniques” in *Lexique des termes ambigus et controverses sur la famille, la vie et les questions éthiques*, Conseil Pontifical Famille, Téqui ed. (French edition), Preface Card. L. Trujillo, 2005, p. 711.

³⁸ *Op. et loc. cit.*, Rev. Rech. Jur. 2005-1.

³⁹ In La NEF, No. 164, June 2005, p. 12.

⁴⁰ *Le Monde*, July 19, 1995, p. 8 with the description of abortion as “a woman’s right”.

⁴¹ In “L’objection du roi des Belges à la justification de l’avortement”, unpublished.

⁴² J.-M. Aubert, *Loi de Dieu, lois des hommes*, Désclée ed. 1994, p. 65 and ss.

questions, organic and clear laws, based on solid ethical bases, to protect the inestimable good of human life”.⁴³ The difficulty is not one of principle. It is political, which means that in the present state of dominant Western thought, we have to be content—somewhat—with waiting.⁴⁴ It is true that in expressing the sentiment of many jurists Christian Atias wrote: “French jurists, we have seen the law recoil under the blows of false reforms; and we had doubts. These laws presume to authorize unhappy spouses to ‘remake their lives’. On the one hand, they put on the good side ‘the wanted child’, and, on the other, ‘that which’ a woman, who is ultimately ‘responsible’ for her pregnancy, would have the ‘choice’ to annihilate. We have heard judges put on the scale the life received and the sufferings that accompany it; they have thought of making reparation to the child whose mother would have been ‘deprived’ of the legal possibility to not treat him as a child and deny him his life. These laws teach that spouses have the choice between fidelity and adultery, that they are masters of forming in one and through the other equivalent ‘families’. What do these quotation marks say behind which the meaning of the words must be protected? They denounce the lies of these miracle workers who have not even wanted to absolve us for our sins, but transform our failures into victories”.
“A voice was raised and the desert receded”.⁴⁵

⁴³ John Paul II, Exhortation, February 2, 2003.

⁴⁴ E.g., Msgr. V. di Muro, “La société en conflit entre la culture de la vie et la culture de la mort, *Dolentium Hominum*, 62/2006, p. 44.

⁴⁵ By a French jurist in: *Giovanni Paolo II, la via della giustizia*, Bardi & Lib. Ed. Vaticana ed. 2003, p. 395.