

**INTER-UNIVERSITY CENTRE FOR HUMAN RIGHTS  
AND DEMOCRATISATION**

**COMPATIBILITY OF CONCORDATS WITH  
DEMOCRATIC CONSTITUTIONS**

**CASE STUDY OF SLOVAKIA**

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AND DEMOCRATISATION**

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**Case Study of Slovakia**

**E.MA Thesis**

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Academic year 2011/2012

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## **Abstract**

The thesis is focused on the question of compatibility of concordats with democratic constitutions. Roman Catholic religion represented by the Holy See as the head of Vatican City State is the only religion with international personality that provides means to inter alia conclude international treaties with other states. These treaties usually aim at securing rights of the Church and her members to govern themselves in particular country independently from the government.

However, concordats can regulate also religious freedom for Roman Catholic believers and even some other rights. One such example is a proposed Draft Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection of Conscience. Despite the fact that this treaty guarantees the exercise of conscientious objection to everyone, such claim has to be based on Roman Catholic teaching on faith and morals. In addition, exercise of this right is insufficiently limited. Therefore, if adopted, the Draft Treaty will result in violation of a guarantee of fundamental rights principle of legally consistent state as well as state's obligations undertaken by ratification of international human rights treaties. In addition, regulation of exercise of conscientious objection as proposed by the Draft Treaty has the potential of multiple breach of the Constitution of the Slovak Republic because its adoption can result in participation of Catholic Church in legislative process and introduction of canonical law as source of law.

## Content

1.	Introduction	8
1.1	Structure	8
2.	Freedom of Religion, Conscience and Thought as a Human Right	10
2.1	The United Nations Framework	10
2.2	Framework of Council of Europe	14
2.3	Conclusion	17
2.4	Conclusion	17
3.	The Institution of Concordat and the Holy See	19
3.1	Legal Character of Concordats and International Personality of the Holy See	19
3.2	Characteristics and Types of Concordats	21
3.3	Roman Catholic Church and Human Rights	23
3.4	Conclusion	33
4.	The Draft Treaty between Slovak republic and the Holy See on the Right to Exercise Objection of Conscience	34
4.1	Conclusion	49
5.	The Revised Draft Treaty between Slovak republic and the Holy See on the Right to Exercise Objection of Conscience and the Constitution of Slovak republic 50	
5.1	Legal certainty	51
5.2	Guarantee of fundamental rights and freedoms	54
5.3	Constitutionality and the Rule of Law	63
5.4	Obligation of Slovak Republic Established by Ratification of International Human Rights Protection Treaties	65

5.5 Conclusion	70
6. Conclusion	72
Bibliography	75

## 1. Introduction

Slovak parliamentary elections in March 2012 were ideal situation for the release of a document written by the Convention of Bishops in Slovakia expressing Catholic Church's opinion on general situation in the Slovak Republic and its ideas on what should be done in order to improve this situation. "*Catholic Church and Society 2012 – 2016*" addressed areas such as support for family, support of sustainable development of society, reform of healthcare system, legal regulation of relation with the Holy See, and some other.<sup>1</sup> In the area of legal regulation of relation with the Holy See, the Conference reminded the obligation of Slovakia to conclude treaty with the Holy See on exercise of objection of conscience that is stated in the Basic Treaty between the Slovak Republic and the Holy See. Although this document is not worded in ultimate-like manner and it can be considered list of recommendations, it might lead to re-opening of the question of conscientious objection in Slovakia.

This thesis contributes to potential discussion about regulation of conscientious objection through treaty with the Holy See and implications of such type of regulation. It examines question whether regulation of conscientious objection by concordat is compatible with constitution of democratic state that includes among others also obligation to protect human rights and freedoms. While such treaty undoubtedly contributes to respect for freedom of religion, it might not take into account other human rights that have to be respected by the state as well. In addition, the fact that Roman Catholic religion is the only one represented by state and therefore it is the only religion with a representative who is capable of concluding an international treaty, might be problematic from the point of view of non-discrimination principle.

### 1.1 Structure

The text is divided into several chapters. Firstly, the thesis is focused on religious freedom as one of the human rights. It discusses this particular freedom in several frameworks such as the United Nations, Council of Europe and other regional organisations. Attention is paid not only to the actual wording of the right in human

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<sup>1</sup> Konferencia biskupov Slovenska, 2012, D.

rights instruments but also to interpretations developed by human rights bodies and cases of human rights courts.

Secondly, the concept of concordat is discussed. This part is focused on questions of legal personality of the Holy See, typology of concordats that is based on areas usually regulated by them, and both legal and moral value of these treaties. Moreover, this chapter focuses on relationship between the Catholic Church and human rights as its characteristics have the potential of helping to answer the question of this thesis.

Thirdly, the Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience is analysed. It captures some developments of the draft over time and provides their evaluation. In addition, it highlights provisions that are problematic from the point of view of human rights protection.

Fourthly, the implications of Draft Treaty on the right to exercise objection of conscience are examined in the light of the Constitution of the Slovak Republic as a basic document of state that states among other principles protection of human rights and freedoms.

## 2. Freedom of Religion, Conscience and Thought as a Human Right

Freedom of religion is considered to be one of the basic rights and therefore it is included in every major human rights document. The following section discusses provisions on religious freedom contained in human rights documents and major developments in interpretation of religious freedom provisions resulting from decision of human rights courts and committees that influenced understanding of religious freedom as a human right.

### 2.1 The United Nations Framework

Universal Declaration of Human Rights (UDHR) was adopted on 10 December 1948 as the basic human rights document. Despite the ongoing debate on legal character of the Declaration, it does not create legal obligations as it merely states the existence of certain inalienable rights that everyone has by the virtue of being human being. However, all subsequent human rights documents refer to it and therefore it can be said that it forms the basis for international human rights law. The UDHR mentions freedom of religion in Article 18:

*“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.”<sup>2</sup>*

Scope of this article is considered to cover *“all possible attitudes of the individual toward the world, toward society, and toward that which determines his/her fate and the destiny of the world, be it a divinity, some superior being or just reason and rationalism, or chance.”<sup>3</sup>*

Legally binding International Covenant on Civil and Political Rights (ICCPR) of the United Nations from 1966 elaborates on religious freedom a bit more:

*“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his*

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<sup>2</sup> Universal Declaration of Human Rights, Article 18.

<sup>3</sup> Scheinin, 2000, p. 6.

*choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

*2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*

*3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

*4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*<sup>4</sup>

Article 18 (1) of the ICCPR guarantees freedom of religion, conscience and thought that is “*far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.*”<sup>5</sup> Protection of Article 18 covers “*theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief*” and “*is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices or practices analogous to those of traditional religions.*”<sup>6</sup> Therefore, this freedom as defined in the Covenant protects religious people equally to atheists, agnostics, sceptics and the indifferent.<sup>7</sup> In addition, freedom of religion, conscience and thought includes also “*the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief*” although the Covenant, unlike Universal Declaration, does not express it explicitly.<sup>8</sup>

The right contained in Article 18 of ICCPR is composed of two freedoms: freedom of religion, conscience and thought, and freedom to manifest religion or belief. This distinction is very important in situations when the limitation of this article is in

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<sup>4</sup> International Covenant on Civil and Political Rights, Article 18.

<sup>5</sup> Human Rights Committee, General Comment No. 22, 1.

<sup>6</sup> Ibidem, 2.

<sup>7</sup> Office of the High Commissioner for Human Rights, 2003, p. 526.

<sup>8</sup> Human Rights Committee, General Comment No. 22, 5.

question. Freedom of religion, conscience and thought is absolute right, meaning it can be limited under no circumstances, not even in time of public emergency.<sup>9</sup> However, absolute nature of the freedom does not result in entitlement of individual to refuse whichever obligation imposed on him/her by law that is not compatible with individual's religion or conscience as well as it does not grant immunity from criminal liability in all cases of such a refusal.<sup>10</sup>

Freedom to manifest one's religion "*either individually or in community with others an in public or private*" includes worship, observance, practice and teaching of the religion or belief.<sup>11</sup> This freedom can be limited under strictly defined conditions. Restrictions that are applicable to the manifestation of religion or belief have to be prescribed by law and their aim has to be the protection of public safety, order, health or morals or fundamental rights and freedoms of others.<sup>12</sup> Noteworthy is the fact that national security is not included in these conditions as a legitimate reason for the limitation of the freedom to manifest religion.<sup>13</sup> A justified limitation has to fulfil several conditions. Firstly, it has to comply with the principle of legality. It means that there has to be a legal basis for the limitation, meaning that limitation has to be imposed by legal act. Secondly, it can be applied only in cases of danger to public safety, order, health, morals or fundamental freedoms of other people. Need to be said the list of legitimate reasons for restriction of this right is exhaustive. Thirdly, limitations have to be necessary to achieve the goals mentioned above which means that there is no other way how to achieve these goals. Lastly, the restrictions cannot be discriminatory and they have to be applied in "*an objective and reasonable manner.*"<sup>14</sup> The last condition aims at ensuring that limitations do not place bigger burden on one particular group of people.

In addition, the framework of the United Nations provides document dealing with the elimination of intolerance and discrimination based on religion. The

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<sup>9</sup> Office of the High Commissioner for Human Rights, 1993, 1.

<sup>10</sup> The UN Human Rights Committee, *Westerman v. The Netherlands*, CCPR/C/67/D/682/1996, 9.3.

<sup>11</sup> Office of the High Commissioner for Human Rights, 2003, p. 530.

<sup>12</sup> International Covenant on Civil and Political Rights, Article 18 (3).

<sup>13</sup> Office of the High Commissioner for Human Rights, 2003, p. 533.

<sup>14</sup> *Ibidem*.

importance of this freedom is stressed in the preamble of Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief in words “... considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed...”<sup>15</sup>

The definition of freedom of religion that is stated in Article 1:

*“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

*2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.*

*3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”*<sup>16</sup>

Despite the fact that the Declaration is not binding on states, it is considered to articulate the freedom of religion or belief. This statement is based on the fact that this Declaration “gives specific content to general statement of the rights to freedom of religion or belief and freedom from discrimination based on religion or belief contained in the major human rights instruments.”<sup>17</sup> In addition, it has been claimed that because of normative wording that is apparent in Articles 4 and 7, the Declaration has “a certain legal effect under the criteria deriving from international legal decisions.”<sup>18</sup> Moreover, Article 3 states that discrimination based on the grounds of religion “shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the

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<sup>15</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Preamble.

<sup>16</sup> Ibidem, Article 1.

<sup>17</sup> Sullivan, 1988, p. 488.

<sup>18</sup> Ibidem.

*International Covenants on Human Rights.*”<sup>19</sup> Nevertheless, similar discussions are connected with the Universal Declaration as well and therefore it can be concluded that as a declaration it does not have legal force creating obligations of states that have ratified it.

It is notable that none of these documents contain definition of religion as such. All of the ideas on what religion is, come from documents by courts, commissions or committees that supervise states’ compliance with them. However, absence of precise definition might have positive impact on protection of this freedom. Detailed description or enumeration could lead to claiming of no entitlement to protection of freedom of religion articles by states if the belief in question does not fulfil all set criteria.<sup>20</sup> Therefore, focus on parameters of conduct as described in Article 6 of Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief seems to be a better strategy for deciding which beliefs are entitled to protection under religious freedom articles.<sup>21</sup>

## 2.2 Framework of Council of Europe

Freedom of religion, conscience and thought is addressed also by regional human rights documents. The European Convention for the Protection of Human Rights and Fundamental Freedoms adopted by Council of Europe in 1950 deals with religious freedom in Article 9:

*“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

*2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the*

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<sup>19</sup> Dickson, 1995, p. 345.

<sup>20</sup> Sullivan, 1988, p. 492.

<sup>21</sup> Ibidem.

*interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*”<sup>22</sup>

In comparison with ICCPR, the European Convention on Human Rights provides a slightly more concrete condition of necessity – the restrictions have to be “*necessary in a democratic society.*”<sup>23</sup> Therefore, the European Court of Human Rights tests the restrictions on this freedom from the point of view of the needs of the society that is based on a democratic constitutional order.<sup>24</sup>

As indicated above, when speaking about the European Convention on Human Rights, it is inevitable to include case law of the Court and previously the European Commission on Human Rights whose judgments contribute to interpretation of the Convention, and clarify meaning of its provisions.

Parameters for deciding whether particular belief falls within the protection of Article 9 set by the European Court are “*level of contingency, seriousness, cohesion and importance.*”<sup>25</sup> Therefore, this article covers not only long established religions such as Judaism, Buddhism or Christianity but also new religions such as Jehovah’s Witnesses and philosophical beliefs as pacifism.<sup>26</sup> However, no matter how cohesive the belief is, if it is not compatible with rule of law, democracy or human rights, protection of Article 9 does not apply to it.<sup>27</sup>

In addition, in conformity with the interpretation of Article 18 of ICCPR, the Court assessed in *Kokkinakis v. Greece* that although religious freedom primarily concerns an individual, the freedom implies also the right to manifest religion or belief as well as “*bearing witness in words and deeds is bound up with the existence of religious conviction.*”<sup>28</sup> Nevertheless, the Court also stressed the distinction between acts that communicate a belief and those that are motivated by the belief but does not

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<sup>22</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9.

<sup>23</sup> *Ibidem*, Article 9 (2).

<sup>24</sup> Office of the High Commissioner for Human Rights, 2003, p. 534.

<sup>25</sup> Jacobs, White & Ovey, 2010, p. 403.

<sup>26</sup> Harris, O’Boyle & Warbrick, 2009, p. 426.

<sup>27</sup> Jacobs, White & Ovey, 2010, p. 407.

<sup>28</sup> The European Court of Human Rights, *Kokkinakis v. Greece*, 14307/88, 31.

constitute important part of its expression.<sup>29</sup> Therefore, not each action that is claimed to be a manifestation of religion or belief, is necessarily accepted as having this quality.

In the same case the Court stated that “*the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it [freedom of thought, conscience and religion].*”<sup>30</sup> This statement reflects the opinion of the European Court that it is religious freedom rather than religion as such that constitutes a foundation of democratic society.<sup>31</sup>

There were also cases when the interpretation by either of the two European institutions evolved over time. Article 9 provides one such case in question whether it can be applied to institutions in the same way as to individuals. At first, the Commission ruled that this article does not cover any legal person.<sup>32</sup> However, later on, the Commission stated that religious or philosophical organisations such as churches could be entitled to right to manifest religion under Article 9 that led to change in the interpretation. However, the Commission did not address the question of associations in general. Nevertheless, it seems that, in general, associations do not have rights covered by Article 9. The argument for granting the exercise of rights mentioned in Article 9 to religious associations is that “*the autonomous existence of religious communities is indispensable for pluralism in democratic society and is thus an issue at the very heart of the protection which Article 9 affords.*”<sup>33</sup>

The European Court also observed that states are not entitled to assess legitimacy of religious beliefs or ways in which they are expressed as such conduct would be contrary to principle of state’s neutrality and impartiality.<sup>34</sup> Therefore, punishment for manifestation of belief that has not been recognised by the state amounts to violation of Article 9.

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<sup>29</sup> Jacobs, White & Ovey, 2010, p.406.

<sup>30</sup> The European Court of Human Rights, Kokkinakis v. Greece, 14307/88, 31.

<sup>31</sup> Evans & Thomas, 2006, p. 700.

<sup>32</sup> Jacobs, White & Ovey, 2010, p.408.

<sup>33</sup> Ibidem, p. 409.

<sup>34</sup> Ibidem, p. 419.

### 2.3 Other regional frameworks

The focus of this thesis is the case of Slovakia and therefore relevant human right documents are those adopted by the United Nations and Council of Europe. However, to illustrate the importance of religious freedom, it has to be said that freedom of religion is included in other regional human rights instruments as well.

American Declaration of Rights and Duties of Man grants both religious freedom and freedom to worship in Article III.<sup>35</sup> Similarly to the Universal Declaration and International Covenant on Civil and Political Rights provision on religious freedom included in American Declaration is expanded in Article 12 of the American Convention on Human Rights.<sup>36</sup>

Religious freedom is not left out in the African Charter on Human and Peoples' Rights where it is acknowledged in Article 8<sup>37</sup> and it is included also in Arab Charter on Human Rights in Article 30.<sup>38</sup>

In context of Europe there is one more human rights document. It is the Charter of Fundamental Rights of the European Union that addresses religious freedom in Article 10.<sup>39</sup> This article resembles Article 9 of the European Convention of Human Rights but the Charter explicitly recognises the existence of conscientious objection while in the context of the European Convention this right can be merely derived from Article 9. However, provisions of this charter can be invoked only in connection with the EU legislation. The European Union does not have a human rights document in its legal system that would bind the member states in general.

### 2.4 Conclusion

It has been argued that freedom of religion, conscience and thought is “*the foundation of all other freedoms and is fundamentally interrelated to all other civic liberties.*”<sup>40</sup> Its importance is proven by the fact that virtually all documents that state

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<sup>35</sup> American Declaration of Rights and Duties of Man, Article III.

<sup>36</sup> American Convention on Human Rights, Article 12.

<sup>37</sup> Charter on Human and Peoples' Rights, Article 8.

<sup>38</sup> Arab Charter on Human Rights, Article 30.

<sup>39</sup> Charter of Fundamental Rights of the European Union, Article 10.

<sup>40</sup> Wood, jr., 2004, p. 763.

existence of human rights include this freedom in the catalogue of rights they proclaim. Recognition of this right has even become a normative constitutional principle followed by all modern nation-states.<sup>41</sup> Therefore it should not come as a surprise that authoritarian regimes in efforts to show they are democratic often recognise this particular human right.<sup>42</sup> One way how to recognise religious freedom is to conclude a concordat with the Holy See.

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<sup>41</sup> Wood, jr., 2004, p. 762.

<sup>42</sup> *Ibidem*.

### 3. The Institution of Concordat and the Holy See

A concordat is defined in Max Planck Encyclopedia of Public International Law as “a bilateral treaty between the Holy See and a State to regulate subjects relating to the organization and activities of the Roman Catholic Church (the Church) inside that State.”<sup>43</sup> As Ferrari wrote, the basis for emergence of concordat lies in the belief that people are ruled by two authorities of which one is governing spiritual matters (the Church) and the other in charge of material matters (the State) and that the two authorities have to cooperate in order for society to flourish. Concordats evolved from agreements between these two authorities on regulation of matters of common interest. In the beginning, the regulation took a form of unilateral legal act that was issued by one authority for the benefit of the other or two individual acts issued by both authorities. However, with the formation of nation-states a bilateral convention began to be the standard way to ensure stable organisation of Church’s activities within the state borders.<sup>44</sup>

Ferrari observes that concordats are not the only way to regulate activities of the Church. Liberal states preferred to see Church as a private association and therefore they were prone to regulate religious matters by domestic laws. After World War I concordats became popular because of desire of authoritarian and totalitarian regimes to get international recognition and to legitimize their existence through international treaty with the Holy See. It has to be noted that these concordats have not been revoked after transitions of these regimes into democracy. They were integrated into new legal systems, reformed or replaced by new concordat. In recent past concordats have been concluded with countries from former Eastern bloc and with states or organisations with Roman Catholic minority.<sup>45</sup>

#### 3.1 Legal Character of Concordats and International Personality of the Holy See

According to Ferrari there have been different opinions on legal character of a concordat. It used to be considered as unilateral act of the Pope that represented a

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<sup>43</sup> Ferrari, 2006.

<sup>44</sup> Ibidem.

<sup>45</sup> Ibidem.

privilege given by the Holy See to a State. On the other hand, some jurists maintained that the Church is without international legal status and therefore concordats were seen as unilateral acts by the sovereign that granted rights to religious authorities. Another group of jurists claimed that concordats do not have legal status and therefore they are not capable of creating legal obligations apart from moral ones. Nowadays concordats are considered to be bilateral act of the same value as international treaties as subjectivity of the Holy See under international law is widely accepted.<sup>46</sup> However, state and the Holy See are still considered sovereign, each in its own sphere – political and spiritual.<sup>47</sup> Nevertheless, after the Lateran Treaty the Holy See is not only the leader of the Church but also the last absolute monarch in the world ruling over Vatican City State.<sup>48</sup>

Legal personality of the Holy See is based on “*long-standing involvement in world affairs over the last thousand years*” that is considered to be the essential aspect of its unique status in international law.<sup>49</sup> Bathon claims that the gradual development of the Holy See’s status began in 395 AD with recognition of the Church as corporate body in Roman Empire. Since the recognition the Church has been gaining wealth, power and lands. However, when Papal States were annexed by Napoleon in 1809, the international status of Pope became uncertain as he lost his temporal sovereignty. Nevertheless, papal diplomats were given the same status as ambassadors from other states in Protocol of Vienna in 1815.<sup>50</sup> This act showed that in case of the Holy See, territory is not essential for sovereignty over spiritual matters.<sup>51</sup> Alternatively it can be said that states through exercise of their own sovereignty conferred a type of international personality on the Holy See as a non-state entity.<sup>52</sup> In any case, the prevailing opinion is that international personality of the Holy See was acknowledged on the basis of spiritual authority rather than temporal sovereignty.<sup>53</sup> Such basis for international status allowed the Holy See to continue to be internationally active also

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<sup>46</sup> Ferrari, 2006.

<sup>47</sup> Minnerath, 1997, p. 468.

<sup>48</sup> Bathon, 2001, p. 600.

<sup>49</sup> Ibidem, p. 597.

<sup>50</sup> Ibidem, p. 602.

<sup>51</sup> Araujo, 2000-2001, p. 296.

<sup>52</sup> Ibidem, p. 322.

<sup>53</sup> Bathon, 2001, p. 602.

after the Papal States were annexed by Italy in 1870.<sup>54</sup> Although the Holy See became temporal sovereign again in 1929 by the conclusion of Lateran Treaty with Mussolini's Italy, the State of Vatican City is an exception to requirements for statehood.<sup>55</sup> Nevertheless, this treaty defines current status of the Holy See in international order and it considers its international personality to be "*an attribute inherent to its nature.*"<sup>56</sup>

### 3.2 Characteristics and Types of Concordats

It has been shown that international personality of the Holy See has not been dependent on temporal sovereignty but rather on spiritual authority. As Ferrari states this characteristic of the Holy See is reflected in several peculiarities connected with concordats.

Firstly, matters regulated by concordats are very different from issues usually addressed by international treaties.<sup>57</sup> They mostly acknowledge authority of the Church in territory of sovereign state and grant independent exercise of religious freedom in territory of that state. Questions that are dealt with in concordats are e. g. equal status of religious marriage or religious education. Major feature of concordat is that it does not have reciprocal character; most of the provisions benefit exclusively the Church.

Secondly, concordats are based on recognition of double identity – citizens and believers – of recipients of provisions in the treaty.<sup>58</sup> However, what needs to be kept in mind is the fact that not all citizens of the state concluding concordat with the Holy See do necessarily have the identity of believers. Alternatively, their identity of believers does not inevitably have to be the one of Roman Catholic believer.

Thirdly, as noted above one of the parties to the treaty has the non-state character with legal subjectivity based on its spiritual authority. Nevertheless, given the history of concordats one might wonder whether the Holy See as spiritual authority can interact with regimes that do not apply the same morals that are associated with

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<sup>54</sup> Bathon, 2001, p. 602.

<sup>55</sup> Ibidem, p. 599.

<sup>56</sup> Ibidem, p. 604.

<sup>57</sup> Ferrari, 2006.

<sup>58</sup> Ibidem.

Christianity as was the case of the Holy See and authoritarian regimes after the Second World War.<sup>59</sup>

Ferrari identifies two types of concordats. It can be agreement that regulates specific problem or it can be treaty aiming at addressing common interest between the Holy See and a state in general. In case of Slovakia, the Basic Treaty between the Slovak Republic and the Holy See would be the example of the latter type while treaties on Catholic education and armed forces represent the former.

Apart from these there is one other type of treaties that can be concluded by the Holy See. These treaties that deal with conventional topics are not classified as concordat and therefore they have to be treated in different manner since more temporal question such as customs or postal services are regulated by them.

Similarly, concordat is distinct from agreements concluded between state and national religious authorities. Although they have similar content, they do not have the status of international treaty as national religious authorities lack international legal subjectivity.<sup>60</sup> Therefore, they are concluded according to state law and they form a part of domestic legal order.<sup>61</sup>

Minnerath states that adoption of concordat by a state is an implicit recognition that religion and membership in religious community are not private matters only. It has been claimed that religion by its very nature presupposes social visibility as it is expressed also through an organised community of the faithful. However, with the introduction of concept of human rights, freedom of religion as well as most of other rights was defined as the right of individual. Consequently, any right of community of worshipers is derived from rights of individuals forming the community. Concordats replace derivation of corporate rights of the religious community from individual rights of its members and grant these rights to the Church directly.<sup>62</sup> However, as the concept of human rights evolved over time, some rights were acknowledged to have collective

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<sup>59</sup> Ferrari, 2006.

<sup>60</sup> Ibidem.

<sup>61</sup> Minnerath, 1997, p. 468.

<sup>62</sup> Ibidem, p. 472.

dimension as well as individual one. One such example is exactly the freedom of religion. Therefore, the question arises whether there is still a need for concordats.

It has been stated that nowadays concordats are concluded with constitutional states and therefore they do not accord any special treatment to people belonging to Catholic religion.<sup>63</sup> However, concordats have a status of international treaty and therefore they might take precedence over domestic laws.<sup>64</sup> Although they do not have supremacy over constitutions, they can be used as guidance for interpretation of legal acts which would result in imposing moral system of the Catholic Church on every individual in the state regardless to his/her religious identity. Therefore, there is possibility of concordat resulting in privileged status of Catholic religion. Such situation can potentially lead to discrimination based on religious belief even though the Holy See prefers nowadays reference to state religion or adherence to Roman Catholic faith to be left out from concordats.<sup>65</sup>

All concordats concluded after 1964 state the commitment of both the state and the Holy See to respect and promote human rights with special emphasis to religious freedom.<sup>66</sup> Nevertheless, concordats are inevitably affected by Catholic moral doctrine. In addition, the Church has different approach to human rights which might lead to different results than those intended by establishing the protection of human rights. Therefore, the question is how different is definition of religious freedom by the Catholic Church from the human right definition.

### 3.3 Roman Catholic Church and Human Rights

Historically speaking, the relationship between the Catholic Church and human rights is rather antagonistic one. It is undeniable that for hundreds of years the Christian Church professed religious intolerance resulting in persecution of those who thought differently.<sup>67</sup> Tolerance of different thinking was considered by the Church to represent

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<sup>63</sup> Minnerath, 1997, p. 472.

<sup>64</sup> Lajčáková, 2005, 3.

<sup>65</sup> Ferrari, 2006.

<sup>66</sup> Ibidem.

<sup>67</sup> Villa-Vicencio, 1999-2000, p. 579.

indifference and as such it was unacceptable.<sup>68</sup> It was expressed by Pope Gregory in encyclical *Mirari Vos* in 1832:

*“... From this poisonous spring of indifferentism flows the false and absurd, or rather the mad principle, that we must secure and guarantee to each one liberty of conscience; this is the most contagious of errors.”*<sup>69</sup>

In addition, some of what is nowadays considered gross human rights violations were tolerated and even promoted by the Church.<sup>70</sup> As examples Villa-Vicencio mentions slavery, discrimination on the grounds of sexual behaviour and unequal status of women.

However, it has to be noted that this characteristic does not apply to Christianity only. As Wood states, practice of non-tolerance towards other religions or ideologies is a general feature of all religions including Christianity but not limited to it.<sup>71</sup> As Wood points out, tolerance is not compatible with history and metaphysical characteristics of religion as such because it used to determine identity of particular group that differentiated its members from other groups. In addition, each religion perceives truth in different way that is however considered absolute and therefore it does not leave space for tolerating the truths of others.<sup>72</sup> Religious persecution is manifestation of this feature as it contributes to absolutiation of persecutor’s faith. Despite the past practice, Christianity in general teaches tolerance especially by affirmation that everyone was created in the image of God.<sup>73</sup> However, as Wood notes, once again it is not only Christianity but all religions that did not live up to their own teachings concerning what is now called human rights.

Human rights represent transition from pre-given normativity to normative model created by human beings themselves.<sup>74</sup> As Kasper puts it, they are the moral order founded in dignity of people and not in divine being. It was suggested that public

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<sup>68</sup> Wood, jr., 2004, p. 750.

<sup>69</sup> Kleinz, 1967, pp. 183-184.

<sup>70</sup> Villa-Vicencio, 1999-2000, p. 584.

<sup>71</sup> Wood, jr., 2004, p. 749.

<sup>72</sup> Ibidem, p. 748.

<sup>73</sup> Ibidem, p. 754.

<sup>74</sup> Kasper, 1991, p. 256.

debate on the nature of moral value could take place only after five revolutions separated law from religion.<sup>75</sup> Basis for this argument is that for a long time religion formed the identity of the state and therefore any criticism of it would be considered unpatriotic and threatening the foundation of that state.<sup>76</sup> It is also reason why the answer to religious differences was persecution of those that thought differently. Wood argues that it was considered to be the means of safeguarding existence of the state. In addition, Western concept of human rights was based on rational philosophy that considers human rights to be the opposition to divine rights of monarchs and Church's representatives and promotes autonomy of individual.<sup>77</sup> As Villa-Vicencio puts it, human rights defined in that way led the Church to conviction that they are in fact rebellion against God.

Nevertheless, it can be said the Church also contributed to the development of human rights by insisting on Church's right to freedom from the control of temporal sovereigns.<sup>78</sup> However, this struggle was not about religious freedom of individual but rather freedom of the institution of church that would allow it to govern its own affairs.<sup>79</sup> According to Villa-Vicencio, it was precisely the freedom that allowed for persecution of individuals by the Church.

Acceptance of human rights by the Church was a long process. At the beginning the Catholic Church based existence of human rights on natural law theory when calling for interventions of governments in order to ensure just wages and humane working conditions for workers:

*“As regards the State, the interests of all, whether high or low, are equal. The members of the working classes are citizens by nature and by the same right as the rich; they are real parts, living the life which makes up, through the family, the body of the commonwealth; and it need hardly be said that they are in every city very largely in the majority. It would be irrational to neglect one portion of the citizens and favour another, and therefore the public administration must duly and solicitously provide for*

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<sup>75</sup> Villa-Vicencio, 1999-2000, p. 582 – 583.

<sup>76</sup> Wood, jr., 2004, p. 749.

<sup>77</sup> Villa-Vicencio, 1999-2000, p. 590.

<sup>78</sup> Ibidem, p. 585.

<sup>79</sup> Ibidem, p. 586.

*the welfare and the comfort of the working classes; otherwise, that law of justice will be violated which ordains that each man shall have his due. To cite the wise words of St. Thomas Aquinas: "As the part and the whole are in a certain sense identical, so that which belongs to the whole in a sense belongs to the part." Among the many and grave duties of rulers who would do their best for the people, the first and chief is to act with strict justice - with that justice which is called distributive - toward each and every class alike.*<sup>80</sup>

As Shupack observes, the natural law theory was later replaced by human rights norms developed by international community as well as new interpretations within Catholic social teaching. It was Vatican II that changed hostile attitude of the Church towards human rights for good by turning back to writings of St. Thomas Aquinas and reiterating the idea that basic rights of human beings were revealed by Christ.<sup>81</sup> Idea of people being created in the image of God has been interpreted as implying respect for personhood that comes from God.<sup>82</sup> This respect should be demonstrated by creating society that protects human dignity by providing for basic needs of all individuals in form of creating conditions for exercise of full range of human rights.<sup>83</sup> Human dignity does not lay in subordination to higher purpose but in one's own self-purpose that enables individual to decide on their life and destiny.<sup>84</sup> In addition, the Church identifies redemption of mankind through death of Christ as a source of extraordinary dignity of all people.<sup>85</sup>

Current attitude of the Church toward human rights proves that it is not a rigid institution that only repeats the same ideas.<sup>86</sup> It was able to find human rights in tradition of Christianity through interaction with other social forces.<sup>87</sup> The Church is able to adopt new ideas on the assumption that they are consistent with the old ones.<sup>88</sup>

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<sup>80</sup> Rerum Novarum, 1891, 33.

<sup>81</sup> Villa-Vicencio, 1999-2000, p. 592.

<sup>82</sup> Shupack, 1993, p. 149.

<sup>83</sup> Ibidem.

<sup>84</sup> Kasper, 1991, p. 256.

<sup>85</sup> Shupack, 1993, p. 151.

<sup>86</sup> Kasper, 1991, p. 257.

<sup>87</sup> Villa-Vicencio, 1999-2000, p. 579.

<sup>88</sup> Kasper, 1991, p. 257.

Despite the difference between theory represented by work of St. Thomas Aquinas alongside some other theologians and practice of religious persecution organised by the Church, Kasper assesses that there is Christian tradition of human rights. However, it is quite different from secular one. Modern human rights focus on abstract individual without taking into consideration his/her social background. On the contrary Christian tradition of rights of person is interested in these circumstances.<sup>89</sup>

As Shupack observes, dignity and freedom are the foundations of both Church's and modern idea of human rights. However, Church's understanding of freedom is different from the secular one. Freedom in the mind of the Church is broader as it covers both inviolability of personal autonomy, and liberation from spiritual and material bonds with oppressive effect on individual. Therefore, the Church enriches the concept of freedom by including social and economic dimension.<sup>90</sup> This attitude toward human right was expressed in papal encyclical *Pacem in Terris*:

*“...Man has the right to live. He has the right to bodily integrity and to the means necessary for the proper development of life, particularly food, clothing, shelter, medical care, rest, and, finally, the necessary social services. In consequence, he has the right to be looked after in the event of ill health; disability stemming from his work; widowhood; old age; enforced unemployment; or whenever through no fault of his own he is deprived of the means of livelihood.”*<sup>91</sup>

Here is the basis for Church's opposition to apparent hierarchical relationship between different generations of human rights.<sup>92</sup> It maintains that in order to enable people to exercise civil and political rights, there has to be certain level of realisation of other generations of rights.<sup>93</sup> However, this approach is not exclusively represented by the Catholic Church. In fact, in the final act of 1993 World Conference on Human Rights there was acknowledged the equality of all human rights regardless of to which generation they belong.<sup>94</sup> Nevertheless, unlike civil and political rights, economic,

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<sup>89</sup> Kasper, 1991, p. 259.

<sup>90</sup> Shupack, 1993, p. 132.

<sup>91</sup> *Pacem in Terris*, 1963, 11.

<sup>92</sup> Villa-Vicencio, 1999-2000, p. 594.

<sup>93</sup> *Ibidem*, p. 595.

<sup>94</sup> The United Nation General Assembly, A/CONF.157/23, 1993, Art. 5.

social and cultural rights are connected with the notion of progressive realisation that states that these rights have to be realised to the maximum extent allowed by the state's budgetary possibilities.<sup>95</sup> The Church does not seem to subscribe to this idea as it understands human rights as a combination of rights and duties.

The Church's emphasis on duties of both society and individuals and considering rights and duties indivisible and complementary, can be considered the main difference between human rights as understood by the Church and their secular version.<sup>96</sup> The importance of duties alongside with rights was expressed as follows:

*"...it follows that in human society one man's natural right gives rise to a corresponding duty in other men; the duty, that is, of recognizing and respecting that right. Every basic human right draws its authoritative force from the natural law, which confers it and attaches to it its respective duty. Hence, to claim one's rights and ignore one's duties, or only half fulfil them, is like building a house with one hand and tearing it down with the other."<sup>97</sup>*

It has to be noted though that the Universal Declaration of Human Responsibilities has been proposed by the InterAction Council on the occasion of upcoming 50<sup>th</sup> anniversary of Universal Declaration on Human rights.<sup>98</sup> Nevertheless, this idea did not get much support and therefore emphasis on duties can still be identified as a difference between secular and Catholic human rights.

Although the Church emphasises duties, entitlement to right is not conditional upon fulfilment of correlative duty.<sup>99</sup> Nevertheless, the Church refers to the notion of responsible exercise of rights that requires awareness of duties as well as rights.<sup>100</sup> Therefore, the Church expects that individuals will fulfil their duties as well as exercise their rights.

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<sup>95</sup> Committee on Economic, Social and Cultural Rights, 1990, General Comment No. 3, 1.

<sup>96</sup> Shupack, 1993, p. 136.

<sup>97</sup> Pacem in Terris, 1963, 30.

<sup>98</sup> InterAction Council, 1997.

<sup>99</sup> Shupack, 1993, p. 142.

<sup>100</sup> Ibidem.

However, it is not only the individual who has duties. As Shupack states, the Church recognises duties of private institutions as well. Following the indivisibility principle connected to rights and duties, it is clear that as private institutions have duties, they have rights as well. Although it is stated above that religious institutions might be entitled to some of religious rights, it is not a general rule as institutions lack the characteristics of human beings, such as dignity that forms the basis for existence and possession of human rights.

There are several duties identified by the Church. One of the individuals' duties is the duty to demand respect for their rights.<sup>101</sup> This might seem to be in conflict with the principle of selfless love that requires individual to abandon exercise of their rights to the benefit of common good. However, all rights are based on dignity given by God and by claiming them, individuals honour this gift. In addition, each individual that claims his/her rights contributes to creation of just and moral community as human rights are considered moral standards that society should live up to.<sup>102</sup>

Another important duty is respect for the rights of others.<sup>103</sup> It is similar to limitation clause included in virtually all human rights instruments that states that the exercise of the right can be limited for protection of rights of others. However, as Shupack points out, the duty covers not only refraining from violating right of others but it also creates obligation of individuals to promote rights of their neighbours. Moreover, obligation to liberate those whose rights are denied is also included in this duty as well as obligation of resistance against inhumane and illegitimate regimes that violate rights of the neighbour. However, this duty seemingly does not apply to the Church itself. In the past, the Holy See, as representative of both the Church and the Vatican City State, has concluded concordats with obvious authoritarian regimes.<sup>104</sup> It can be argued that the Holy See did so with the goal of protecting rights of Catholics and the Church in those countries. However, value of such argument would be conditioned by the authoritarian regime actually fulfilling the agreement. Nevertheless,

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<sup>101</sup> Shupack, 1993, p. 141.

<sup>102</sup> Ibidem, p. 142.

<sup>103</sup> Ibidem.

<sup>104</sup> Ferrari, 2006.

even then it would be problematic from the point of view of equality among all people because the protection of concordat is applied only to the Catholics and the Catholic Church. Naturally, people can join the Catholic religion but then there is a question whether it is consistent with freedom of religion. While Catholic religion would not be forced upon those people per se, it would be doubtful if their choice were genuinely free in such circumstances. Voluntariness is important not only from the point of view of human rights but also for the authenticity of religion as such.<sup>105</sup> Therefore it should be in the interest of the Church to promote voluntary adoption of Catholic religion.

There is also duty to seek the common good.<sup>106</sup> This duty is fulfilled by political participation of individuals.<sup>107</sup> *Gaudium et Spes* explains this duty in following manner:

*“They [men, families and the various groups] see the need for a wider community, within which each one makes his specific contribution every day toward an ever broader realization of the common good. For this purpose they set up a political community according to various forms. The political community exists, consequently, for the sake of the common good, in which it finds its full justification and significance, and the source of its inherent legitimacy.”*<sup>108</sup>

However, it is not clear how much involvement of the Church would be consistent with the principle of state and church being sovereigns in their respective realms.

The above mentioned focus on material matters of individual’s life results in the duty to the poor.<sup>109</sup> This duty applies to both individual and society meaning that both are responsible for improving conditions of those in need.

Although there are some common values in both secular human rights and the Church’s understanding of this concept, the Church adds one other value: community.<sup>110</sup> Importance of this value rests on the fact that just as human beings are

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<sup>105</sup> Wood, jr., 2004, p. 760.

<sup>106</sup> Shupack, 1993, p. 143.

<sup>107</sup> Ibidem.

<sup>108</sup> *Gaudium et Spes*, 1965, 74.

<sup>109</sup> Shupack, 1993, p. 143.

<sup>110</sup> Ibidem, p. 140.

inherently endowed with dignity, they are also intrinsically sociable. Therefore, as Shupack notes, the interpretation of human rights by the Church does not see them as claims of individual against the state but rather as rights of people in community.

In addition, organisation of society has to ensure that everyone is provided with material sufficiency.<sup>111</sup> Consequently, as Shupack observes, society in Church's understanding has certain duties, such as provide everyone with access to education or effective social insurance. These obligations include the regulation of private property and commerce by introducing distributive justice mechanism in order to ensure fulfilment of the basic needs of all members of society. Therefore the Catholic Church criticises unlimited free market although at the same time it rejects the idea of centrally controlled economy. Nevertheless, Shupack points out that it is clearly stated that principle of subsidiarity should be applied, meaning that societal structures should not replace individuals' role in pursuing the goal of eradicating poverty as well. In this area the Church urges developed and prospering countries to embrace their obligation to assist developing countries, and calls for international community to regulate activities of transnational corporations as to prevent their benefiting to the detriment of these countries.<sup>112</sup>

Embracing the idea of human right did not lead to stating a Christian declaration on human rights by theologians. Instead, they have been exploring what it means to be human in order to provide support and critique for existing human rights standards and debates.<sup>113</sup> One of the critiques of human rights by the Church is their lack of foundations. This critique could refer to the famous statement of one member of the commission that drafted Universal Declaration of Human Rights: "*We are unanimous about these rights on condition that no one asks why.*"<sup>114</sup> The argument of the Church is that the absence of foundations might lead to questioning of validity of these rights. In addition, unconditional value of human rights accepted by everyone is a prerequisite for their full realisation.<sup>115</sup> Different interpretations of their foundations might fuel

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<sup>111</sup> Shupack, 1993, p. 138.

<sup>112</sup> Ibidem, p. 141.

<sup>113</sup> Villa-Vicencio, 1999- 2000, p. 594.

<sup>114</sup> Kasper, 1991, p. 254.

<sup>115</sup> Ibidem.

ideological differences that could ultimately lead to irreconcilable conflicts. It has been argued that the contribution that Catholic religion brings to the concept of human rights is foundations firmer than any ideology or philosophy can provide.<sup>116</sup> Most of the people believe in one divine or the other and therefore basing human rights in this realm has the potential of strengthening these norms. Moreover, the Church maintains that the character of human rights as moral values presupposes them having religious foundations. Biblical narrative would give human rights deeper meaning that could result in their greater effectiveness.<sup>117</sup>

Generally speaking, the secular grounds of human rights might not be as strong as it would be desirable. It is visible in e. g. Asian values debate where the main argument is that human rights are tied to particular – Western – culture and for that reason they are not a part of Asian culture.<sup>118</sup> However, apart from rather weak argument that Christian faith provides the most comprehensive and true account of history, life and humanity, and therefore it is the best foundation for human rights, it is difficult to see how Christian religion would solve this question.<sup>119</sup> When it comes to the above mentioned argument, it is more a matter of belief than facts. In fact, it can be argued that proclaiming Christianity as foundation for human rights might even strengthen the perception that human rights are Western concept that is not applicable in other parts of the world where other religious beliefs prevail.

In addition, the lack of precisely formulated foundation of human rights might not be as problematic as the Church sees it. Different parts of the world have different histories which formed different tradition and resulted in different ways of perceiving and thinking of life and everything connected to it. In these conditions it is rather impossible to design reasoning for human rights that would be acceptable by everyone. Therefore it seems that the agreement is more important than how it was achieved. The universality of human rights could be based precisely on the fact that no matter what

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<sup>116</sup> Shupack, 1993, p. 153.

<sup>117</sup> Ibidem, p. 128.

<sup>118</sup> Grimheden, 2009, p. 957.

<sup>119</sup> Shupack, 1993, p. 155.

one believes in, it will always get him/her to the same result – unconditional and inalienable rights of human being.

Emphasis on duties as indivisible and complementary part of rights can be also understood as critique of liberal human rights. Without duties societies tend to divide into smaller self-interested groups and therefore they lack cohesion.<sup>120</sup> As Shupack notes, this phenomenon is especially disadvantageous for the most vulnerable members of these communities that do not have the means to protect themselves in such circumstances. For example, it has been stated that stressing duties and responsibilities of individuals would lead to the settlement of question of abortion. The Church believes that awareness of responsibility of both parents to unborn child would undermine absolute right to abortion.<sup>121</sup>

### 3.4 Conclusion

Concordats are generally considered to be the international treaties between the state and the Holy See. Although recent developments within the Church led to replacing reference to Catholicism as state religion with commitment to respect and promote human rights, the Church's approach to human rights is different from the secular one.<sup>122</sup> Therefore, there is a potential for conflict between the obligations imposed on state by international human rights treaties and those imposed by concordat. In the next chapter the Draft Treaty between the Slovak Republic and the Holy See is analysed in order to assess its compatibility with the Slovak Constitution and human rights obligations of Slovakia.

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<sup>120</sup> Shupack, 1993, p. 144

<sup>121</sup> Ibidem.

<sup>122</sup> Ferrari, 2006.

#### **4. The Draft Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection of Conscience**

The adoption of treaty with the Holy See on exercise of conscientious objection is one of obligations that the Slovak Republic undertook by signing the Basic Treaty with the Holy See.<sup>123</sup> Apart from the treaty on the exercise of conscientious objection Slovakia has to conclude separate treaties with the Holy See on financing the church, pastoral care in armed forces and religious education.<sup>124</sup> Although the Basic Treaty was signed in 2000 meaning during the first term of Mikuláš Dzurinda as Prime Minister, it was negotiated during the period of Vladimír Mečiar when Slovakia was considered not to be a fully democratic country.<sup>125</sup> It resulted in increasing international isolation of country and the Basic Treaty was said to be the means of achieving international legitimisation of the regime.<sup>126</sup> It could be considered a sort of repetition of history shortly because after Second World War when authoritarian regimes were legitimising themselves in the same way.<sup>127</sup> In fact, the Basic Treaty is being compared to concordat concluded between the Holy See and Mussolini's Italy in 1929.<sup>128</sup>

As the treaty on the exercise of conscientious objection has not been concluded yet, only the draft of the treaty is available for analysis. There have been several versions of the draft treaty although they are still considered one document. It is because Proposal 5/11/2004 was subjected to several revisions. First revision was done by the Ministry of Justice of the Slovak Republic which also drafted the proposal, and later the proposal was revised by the Legislative Council of Government Office of the Slovak Republic which is the advisory body of the government office.<sup>129</sup> The last revision took place in May 2005.<sup>130</sup> Although the latest version of the draft is the focus of the analysis, attention is paid also to the previous drafts. For the purpose of this analysis the latest version of the draft is called The Revised Draft Treaty while the previous versions

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<sup>123</sup> The Basic Treaty between the Slovak Republic and the Holy See, 2000, Art. 7.

<sup>124</sup> *Ibidem*, Art. 13, 14 and 20.

<sup>125</sup> Závacká, 2010.

<sup>126</sup> *Ibidem*.

<sup>127</sup> Ferrari, 2006.

<sup>128</sup> Závacká, 2010.

<sup>129</sup> Lamačková & Lajčáková, 2006.

<sup>130</sup> *Ibidem*.

are the Draft Treaty as they cannot be distinguished from one another because of the lack of information.

Revisions of the draft addressed some of the most problematic issues. One of them is the fact that the original draft granted the exercise of conscientious objection in open-ended list of areas.<sup>131</sup> Six areas were specifically enumerated as primary areas where conscientious objection can be exercised.<sup>132</sup> However, the open-ended nature of Article 4 of the Draft Treaty did not exclude the possibility to claim this right in other areas as well.<sup>133</sup> It would result in state of legal uncertainty because it would be impossible to predict areas and situations in which individuals might invoke objection of conscience. Therefore, the Revised Draft Treaty contains exhaustive enumeration of five areas in which objection of conscience can be exercised.<sup>134</sup>

The original Article 4 of the Draft Treaty enumerated six areas of exercise of conscientious objection.<sup>135</sup> Following areas were mentioned before the revision of the draft took place:

- “- activity in armed forces and armed corps, including performance of military service, according to the Slovak Constitution*
- health-care activity, especially as regards abortion, artificial or assisted fertilization, experiments with, and disposal of, human organs, human embryos and human sex cells, euthanasia, cloning, sterilization and contraception,*
- educational activity, especially activity relating to Articles 12 and 13 of the Basic Treaty,*
- judicial decision-making and provision of legal services,*
- employment and other related labour relations, as well as other relations the content of which applies to the subject matter of this Treaty.*

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<sup>131</sup> Lajčáková, 2005, 5.

<sup>132</sup> Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 4 (1).

<sup>133</sup> Ibidem.

<sup>134</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 4 (1).

<sup>135</sup> Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 4 (1).

- acting related to genocide, execution of captives without lawsuit, torture, soldierly cruelty and persecution of defenceless civil population.”<sup>136</sup>

The revision process focused on this article a lot. It was already mentioned that the list of areas where right to exercise conscientious objection was granted, was changed from open-ended to exhaustive. The next change that can be considered to be rather logical was leaving out the last area where conscientious objection is supposed to be exercised.<sup>137</sup> Conscientious objection enables individuals to avoid performance of their duty that is imposed on them by law. However, Slovak legal system does not state a duty to participate in either of the above mentioned actions. In fact, they are prohibited not only by Slovak law but by international law as well.<sup>138</sup> It can be argued that domestic law might be changed, and therefore such duty might be established. Nevertheless, such change would most likely be connected with change from democratic to authoritarian regime. Such regimes usually try to keep the democratic facade which among other things means that they would not legalise actions that amount to international crimes or confirm undemocratic nature of the regime. In addition, the right to exercise objection of conscience was removed from the area of judicial decision-making.<sup>139</sup> This change should prevent judges from refusing to decide e. g. divorce cases.

Article 4 (2) of the Revised Draft Treaty created obligation of the Slovak Republic to in fact grant right to exercise objection of conscience to hospitals that are established by the Catholic Church or organisation associated with the Church:

*“The Slovak Republic undertakes not to impose an obligation on the hospitals and healthcare facilities founded by the Catholic Church or an organisation thereof to perform artificial abortions, artificial or assisted fertilisations, experiments with or handling of human organs, human embryos or human sex cells, euthanasia, cloning, sterilisations, acts connected with contraception, and not to make the establishment or operation of a hospital or a healthcare facility founded by the Catholic Church or an*

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<sup>136</sup> Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 4 (1).

<sup>137</sup> Ibidem.

<sup>138</sup> Lajčáková, 2005, 5.

<sup>139</sup> Ibidem.

*organisation thereof conditional on the performance of the aforementioned activities.*<sup>140</sup>

This provision is particularly interesting in the context of characterising this treaty as human rights treaty. Article 4 (2) virtually grants exercise of human right to specific kind of legal persons, namely hospitals.

There are several authors such as Sulmasy or Pellegrino who claim that health care institutions seem “*to possess all the features that one would attribute to moral agents.*”<sup>141</sup> As such they are prone to have conscience. Consequently, they should be entitled to its protection. Sulmasy supports his claim with several arguments. Firstly, health care institutions are making decisions and they can be praised or blamed for them. Secondly, they act on purpose. Thirdly, under certain conditions, the acts by persons employed by them are counted as acts of the institution. In addition, health care institutions are not “*random collections of doctors, nurses, social workers and other professionals thrown together in a building without a common purpose and identity that transcends each of them.*”<sup>142</sup> Therefore, they have the identity that overcomes enumeration of the individuals employed in them. Sulmasy supports this argument by stating that when the nursing shift changes at the University of Chicago Hospital it is still the University of Chicago Hospital even though there is a different set of people. However, this example is not convincing because people in both shifts are employed at the hospital and that makes them part of the institution. Therefore there is no reason for the hospital to change or lose its identity when the shift changes. Sulmasy made his point by his second example when in the situation that the whole department quits and enters private practice the University of Chicago Hospital remains the University of Chicago Hospital even though it has lost something. Nevertheless, this example suggests that it is people who shape the identity of institutions because although the University of Chicago Hospital is still the University of Chicago Hospital without an entire department, it is not the same institution as before.

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<sup>140</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 4 (2).

<sup>141</sup> Sulmasy, 2008, p. 143.

<sup>142</sup> Ibidem.

Nonetheless, Sulmasy claims that “*the institution* [the University of Chicago Hospital] *has an overriding identity and purpose that goes beyond its members.*”<sup>143</sup> Its purpose is to help the sick and it fulfils this purpose through actions of individuals who have sworn oaths to put their skills at the service of patients. These oaths taken by individuals, Sulmasy stated, seal “*a common purpose for the institution with all the moral binding force that these oaths carry.*”<sup>144</sup> The common purpose can be defined as “*to satisfy the moral obligations of the actors who play the central role in the institution...*”<sup>145</sup> Therefore “overriding identity and common purpose” is what makes health care institutions moral agents with conscience that “*is rooted in the fact that they profess a set of fundamental moral commitments and they must act in accordance with them.*”<sup>146</sup>

Although the idea of an institution assuming obligations of its actors is interesting and it has its logic, it does not provide the ground for ascribing the ability to have or develop conscience to institutions. Even less it is ground for granting the right to exercise conscientious objection as it is proposed by the Revised Draft Treaty. First of all, while Sulmasy is right about institutions being considered a person under law, has to be noted that there are two types of persons recognized by law: natural and legal. While individuals are natural persons under the law, institutions are considered legal persons with no exception. There are no circumstances under which an institution could be considered a natural person. This division under law is used for differentiation of rights and duties of natural and legal persons. In this case the most crucial differentiation is that certain human rights and freedoms are granted only to natural persons and not to legal ones.

It is true that institutions are praised or blamed for decisions they made. However, in reality the decisions are not so much made by an institution as by an individual or individuals that are working at the institution. This makes blaming institutions just a simplification that allows people to name just one institution instead

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<sup>143</sup> Sulmasy, 2008, p. 143.

<sup>144</sup> Ibidem.

<sup>145</sup> Ibidem.

<sup>146</sup> Ibidem.

of several names of members of board of directors. Therefore Sulmasy's claims that institution's conscience is exercised in "*making moral judgement that decision that it has made or is considering would violate fundamental moral commitments*" does not apply to the institution itself but to the people responsible for the decision.<sup>147</sup> The decisions depend on the individual entitled to make them, not on the institution. It is the reason why it is possible to hold an individual working in the institution responsible for a decision he/she made. This logic is also applied when it comes to acts by individuals that can be counted as institution's acts. Even if the institution is publicly blamed and there can be a fine that has to be paid by the institution, punishment is delivered to an individual as well, either by the competent authority or by the institution itself.

Furthermore, as it was noted before, the argument that the institution's identity is overriding and goes beyond its members is not convincing. The examples that Sulmasy used to support this claim merely showed that individuals working at the institution shape its identity because if the entire department quits, the institution is no longer the same. In conjunction with the fact that health care institutions assume obligations of its employees, which is the way they create their purpose, it is clear that the institution's purpose and identity is rather dependent on its staff. It can be demonstrated on an example of a health care institution whose staff would instead of treating people test an impact of non-treatment on the sick or experiment with new untested treatment techniques without the consent of patients. Even though the hospital is officially still a health care institution, actions of its employees are illegal and amoral and the institution can hardly be considered having the identity of a common health care institution at which patients are treated. To apply this on Sulmasy's example the University of Chicago Hospital will still be the University of Chicago Hospital even if its staff starts torturing the terminally ill by refusing to provide them with pain killers. Even the fact that institutions have some structures that create certain hierarchy between various departments and administration units as well as between individual employees does not make them independent from people working at them. These structures are made by man, and man can also change them and therefore they cannot be considered a

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<sup>147</sup> Sulmasy, 2008, p. 143.

guarantee of morality. The institution does not have any influence in what it is made up from or what decisions it takes. Therefore the identity and purpose of institutions depends on its employees and because of that there is no ground for developing conscience that is independent from employees. The absence of conscience means that they are not entitled to enjoyment of the right to exercise the objection of conscience.

Moreover, undertaking of its staff's professional obligations by health care institutions does not automatically grant it the same rights as the staff has. The institution cannot be considered entitled to the right to exercise the objection of conscience just because it assumed the same obligations as people working in it had. It lacks qualities that presuppose entitlement to such a right. The objection of conscience is designed to protect the conscience of people (in this case medical workers) against actions that are inconsistent with their moral views. If conscience were not protected, the action that would be performed against a better judgement of individual's conscience would lead to feelings of guilt and personal failure.<sup>148</sup> It is very difficult to imagine that a health care institution would feel guilt and personal failure or that it would feel at all.

Furthermore, although the institution assumes obligations of its staff, the institution does not perform them. It is still the individuals carrying out various tasks connected to the fulfilment of those obligations, and one of the basic rules of the application of the conscientious objection is that it can be applied only to direct participation on the act.<sup>149</sup> Therefore, as the institution is not involved directly in the performance of any medical procedure, it is not entitled to the exercise of the conscientious objection.

In addition, if health care institutions assumed obligations of its employees in similar logic, we could say that they are able to assume moral views of employees as well. Therefore, it is enough to grant the objection of conscience to medical workers because the protection of their conscience and moral views would be transmitted to the institution.

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<sup>148</sup> Sulmasy, 2008, p. 138.

<sup>149</sup> Dickens and Cook, 2000, p. 74.

However, even if the argument that hospitals established by the Catholic Church shall be entitled to provide only those health care services that are consistent with Catholic faith, the provision is not acceptable. Article 4 (2) of the Revised Draft Treaty gives blanket exception to Catholic hospitals in relation to enumerated procedures without stating any limitations to it, such as medically indicated abortion.

In the original draft “*human life, human dignity and meaning of human life*” were proclaimed to be the highest values that result in common good and as such they deserve protection.<sup>150</sup> Such provision could be interpreted as prohibition of abortion that is essentially considered murder by the Catholic Church. However, abortion is legal under the Slovak domestic legal system without any restriction up to twelfth week of pregnancy.<sup>151</sup> After first three months abortion is allowed in cases of threat to life or health of mother and serious defect of foetus.<sup>152</sup> Nevertheless, the treaty on the right to exercise conscientious objection was defined as international human rights treaty in the Submission Report, and therefore after ratification by the National Council it would gain supremacy over domestic legislation.<sup>153</sup> Therefore, the adoption of the draft might result in unavailability of abortion not only on demand but also the one whose purpose is to save the life of mother because of doctor’s unwillingness to accept the law-imposed duty. Therefore, this provision was replaced by recognition of freedom of conscience and right to exercise objection of conscience in connection with “*human life, human dignity, and meaning of human life, family and marriage.*”<sup>154</sup> However, it has to be noted that preamble of the Revised Draft Treaty contains the same provision as the one that has been changed.<sup>155</sup>

The very first draft of the treaty on the right to exercise conscientious objection did not include any limitation of the exercise. The right to invoke objection of

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<sup>150</sup> Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 2.

<sup>151</sup> Zákon Slovenskej národnej rady o umelom prerušení tehotenstva č. 73/1986 Z. z. (Act No. 73/1986 Coll.), 4.

<sup>152</sup> Vyhláška Ministerstva zdravotníctva Slovenskej socialistickej republiky č. 74/1986 Z. z. (Regulation No. 74/1986 Coll.), 2.

<sup>153</sup> Lajčáková, 2005, 3.

<sup>154</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 2.

<sup>155</sup> Ibidem, Preamble.

conscience was supposed to be “*free and unlimited*”.<sup>156</sup> It was only after the pressure of other governmental and non-governmental institutions that the draft treaty was amended in 2004 by Ministry of Foreign Affairs of the Slovak Republic and provision on limits of exercise of this right was introduced. In the Revised Draft Treaty this clause is worded as follows:

*“The exercise of the right to conscientious objection is implemented within and according to Slovak laws. The limits and manner in which the objection is exercised must respect nature and purpose of the conscientious objection.”*<sup>157</sup>

In addition, Article 6 states that exercise of conscientious objection cannot endanger human life.<sup>158</sup> This provision was later expended by the Legislative Council and currently the exercise of conscientious objection is limited so that human life and health are not endangered.<sup>159</sup> However, while protection of life and health is undoubtedly important limitation, it is not enough. Exercise of human rights inevitably results in conflict between rights of individual people. Therefore, all human rights apart from several that have absolute nature might be limited in order to protect the rights of others. Objection of conscience has without any doubt the potential to infringe rights as it enables individuals to avoid fulfilment of their duties that might be crucial for exercise of rights by other people. This fact is acknowledged by limitation clause that is part of virtually all international human rights treaties. However, as long as the treaty with the Holy See on the right to exercise objection of conscience will be considered to be international human rights treaty that after its ratification prevail over domestic legislation, it can be argued that any other limitation than the one protecting human life and health is contrary to the treaty. Therefore, the Revised Draft Treaty still does not proclaim appropriate limitation to the exercise of conscientious objection.

Furthermore, the Legislative Council removed provision on the interpretation of the teaching of faith and morals by authority entrusted with this task by the Holy See

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<sup>156</sup> Lajčáková, 2005, 8.

<sup>157</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 5.

<sup>158</sup> Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 6 (2).

<sup>159</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 6 (2).

when requested by Slovak authority.<sup>160</sup> The original draft did not specify the legal significance of the interpretation nor which Slovak institutions may request such interpretation.<sup>161</sup> Lajčáková suggests that it is possible that also courts would have been able to request interpretation. If the judge followed the provided interpretation in deciding the case, it would result in application of canonical law in the Slovak Republic.<sup>162</sup> The removal of this provision has a positive effect of preventing the application of canonical law in country where separation of church and state is proclaimed in the Constitution. On the other hand, the question of interpretation of Catholic faith and morals is not dealt with at all. One of possible scenarios is that interpretation of faith and morals will rest upon the judge. However, such solution has potential of bringing major differences in interpretations and consequently in different levels of acceptable exercise of conscientious objection.

Nevertheless, it can be argued that the interpretation of Catholic faith and morals is included in regulation established by Article 7 of the draft. The Draft Treaty determines that contested issues connected to either implementation of interpretation of the treaty are going to be solved by mutual consultations.<sup>163</sup> For that purpose creation of joint committee is required. It shall be composed of representatives of both the Slovak Republic and the Holy See and meet at least twice a year.<sup>164</sup> Tasks of this joint committee are composed especially of the following:

*“- to assess areas and the different activities to which objection of conscience applies,*

*- to submit comments to drafts of generally binding legal acts, and to drafts of legislative measures necessary for the protection of the right to exercise objection of conscience as well as for the prevention of its abuse,*

*- to evaluate the implementation of this Treaty,*

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<sup>160</sup> Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 6 (3).

<sup>161</sup> Lajčáková, 2005, 9.

<sup>162</sup> Ibidem.

<sup>163</sup> Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 7 (1).

<sup>164</sup> Ibidem, Article 7 (2).

- to submit proposals for amendments to this Treaty. “<sup>165</sup>

This provision put in effect would provide the Holy See and therefore also the Catholic Church with the right to participate in drafting of new legal acts and interpretation of existing legislation in Slovakia.<sup>166</sup> The Revised Draft Treaty specified the status of the committee as advisory.<sup>167</sup> While this particular revision might reduce the involvement of the Catholic Church in law-making process, it does not prevent it. Therefore, there is still possibility of legal acts reflecting Catholic teaching. It can be argued that institutions of the European Union have even more power to influence law-making process in Slovakia as was proposed for the joint committee. However, the major difference between these two situations is that the Slovak Republic did not enter into relationship with the Holy See that would be comparable with the one it has with the European Union. Accession of country to the European Union is connected with transfer of part of state’s sovereignty and competencies to Union’s institutions. The transfer of competencies entitles these institutions to issue acts that are directly applicable in all member states of the European Union. Neither one of the draft treaties state that the Slovak Republic and the Holy See are entering into relationship similar to the one that Slovakia has with the European Union. Therefore granting right to participate in the legislative process is unprecedented and severely impairs separation of church and state in the Slovak Republic proclaimed by the Slovak Constitution in Article 1 (1).<sup>168</sup>

As the list of competences of the joint committee is open-ended, it is possible that the interpretation of Catholic faith and morals would be added to its tasks. However, in that case the advisory status of the joint committee makes any interpretation non-binding. Therefore, it would be at the discretion of the authority that requested interpretation, whether the interpretation would be followed or not, what might lead to different levels of conscientious objection granted by different authorities.

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<sup>165</sup> Draft Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection of Conscience, Article 7 (2).

<sup>166</sup> Lajčáková, 2005, 10.

<sup>167</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection of Conscience, Article 7 (2).

<sup>168</sup> Constitution of the Slovak Republic, Article 1 (1).

Naturally, the interpretation also might be just followed in decisions of authorities in which case it is possible that such practice would still result in application of canonical law in the Slovak Republic.

Revision process of the Draft Treaty brought important changes of which some solved pressing issues but some also created new problems. However, the revision did not deal with Article 3 of the Draft Treaty at all. This article is formulated in following way:

*“(1) For the purposes of this Treaty, “teaching of faith and morals” means the body of teaching of the Catholic Church.*

*(2) For the purposes of this Treaty, “objection of conscience” means an objection raised on the basis of the principle of free conscience according to which anyone may refuse to act in a way, which he in his conscience finds impermissible by the teaching of faith and morals.*

*(3) “To act” includes participation at acting, and any action, related to such acting, including assistance.”<sup>169</sup>*

Neither Draft Treaty not Revised Draft Treaty grants exercise of objection of conscience only to the Roman Catholics. In fact, the adoption of treaty with the Holy See on the right to exercise objection of conscience is based on Article 7 of the Basic Treaty between the Slovak Republic and the Holy See signed in 2000:

*“The Republic of Slovakia recognises the right of all to obey their conscience according to the doctrinal principles and morals of the Catholic Church. The extent and conditions of the application of this right will be defined by special Accord between the Above Parties.”<sup>170</sup>*

Therefore, the exercise of conscientious objection is granted to everyone. However, Article 3 (2) of both Draft Treaty and Revised Draft Treaty defines objection of conscience as *“objection raised on the basis of the principle of free conscience according to which anyone may refuse to act in a way, which he in his conscience finds*

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<sup>169</sup> Draft Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection of Conscience, Article 3.

<sup>170</sup> Basic Treaty between the Slovak Republic and the Holy See, Article 7.

*impermissible by the teaching of faith and morals.*”<sup>171</sup> Article 3 (1) specifies that “teaching of faith and morals” refers to teaching of Catholic Church.<sup>172</sup> Therefore, the basis on which the objection of conscience can be raised is restricted to teaching on faith and morals of Catholic Church. Religious identity is considered being of crucial importance to individual and it is protected by all international human rights instruments. Therefore, such definition of objection of conscience prevents this right from being considered the right of everyone.

It has been argued that the teaching of the Catholic Church on freedom of conscience is the most extensive in the world and therefore the treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience would protect conscience not only of Catholics but non-Catholic believers and non-believers as well.<sup>173</sup> However, taking into consideration the importance of religious identity it is questionable whether objection of conscience defined as objection based on Catholic teaching would be invoked also by non-Catholics. It can be argued that it is important that objection of conscience can be exercised and not how it is defined. Nevertheless, this pragmatic approach might not be comfortable for everyone to apply. In the end, freedom of religion, conscience and thought as defined by international human rights instruments does not suggest that because of the extent of teaching of one religion is justification for making that particular teaching basis for exercise of right that is supposed to be granted to everyone.

In addition, objection of conscience defined in such manner might result in practice by the courts of granting this right only to individuals affiliated with the Catholic Church.<sup>174</sup> It is true that other religions or non-religious beliefs can come to the same moral conclusions as moral teaching of the Catholic Church but they do not necessarily have to have the same reasoning for those conclusions. That might weaken the claim of right to exercise objection of conscience.

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<sup>171</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection of Conscience, Article 3 (2).

<sup>172</sup> *Ibidem*, Article 3 (1).

<sup>173</sup> Saunders, Kubik & Daniska, 2012.

<sup>174</sup> Lajčáková, 2005, 7.

It has to be noted that Agreement with registered churches and religious societies on the right to exercise objection of conscience has been prepared. Article 1 of this agreement suggests that it can be considered an attempt to remedy the fact that the Revised Draft Treaty allows for exercise of conscientious objection only in accordance with Catholic faith and morals:

*“The Slovak Republic and the registered churches and religious societies (hereafter "Contracting Parties") conclude this Agreement with the aim to set out the scope and terms of exercising the right to objection of conscience in conformity with Article 7 of the Basic Agreement.”*<sup>175</sup>

Although this agreement has potential to remedy situation of exercise of conscientious objection only on the basis of Catholic teaching on faith and morals it can do so only partially. It is true that it could serve as basis for claiming the right to exercise of conscientious objection based on morals different from than Catholic. Nevertheless, the Agreement between the Slovak Republic and Registered Churches and Religious Societies would be a part of Slovak domestic legal system while the Revised Draft Treaty as international human rights treaty would after ratification have primacy over domestic legal acts. Therefore, the level of protection of right to exercise objection of conscience would still be different. For example, it was suggested above that because the Revised Treaty limits exercise of conscientious objection by protection of life and health, it might be argued that any additional limitation is unjustified. This could not be the case of the Agreement because it is part of domestic legal system and therefore it does not have primacy over other legal acts. As a result it is possible that Catholic believers would be granted broader right to exercise objection of conscience than non-Catholic believers. Such situation would breach Article 12 of the Constitution of the Slovak Republic.<sup>176</sup> In addition, churches and religious societies that are not recognised by the Slovak Republic and atheists and non-religious believers would be in the same situation as their right to exercise objection of conscience would be based only

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<sup>175</sup> Agreement between the Slovak Republic and the Registered Churches and Religious Societies on the right to objection of conscience, Article 1 (1).

<sup>176</sup> Constitution of the Slovak Republic, Article 12 (1) and (2).

in domestic legal act providing that the act would grant general right to exercise conscientious objection without tying it to any particular moral system.

Another issue of the Revised Draft Treaty is its definition of “to act.” Article 3 states that “to act” means “*participation at acting, and any action, related to such acting, including assistance.*”<sup>177</sup> This definition is too broad. The state has obligation to ensure availability of all legal services on its entire territory especially when it recognises the right to exercise conscientious objection that enables individuals to refuse to perform their duties. However, such a broad definition of “to act” as the one contained in Article 3 of the Revised Draft Treaty would significantly complicate fulfilment of this obligation. As an example medical sphere can be used, more specifically the situation when a woman is undergoing abortion. With this article in force nurses would be able to refuse virtually every action that would concern this particular woman including serving her food or providing pre- and post-operation care. In addition, people in the administration department could refuse to deal with administrative side of health care provision that might be subject of conscientious objection such as issuing the bill for the procedure. As a matter of fact, adoption of such broad definition is contrary to general rule that objection of conscience should be applicable only to direct participation on act that is contrary to one’s belief.<sup>178</sup> It is one of the safeguards that could prevent violation of right of others by allowing individuals to exercise conscientious objection. In addition, broad definition of “to act” prevents imposition of duties connected to exercise of conscientious objection in medical sphere that are generally agreed upon. These duties include referral to practitioner that does not object to demanded procedures without undue delay or obligation to provide information on options available in particular medical condition without bias.<sup>179</sup> Therefore, this provision is incompatible with the Church’s own concept of human rights that includes duty to respect the rights of others.<sup>180</sup>

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<sup>177</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection of Conscience, Article 3 (3).

<sup>178</sup> Dickens and Cook, 2000, p. 74.

<sup>179</sup> FIGO Ethical guidelines on conscientious objection, 2009, Guideline 3 and 6.

<sup>180</sup> Shupack, 1993, p. 142.

#### 4.1 Conclusion

The analysis of the Revised Draft Treaty highlighted several issues that are problematic from the human rights point of view. Firstly, the Submission Report characterises this Treaty as international human rights treaty and therefore it would gain primacy over domestic laws after its ratification. As the Treaty grants exercise of conscientious objection to actions that are not compatible with Catholic teaching of faith and morals, it would give special protection to people that follow this system of belief and morals. It has been argued that Catholic moral teaching is the most comprehensible one and therefore everyone can invoke conscientious objection that is based on Catholic moral system. However, it does not change the fact that Catholic religion would gain special position in Slovakia after the ratification of the Treaty.

In addition, the Revised Draft Treaty states that manner of exercise of conscientious objection and its limits shall be regulated by legal act. At the same time the Treaty acknowledges that exercise of conscientious objection can be limited for protection of life and health. Therefore, more extensive limitation set in domestic legal act can be claimed ungrounded. Moreover, Catholic hospitals would be freed of obligation to perform even therapeutic abortions. Yet the very nature of conscientious objection that allows refusal to perform law-imposed duties requires that the limitation would take into consideration right of others as ability to avoid fulfilling one's obligation might result in disabling other to exercise their rights.

Furthermore, the definition of "to act" is unacceptably broad. It includes virtually any kind of act performed in areas enumerated in Article 4 (1) of the Revised Draft Treaty. The generally accepted rule is that objection of conscience should be exercised only to direct participation on objectionable act.

Therefore, it can be argued that regulation of exercise of conscientious objection as proposed in the Revised Draft Treaty is improper. If adopted this regulation might lead to violation of human rights in Slovakia. The next chapter examines the Revised Draft Treaty in the light of provisions of Constitution of the Slovak Republic including those establishing obligation to protect of human rights and freedoms.

## **5. The Revised Draft Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection of Conscience and the Constitution of the Slovak Republic**

The Submission Report to the draft of Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience states that the treaty is in conformity with Article 24 of Constitution of the Slovak Republic.<sup>181</sup> This article recognises freedom of religion, conscience and thought:

*“(1) The freedoms of thought, conscience, religion, and faith are guaranteed. This right also comprises the possibility to change one’s religious belief or faith. Everyone has the right to be without religious belief. Everyone has the right to publicly express his opinion.*

*(2) Everyone has the right to freely express his religion or faith on his own or together with others, privately or publicly, by means of divine and religious services, by observing religious rites, or by participating in the teaching of religion.*

*(3) Churches and religious communities administer their own affairs. In particular, they constitute their own bodies, inaugurate their clergymen, organize the teaching of religion, and establish religious orders and other church institutions independently of state bodies.*

*(4) Conditions for exercising rights according to sections 1 to 3 can be limited only by law, if such a measure is unavoidable in a democratic society to protect public order, health, morality, or the rights and liberties of others.”<sup>182</sup>*

However, the above analysis of the Revised Draft Treaty revealed some problematic provisions that might lead to breach of the Slovak Constitution. Therefore, the following section examines compatibility of provisions of the Revised Draft Treaty with the Constitution of the Slovak Republic. Although the Revised Draft Treaty grants exercise of conscientious objection in five areas the compatibility test is focused only on the area of health-care provision.

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<sup>181</sup> Submission Report to the draft of Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, 5.

<sup>182</sup> Constitution of the Slovak Republic, Article 24.

Constitution of the Slovak Republic is the basic and the most important source of law in the state.<sup>183</sup> It also creates a pillar of legal order because its provisions permanently regulate social relations of each subject of law in the state.<sup>184</sup> According to the constitution, Slovakia is a legally consistent state, which means that it observes certain principles. There are six of them:

1. Principle of limited government
2. Principle of constitutionality and rule of law
3. Principle of division and control of power
4. Principle of independent judiciary
5. Principle of guarantee of fundamental rights and freedoms
6. Principle of legal certainty<sup>185</sup>

Although there are six principles this analysis is focused on principles of constitutionality and the rule of law, the guarantee of fundamental rights and freedoms and legal certainty as these are most likely to be affected by the adoption of the Revised Draft Treaty.

### 5.1 Legal certainty

Legal certainty is a principle that allows an individual to learn what kind of behaviour is required and what he/she can expect others to do.<sup>186</sup> It requires legal acts to be clear, understandable and mutually consistent.<sup>187</sup>

The Basic Treaty between the Slovak Republic and the Holy See refers to exercise of objection of conscience in Article 7.<sup>188</sup> Although it states that the exercise of this right shall be regulated by separate international treaty, it has been used as basis for exercise of unlimited objection of conscience.<sup>189</sup> Unregulated recognition of the right to

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<sup>183</sup> Drgonec, 2007, p. 14

<sup>184</sup> Ibidem.

<sup>185</sup> Ottová, 2006, p. 71.

<sup>186</sup> Ibidem, p. 88

<sup>187</sup> Ibidem.

<sup>188</sup> Basic Treaty between the Slovak Republic and the Holy See, Article 7.

<sup>189</sup> Shadow Report to the Committee on the Elimination of Discrimination against Women for the Slovak Republic, 2008, p. 32.

exercise the conscientious objection inevitably leads to certain level of legal uncertainty because it allows an individual to avoid fulfilment of his/her duties under the law. In such a situation, individuals can never be sure whether they will be granted their rights whose exercise presupposes following the law by another person. Therefore, there is high probability of violation of someone's rights. The regulation of exercising the objection of conscience prevents such a situation, preserves legal certainty in the state, and therefore is desirable in a state that is claimed to be legally consistent.

Nevertheless, mal-regulation can also lead to legal uncertainty. The Revised Draft Treaty states limitation of exercise of conscientious objection when life and health are endangered.<sup>190</sup> However, under Slovak law, abortion is legal if it is performed up to the twelfth week of pregnancy without the need to specify the reasons.<sup>191</sup> Because of the status of international human rights treaty, if ratified, the Revised Draft Treaty would have precedence over domestic legal acts. Consequently, abortion without need to specify the reasons might become inaccessible. The same counts for other procedures of reproductive and sexual health such as sterilisation. In addition, the Revised Draft Treaty does not mention any obligations of objectors that are generally associated with recognition of right to exercise conscientious objection. These obligations include for example obligation to refer patient without undue delay to practitioner that does not object to required procedure or provide patient with unbiased information on all the options available in his/her medical condition.<sup>192</sup> If such obligations would be imposed on practitioners by domestic legal act, they might be disregarded as having no ground especially when the Revised Draft Treaty defines "to act" as "*participation at acting, and any action, related to such acting, including assistance.*"<sup>193</sup> Referring patient to non-objecting practitioner can be argued to fall within this definition of "to act" and with the Revised Draft Treaty ratified as international human rights treaty that has

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<sup>190</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 6 (2).

<sup>191</sup> Zákon Slovenskej národnej rady o umelom prerušení tehotenstva č. 73/1986 Z. z (Act No. 73/1986 Coll.).

<sup>192</sup> FIGO Ethical guidelines on conscientious objection, 2009, Guideline 3 and 6.

<sup>193</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 3.

supremacy over domestic laws it can be argued that such obligation violates right granted by the treaty and therefore it is unjustified.

However, reproductive procedures that are legal under Slovak law are also included in constitutional right of protection of health and the access to health care embedded in Article 40 of the Constitution of the Slovak Republic which can be exercised according to regulations of this right by legal acts.<sup>194</sup> For instance, abortion is a legal procedure under Slovak law according to the Act No. 73/1986 Coll. if conditions set in the act are fulfilled. Therefore, the Slovak Republic has the obligation to ensure that this procedure is accessible on the whole of its territory just as any other legal service. In other words, recognition of right to refuse to perform law-imposed duty such as conscientious objection has to include sufficient limitation of exercise of this right that would protect exercise of right of others.

Freedom of thought, conscience and religion is embedded in the Slovak constitution as well.<sup>195</sup> However, according to Article 24 (4) of the Constitution, it is possible to set conditions for limitation of the exercise of this right for the purpose of the protection of public order, health, morals or rights and freedoms of others.<sup>196</sup> It can be argued that Article 24 (4) provides too much space for limitation and therefore limitation based on this article can lead to preventing exercise of the right altogether. However, Article 24 (4) also states that limitation has to be unavoidable and necessary in democratic society.<sup>197</sup> In addition, Article 13 section 4 of the Constitution of the Slovak republic says:

*“When imposing restrictions on fundamental rights and freedoms [such as freedom of thought, conscience and religion], respect must be given to the essence and meaning of these rights and freedoms and such restrictions shall be used only for the specified purpose.”*<sup>198</sup>

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<sup>194</sup> Constitution of the Slovak Republic, Article 40.

<sup>195</sup> Ibidem, Article 24.

<sup>196</sup> Ibidem, Article 24 (4).

<sup>197</sup> Ibidem.

<sup>198</sup> Ibidem, Article 13 (4).

It implies that “*material condition that has to be fulfilled when imposing duty in conformity with constitution is preservation of fundamental right or freedom.*”<sup>199</sup> In addition, even the Revised Draft Treaty in Article 5 states that limitation of exercise of conscientious objection has to respect essence and meaning of this right.<sup>200</sup> Moreover, according to Article 7 of the Revised Draft Treaty the joint committee would have right to comment on legislative regulation of exercise of conscientious objection.<sup>201</sup> Therefore, it can be argued that all of above mentioned provisions guarantee that due attention would be paid to preserving nature of this right when designing limitation of exercise of objection of conscience for the purpose of ensuring availability of legal services, and ultimately fulfilment of legal certainty principle.

## 5.2 Guarantee of fundamental rights and freedoms

The Constitutional Court of the Slovak Republic stated that

*“in a legally consistent state ... particular emphasis is given to the protection of the rights of those who are subjects of its regulation. It is the obligation of all state authorities to ensure the factual possibility of their exercise by those subjects to whom they were given.”*<sup>202</sup>

The guarantee of the fundamental rights and freedoms serves as the protection of an individual against public authorities.<sup>203</sup> In addition, state authorities have also the duty to set legal framework that protect one’s rights by preventing interference of other individuals with exercise of these rights. However, there are certain human rights that tend to collide with each other. Therefore, in cases of conflicting rights state has to be particularly careful when adopting regulation of their exercise. It has to find compromise that would not lead to exercise of one right to the detriment of other right. It is rather obvious that objection of conscience and reproductive rights are one example of conflicting rights.

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<sup>199</sup> Drgonec, 2007, p. 159.

<sup>200</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 5.

<sup>201</sup> Ibidem, Article 7 (2).

<sup>202</sup> Drgonec, 2007, p. 32.

<sup>203</sup> Ibidem, p. 157.

It has been argued that there is no such thing as international sexual and reproductive rights.<sup>204</sup> However, these rights are designed to protect sexual and reproductive health that is defined as

*“a state of complete physical, mental and social well-being and... not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.”*<sup>205</sup>

Therefore, reproductive rights can be considered a part of right to health. The right to the protection of health unlike freedom of religion, conscience and thought does not constitute the fundamental right. It is one of the economic, social and cultural rights that constitute the second generation of human rights. However, it is important to keep in mind that according to Vienna Declaration and Plan of Action of 1993 human rights are indivisible.<sup>206</sup> The only difference is that economic, social and cultural rights are associated with the concept of “progressive realisation.”<sup>207</sup> However, this concept cannot be used as justification in case of Slovakia as unavailability of reproductive health procedures would not be caused by lack of resources but rather flawed legislation.

The Constitution states that the exercise of the right to protection of health in a form of free health care can be realised only in the scope allowed by relevant legal acts:

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<sup>204</sup> Saunders, Kubik & Daniska, 2012.

<sup>205</sup> Cairo Programme of Action, 1994, Chapter VII.

<sup>206</sup> The United Nation General Assembly, A/CONF.157/23, 1993, Art. 5.

<sup>207</sup> Committee on Economic, Social and Cultural Rights, 1990, General Comment No. 3, 1.

*“Everyone shall have the right to the protection of his or her health. The citizens shall have the right to free health care and medical equipment for disabilities on the basis of medical insurance under the terms to be laid down by a law.”*<sup>208</sup>

One of the relevant acts in connection to Article 40 of the Constitution is the Act No. 73/1986 Coll. which regulates the conditions for lawful performance of abortion on demand. It also sets charges that have to be paid for the performance of the procedure, which excludes abortion from free health care.<sup>209</sup> Nevertheless, the legality of abortion on demand in the Slovak Republic makes the access to this procedure included in the right to protection of health.

However, the regulation of the exercise of the conscientious objection set in the Revised Draft Treaty does not secure the availability of abortion and other reproductive health procedures whose recipients are mostly women and thus violates their right to protection of health. As a matter of fact, this treaty does not acknowledge any limits for exercise of conscientious objection apart from protection of health and life.

Unavailability of abortion that is legal according to Slovak law might be claimed to be violation of Article 18 (1) of the Slovak Constitution. This article reflects the idea that the state should serve its citizens and not the other way around by stating that *“no one shall be sent to perform forced labour or forced services.”*<sup>210</sup> It was stated during hearing before the U.S. Supreme Court that *“by restricting the right to terminate pregnancies, the State conscripts women's bodies into its service ... The State does not compensate women for their services.”*<sup>211</sup> Service that is involuntary and unpaid is equal to enslavement.<sup>212</sup> In Slovakia, the state does not restrict the right to terminate pregnancy de jure. However, the improper regulation of the exercise of the conscientious objection in medical sphere can potentially have the same effect. Even though the duty to remain pregnant would not be imposed by law, it can be argued that

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<sup>208</sup> Constitution of the Slovak Republic, Article 40.

<sup>209</sup> Zákon Slovenskej národnej rady o umelom prerušení tehotenstva č. 73/1986 Z. z. (Act No. 73/1986 Coll.)

<sup>210</sup> Constitution of the Slovak Republic, Article 18 (1).

<sup>211</sup> Dickens, 2001, p. 293.

<sup>212</sup> Ibidem.

there is still breach of article 18 (1) of the Constitution caused by negligence on part of the state to fulfil its obligation of ensuring the availability of all legal services.

Furthermore, insufficient limitation of exercise of conscientious objection violates the condition of availability of health care provision set in the Charter of the rights of a patient in the Slovak Republic.<sup>213</sup> In fact, availability is considered one of the main requirements that constitute core content of economic, social and cultural rights. The legality of abortion under Slovak law makes this procedure included in the provision of health care and therefore it has to be accessible within the whole territory of Slovak Republic.

There was a research conducted in 2009 which aimed at the assessment of the availability of abortion in Slovakia.<sup>214</sup> The research sample contained 43 hospitals that were chosen in a manner that would ensure that each region in Slovakia would be represented in the sample. Research data were gathered by phone inquiry whether a hospital performs abortions and what the costs connected with the procedure are. An unexpected obstacle was the unwillingness of the hospital's staff to provide any kind of information, but such a situation occurred in only 2,33% of the research sample. The results of the research showed that geographical availability of abortion in Slovakia is quite good. It was found that 72% of hospitals from the research sample performed abortion. Abortion was not performed at six hospitals out of which two performed medically indicated abortion that was necessary for protection of woman's health. In cases when a hospital did not perform abortion there were other hospitals in reasonable distance at which abortions were performed. However, the research showed the need to establish the duty to refer a patient to another health care service, as not all hospitals referred patients demanding abortion to another health care facility.<sup>215</sup> Taking into consideration that abortion is legal only if it is performed up to the twelfth week of pregnancy (73/1986 Coll.), amount of time needed for a woman to find out that she is pregnant and the time-consuming task of searching for a health care facility that does

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<sup>213</sup> Charta práv pacienta v SR, 2004, Section General Rights of Patients, Subsection 3.

<sup>214</sup> Nemethová, 2009 (unpublished).

<sup>215</sup> Kopčíková, 2009 (unpublished).

not object to abortion, duty to refer is inevitable for ensuring the guarantee of the rights of patients.

Although this research was conducted only three years ago, there are reasonable doubts that the findings confirming availability of abortion as stated in Act 73/1986 Coll. are no longer valid. After the parliamentary election 2010, the Ministry of Health Care was assigned to Christian Democrats to run. As a result there are at least two examples of the Ministry's efforts to shape provision of reproductive services that would be more in accordance with the Roman Catholic faith and morals.

In January 2011, there was news released that starting on 1 February 2011 not one of the teaching hospitals of Comenius University would perform abortion.<sup>216</sup> The only announced exceptions were cases when health conditions (including age) of a woman made abortion necessary.<sup>217</sup> According to doctors employed at these hospitals, the ban on the performance of abortions was caused by some "*mysterious unofficial decision*" that they had to follow regardless their personal conviction.<sup>218</sup> In addition, it was made without taking into consideration that not each doctor in these hospitals exercises the objection of conscience.<sup>219</sup> The spokeswoman of the University Hospital in Bratislava said that it was only the harmonisation of hospital's policy because hospital Bratislava – Ružinov has not performed abortions for seven years.<sup>220</sup> She also expressed the opinion that nowadays most of patients choose private facilities for performance of this procedure.<sup>221</sup> Neither the Minister of Health Care himself nor Christian Democrats commented on this situation but the rest of the coalition parties heavily criticized this decision.<sup>222</sup> At the end of the month this decision was abandoned.<sup>223</sup> The easy manner in which this decision was annulled suggested that this decision was made under the pressure from either the management of the hospital or

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<sup>216</sup> SME, 2011 (a).

<sup>217</sup> Pravda, 2011 (a).

<sup>218</sup> Ibidem.

<sup>219</sup> SME, 2011 (a).

<sup>220</sup> Ibidem.

<sup>221</sup> Ibidem.

<sup>222</sup> Ibidem.

<sup>223</sup> SME, 2011 (b).

from the Ministry.<sup>224</sup> As a matter of fact there was one article that directly named the Minister of Health Care as the author of this decision.<sup>225</sup> Naturally, Minister Uhliarik denied that he was behind this decision of the teaching hospital.<sup>226</sup> Nevertheless, this case proves findings of the European Centre for Law and Justice that in its report from July 2010 Slovakia and Poland were named as examples of the abuse of the right to the conscientious objection by the top management of hospitals.<sup>227</sup>

Another example is not directly connected to the conscientious objection but it is a valuable example of ambitions of Roman Catholic believers in Slovakia to force their worldview on the rest of population regardless the impact on rights of others including the reproductive rights as part of the right to the protection of health. Minister of Health Care Uhliarik intended to forbid the repayment of contraception from public health insurance.<sup>228</sup> However, nowadays health insurance institutions repay contraception that is prescribed to treat health conditions.<sup>229</sup> It means that when contraception is repaid by health insurance the birth-control effect is only the side-effect of treatment. Therefore, this initiative of Minister Uhliarik would have resulted in discrimination based on gender because such rule would affect women only as it does not take into consideration specificities of women's needs in terms of health care.

The most recent case of lobby for extensive right to exercise objection of conscience is from May 2012. There has been an on-line petition-like initiative of mysterious origins that supports the right of pharmacists to exercise objection of conscience.<sup>230</sup> According to the introduction to the initiative pharmacists should be entitled to exercise this right in connection with selling products aiming at birth-control because they “*destroy human fertility and human life from its conception.*”<sup>231</sup> The initiative is supported by Bishop Sečka who claims that pharmacists are forced to sell

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<sup>224</sup> SME, 2011 (b).

<sup>225</sup> Pravda, 2011 (b)

<sup>226</sup> Pravda, 2011 (d).

<sup>227</sup> European Centre for Law and Justice, 2010, p. 11.

<sup>228</sup> Pravda, 2011 (c).

<sup>229</sup> Ibidem.

<sup>230</sup> Pravda, 2012.

<sup>231</sup> Ibidem.

these products under the threat of being dismissed.<sup>232</sup> However, the article stated that pharmacists themselves claim no problems with respecting their convictions by employers. If they do not want to sell products of birth-control, they do not do it. It is very common that pharmacies that are located in the premises of Catholic hospitals or those whose owner does not agree with using of these products do not sell them.<sup>233</sup> Therefore, this initiative is considered pointless by pharmacists themselves.<sup>234</sup> It would be difficult to try to assess to what extent is favourable situation of pharmacists' exercise of conscientious objection result of the Basic Treaty with the Holy See or discussion about the Draft Treaty. It is undoubtedly true that even the Revised Draft Treaty could serve as a basis for exercise of conscientious objection by pharmacists as Article 4 (1) contain reference to acts connected to contraception being eligible for exercise of objection of conscience.<sup>235</sup> However, contraceptive pills are used also for treatment of some medical conditions. In addition, birth-control products are indivisible part of exercise of reproductive rights and therefore they are inevitable also for protection of reproductive health. It has been claimed that so far, the number of pharmacies whose owner of staff does not exercise conscientious objection is sufficiently high to prevent situation of unavailability of birth-control products.<sup>236</sup> However, there are no safeguards established by the state that would conclusively prevent such situation.

As noted above the right to freedom of religion, conscience and thought is included in the fundamental rights and freedoms acknowledged by the Constitution of the Slovak Republic. As a fundamental right, the freedom of religion, conscience and thought should be protected, which includes also the rights to exercise the objection of conscience. However, as it was already mentioned Article 3 (1) of the Revised Draft Treaty determines Roman Catholic teaching on faith and morals as basis for exercise of

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<sup>232</sup> Pravda, 2012.

<sup>233</sup> Ibidem.

<sup>234</sup> Ibidem.

<sup>235</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 4 (1).

<sup>236</sup> Pravda, 2012.

conscientious objection.<sup>237</sup> In order to maintain equality of religions in the Slovak Republic, Agreement between the Slovak Republic and Registered Churches and Religious Societies on the right to exercise objection of conscience which contains the same provisions as the Revised Draft Treaty was prepared. However, the Revised Draft Treaty as an international human rights treaty has different legal status than the Agreement with Registered Churches and Religious Societies which is an internal legal act. Therefore, while individuals that claim to exercise objection of conscience based on Roman Catholic teaching on faith and morals can argue that any other limitation of this right than protection of human life and health is contrary to international human right treaty other believers cannot make such argument. It is possible that a situation of different level of protection for different religious groups would emerge. It would violate the principle of equality and non-discrimination embedded in the Slovak Constitution in Article 12 (1) and (2):

*“(1) People are free and equal in dignity and their rights. Basic rights and liberties are inviolable, inalienable, secured by law, and unchallengeable.*

*(2) Basic rights and liberties on the territory of the Slovak Republic are guaranteed to everyone regardless of sex, race, colour of skin, language, creed and religion, political or other beliefs, national or social origin, affiliation to a nation or ethnic group, property, descent, or another status. No one must be harmed, preferred, or discriminated against on these grounds.”<sup>238</sup>*

In addition, non-believers or believers belonging to churches or religious societies which are not registered in the Slovak Republic do not have any other legal basis to refer to except of the legal act that should be adopted according to Article 5 of the Revised Draft Treaty and the Agreement with Registered Churches and Religious Societies providing that this act would grant and regulate general objection of conscience without referring to any particular religion/s.

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<sup>237</sup> The Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 3(1).

<sup>238</sup> Constitution of the Slovak Republic, Article 12 (1) and (2).

Moreover, as it was noted above there have been cases when individuals belonging to the Roman Catholic Church claimed the right to exercise unlimited objection of conscience based in Article 7 of the Basic Treaty between the Slovak Republic and the Holy See.<sup>239</sup> Therefore, there is already situation that benefits Roman Catholic believers over believers of other faiths or non-believers.

Another issue is the problem of ascribing the right to exercise the conscientious objection to institutions, more specifically hospitals. According to Article 4 (2) of the Revised Draft Treaty the Slovak Republic cannot impose obligation of performing abortions, artificial or assisted fertilisations, experiments with or handling of human organs, human embryos or human sex cells, euthanasia, cloning, sterilisations, acts connected with contraception on hospitals established by the Catholic Church or organisations associated with it nor identify the performance of these procedures as condition for establishment of a hospital.<sup>240</sup> Therefore, some hospitals are in fact entitled to exercise the objection of conscience. However “*the Constitution of the Slovak republic does not contain general provisions on adequate guarantee of fundamental rights and freedoms to legal persons. The Constitution explicitly regulates some of the fundamental rights and freedoms also or only to legal persons in articles 20 subsection 2, article 24 subsection 3 and article 29 subsection 4.*”<sup>241</sup> It follows from the judgement of the Constitutional Court of the Slovak Republic that legal persons should not be awarded fundamental human rights. The only exception from the rule is the right to property.<sup>242</sup> They also should not be granted the rights of minorities or economic, social and cultural rights. On the other hand, the Constitutional Court of the Slovak Republic stated that legal persons should be granted political rights of the third section of chapter two of the Constitution as well as the right to legal protection. Protection against discrimination is also applied to legal persons but only if it concerns those fundamental rights and freedoms that are granted to them.<sup>243</sup> Therefore it is clear that granting the

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<sup>239</sup> Shadow Report to the Committee on the Elimination of Discrimination against Women for the Slovak Republic, 2008, p. 32.

<sup>240</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 4 (2).

<sup>241</sup> Drgonec, 2007, p. 107.

<sup>242</sup> Ibidem, p. 109.

<sup>243</sup> Ibidem.

exercise of the conscientious objection that constitutes one element of protection of freedom of religion, conscience and thought to Catholic hospitals is in conflict with the Slovak constitution.

The Constitutional Court of the Slovak Republic stated in one of its opinions that *“from the Constitution or any legal act it is impossible to derive a right that violates another right, freedom or obligation imposed by the Constitution.”*<sup>244</sup> Yet, regulation of exercise of conscientious objection proposed in the Revised Draft Treaty seems to disregard the right to protection of health and possibly other rights as well.

### 5.3 Constitutionality and the Rule of Law

Constitutionality means strict observance of the Constitution which constitutes supreme law in the state and conformity of legal acts and other legal norms as well as the exercise of power and rights and duties with the constitution.<sup>245</sup> It is the obligation of the state to adopt laws that are in conformity with the Constitution.<sup>246</sup>

The principle of constitutionality would be breached by the adoption of the Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience. As it was discussed above, the adoption would violate several articles of the Constitution of the Slovak Republic. The following section briefly summarises issues of the Revised Draft Treaty in connection with the Constitution of the Slovak Republic as they were sufficiently explained in previous subchapters.

Firstly, adoption of the Revised Draft Treaty as international human rights treaty would cause its supremacy over domestic legislation including the act that would regulate exercise of conscientious objection in more detail. Therefore, additional regulation of exercise of this right by the legal act that would not be mentioned in the Revised Draft Treaty might be dismissed as inapplicable because of the supreme position of the Revised Draft Treaty.

Secondly, although the Revised Draft Treaty acknowledges the right to exercise objection of conscience of every individual, the basis for the exercise is Catholic

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<sup>244</sup> Drgonec, 2007, page 105.

<sup>245</sup> Ottová, 2006, page 72.

<sup>246</sup> Drgonec, 2007, page 61

teaching on faith and morals. This would give the Catholic religion special position within Slovak legal system. To prevent this situation, the Agreement between the Slovak Republic and Registered Churches and Religious Societies on the right to exercise objection of conscience has been prepared that has the same wording as the Revised Draft Treaty. However, there is a major difference between these two documents. While the Revised Draft Treaty is characterised as an international human rights treaty, the Agreement with Registered Churches and Religious Societies is an internal legal act. Therefore they do not have the same legal force that can result in different scope of exercise of conscientious objection as suggested above. In addition, believers belonging to churches and religious societies that are not registered in Slovakia as well as non-believers would have to claim the right to exercise of conscientious objection on the basis of teaching on faith and morals of one of the registered churches or religious societies unless the legal act would grant general objection of conscience. Therefore, religious freedom and principle of equality and non-discrimination might be breached.

Thirdly, the right to protection of health is embedded in Slovak Constitution. However, reproductive health might be endangered by adoption of the Revised Draft Treaty because the limitation of exercise of conscientious objection it mentions is not sufficient to ensure availability of reproductive health procedures that are legal under Slovak law. The Revised Draft Treaty states that manner and limitation of exercise of conscientious objection should be determined by legal act but after adoption and ratification it would have the power to overrule any domestic legal act.

In addition, granting right to exercise objection of conscience to hospitals as legal persons is not compatible with the Constitution. Although according to opinion of the Constitutional Court of the Slovak Republic legal persons are entitled to exercise certain human rights, freedom of religion is not one of them.

Furthermore, it is stated to Article 1 of the Constitution that

*“The Slovak Republic is a sovereign, democratic, and law-governed state. It is not linked to any ideology or religious belief.”*<sup>247</sup>

Therefore, supreme position of Roman Catholic religion that would result from adoption of the Revised Draft Treaty would breach the Slovak Constitution. In addition, joint committee that is proposed in Article 7 (2) of the Revised Draft Treaty despite its advisory status has the potential of introducing canonical law as source of law in the Slovak Republic. However, according to decision of the Slovak Constitutional Court canonical law is not a source of law.<sup>248</sup>

#### 5.4 Obligation of the Slovak Republic Established by Ratification of International Human Rights Protection Treaties

As it was shown in the first chapter, there are many international treaties that aim at establishing the international system of human rights protection. Usually they are connected to a particular international organization, such as the United Nations or the Council of Europe, which established a mechanism for the control of the observance of the treaty provisions and penalization of their violations. Examples of such mechanisms are committees that observe the state of human rights protection in an individual state, or courts at which citizens of the member states of these organizations can lodge a complaint for the violation of their rights by state. The Slovak Republic is a member of those organizations and a signatory country of many of treaties. By signing these treaties Slovakia accepted a set of obligations that are imposed by them and that aim at establishing a common level of the protection of human rights in the signatory states. This subchapter discusses compatibility of regulation of exercise of conscientious objection as proposed in the Revised Draft Treaty with the obligations that Slovakia accepted by ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

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<sup>247</sup> Constitution of the Slovak Republic, Article 1.

<sup>248</sup> Lajčáková, 2005, 15.

Despite the system of international protection of human rights, states still remain the primary actors that enable or hinder the exercise of rights by an individual.<sup>249</sup> They are the key actors that commit themselves to the idea of human rights by signing an international treaty on their protection and that accept the obligations by the act which they have to fulfil. Most of the human rights treaties charge their signatories with the duty to respect and duty to protect the declared rights.<sup>250</sup> The duty to respect means that the state would not interfere with the rights of an individual and the duty to protect ensures protection from interference with the rights of an individual by non-state actors, such as other individuals. The fulfilment of these obligations can be realized through the law of an individual state.<sup>251</sup> Therefore it can be said that the observance or violation of human rights depends on the quality of legal acts that state adopts and implements.

The Constitution of the Slovak Republic expresses the commitment to fulfil international obligations of the state in the following way:

*“The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations.”*<sup>252</sup>

These obligations can be in a form of an international treaty, international custom or some other source of international law.<sup>253</sup>

The question of position of international treaties signed by the state in the Slovak legal system is addressed by Article 7 (2) and (5) of the Constitution.<sup>254</sup> This article establishes the precedence of certain types of international treaties over the law of the states.<sup>255</sup> International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary and international treaties which directly confer the rights or impose duties on natural persons or legal persons, as well as legally binding acts of the European Communities and of the European Union

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<sup>249</sup> Steiner, 2003, p. 765.

<sup>250</sup> Ibidem, p. 772.

<sup>251</sup> Ibidem.

<sup>252</sup> Constitution of the Slovak Republic, Article 1 (2).

<sup>253</sup> Drgonec, 2007, page 93.

<sup>254</sup> Constitution of the Slovak Republic, Article 7 (2) and (5).

<sup>255</sup> Ibidem.

have precedence over Slovak law.<sup>256</sup> The condition for having precedence over state law is the ratification and promulgation of the international treaty in the way laid down by a law.<sup>257</sup>

However, there are international human rights treaties to which precedence over laws of the Slovak Republic is not acknowledged in the extent of Article 7 (5).<sup>258</sup> The precedence over laws of the state of these treaties is regulated by Article 154c:

*“(1) International treaties on human rights and fundamental freedoms which the Slovak Republic has ratified and were promulgated in the manner laid down by a law before taking effect of this constitutional act, shall be a part of its legal order and shall have precedence over laws if they provide a greater scope of constitutional rights and freedoms.*

*(2) Other international treaties which the Slovak Republic has ratified and were promulgated in the manner laid down by a law before taking effect of this constitutional act, shall be a part of its legal order, if so provided by a law.”*<sup>259</sup>

“Before taking effect of this constitutional act” refers to the period before the effectiveness of the constitutional act No. 90/2001 Coll. starting 1 January 2002.<sup>260</sup> Treaties to which Article 154c is applied are e. g. the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The precedence of legally binding acts of the EU and the European Communities as well as international treaties either according to Article 7 (2) and (5) or Article 154c is important for the exercise of fundamental rights in Slovakia.<sup>261</sup> According to Article 51 (1) of the Slovak Constitution fundamental rights are exercised

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<sup>256</sup> Constitution of the Slovak Republic, Article 7 (2) and (5).

<sup>257</sup> Ibidem, Article 7 (5).

<sup>258</sup> Drgonec, 2007, page 41.

<sup>259</sup> Constitution of the Slovak Republic, Article 154c.

<sup>260</sup> Drgonec, 2007, page 41.

<sup>261</sup> Ibidem, p. 42.

as specified in laws of the state.<sup>262</sup> Therefore by acknowledging the precedence over laws for international human rights treaties can result in expanded scope of the right.<sup>263</sup>

As it was written earlier, signing an international human rights treaty creates obligations that a signatory state has to fulfil. If the state does not exercise the reservation to part of the treaty, it accepts the obligation to act in accordance with the full text of that treaty.<sup>264</sup> It means that the state and all its authorities are obliged to act in accordance with the treaty.<sup>265</sup>

The importance of provisions of various international human rights treaties concerning freedom of religion, conscience and thought and principles that are connected to its protection have already been sufficiently discussed and explained (Chapter 2 above). Therefore these provisions are not discussed here again. However, that does not undermine their importance. Issue that has not been addressed previously are the provisions of international human rights treaties that might be considered the basis for the importance of availability of reproductive health procedures, such as in vitro fertilisation or abortion, if these are considered legal under the law of an individual state.

The International Covenant on Economic, Social and Cultural Rights addresses the right to protection of health in Article 12:

*“1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

*2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*

*(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*

*(b) The improvement of all aspects of environmental and industrial hygiene;*

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<sup>262</sup> Constitution of the Slovak Republic, Article 51 (1).

<sup>263</sup> Drgonec, 2007, p. 42.

<sup>264</sup> Ibidem, p. 75.

<sup>265</sup> Ibidem, p. 68.

*(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*

*(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”<sup>266</sup>*

A very broad and open interpretation of this article is necessary in order to connect it to the availability of reproductive health procedures that are considered controversial and to which the objection of conscience is exercised. Nevertheless, e. g. unwanted pregnancy can have negative effects on mental health especially if pregnancy is a consequence of violent crime. In a similar line of argument, if an underprivileged woman decides on sterilisation because there are no indications that her economic situation will be significantly improved in foreseeable future and she will not be able neither to support more children than she already has nor pay for the contraception to prevent pregnancy it would very likely have a positive impact on her mental health. It can be argued that living in a fear of getting pregnant when the woman does not want to or could not afford causes distress just as acting in conflict with one’s conscience.

It is true that economic, social and cultural rights do not have any common standard set that has to be kept by all countries. It is caused by different economic situation of individual states that influences the level of these rights in the country. However, this argument is not valid in this situation because e. g. abortion is a procedure that is paid by patient.<sup>267</sup> As such, the availability of this procedure does not impose additional financial burden on the state.

The Slovak Republic did not sign the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It became party to the Convention by succession on 28 May 1993.<sup>268</sup> That makes Article 154c applicable to this treaty. The most important article of this convention for advocating for reproductive rights is Article 12, which states:

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<sup>266</sup> International Covenant on Economic, Social and Cultural Rights, Article 12.

<sup>267</sup> Zákon Slovenskej národnej rady o umelom prerušení tehotenstva č. 73/1896 Z. z. (Act No. 73/1986 Coll.)

<sup>268</sup> The United Nations Treaty Collection, 2012.

*“1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.*

*2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”<sup>269</sup>*

Restrictions imposed on reproductive health care procedures have significantly bigger impact on women. It is caused by the specific role of a woman in human reproduction.<sup>270</sup> It results in a fact that most of the reproductive health procedures are sought by women. Therefore the negligence of the obligation to ensure availability of all legal procedures of reproductive health inevitably leads to discrimination of women. Committee in the Elimination of Discrimination against Women expressed this opinion in General Comment No. 24:

*“It is discriminatory for a State Party (to the Convention) to refuse to legally provide for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be ensured that women are referred to alternative health providers.”<sup>271</sup>*

Inadequacies in the regulation of the exercise of the conscientious objection have the potential to turn reproductive health procedures to which this right can be exercised into unavailable. Such state of affairs would result in the violation of obligations of the Slovak Republic which state accepted by the succession to the treaty.

## 5.5 Conclusion

Adoption of treaty on the right to exercise objection of conscience is obligation that the Slovak Republic accepted by signing and ratifying the Basic Treaty between the

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<sup>269</sup> Convention on the Elimination of All Forms of Discrimination against Women, Article 12.

<sup>270</sup> Lajčáková, 2005, 18.

<sup>271</sup> Committee on Elimination of Discrimination against Women, General Comment No. 24.

Slovak Republic and the Holy See. However, fulfilment of this obligation by adopting the Revised Draft Treaty would lead to breach of the Constitution of the Slovak Republic which states that the Slovak Republic is not linked to any ideology or religion. Moreover, it has the potential of violating the most basic principle of human rights – equality and non-discrimination – because it grants different level of protection on the basis of religious affiliation. In addition, protection of right to health is endangered because the Revised Draft Treaty does not contain appropriate limitation of exercise of conscientious objection. It is true that it states that manner and limitation of exercise should be regulated by legal act. However, international human rights treaties including the Revised Draft Treaty if adopted have supremacy over domestic legislation and therefore limitation imposed by the domestic legal act can be overruled by referring to supremacy of international human rights treaties.

If adopted, the Revised Draft Treaty would affect also the fulfilment of human right obligations set by international human rights instruments that Slovakia signed and ratified long before the Basic Treaty with the Holy See. Respect and protection of articles on freedom of religion, conscience and thought, right to health and non-discrimination and fulfilment of respective obligations are endangered in case of the Revised Draft Treaty entering into force in current version.

## 6. Conclusion

Freedom of religion, conscience and thought have been considered to be the basis of all other rights.<sup>272</sup> The fact that this right has become a normative constitutional principle in modern era and its incorporation in most of international human rights instruments prove importance of this freedom.<sup>273</sup> However, it has to be kept in mind that it is the freedom of religion not religion itself.<sup>274</sup>

Therefore, concordats – treaties between nation-states and the Holy See as representative of the Roman Catholic Church – might not be the most suitable means of protection of religious freedom. Despite the fact that the Church has embraced the idea of human rights it still maintains its own understanding of the concept that differs from the secular human rights.<sup>275</sup> Therefore, in the situation when concordat aims at recognition and protection of a particular human right, it can cause violation of other human rights obligations of the state. On top of that, it can lead to breach of constitution of the state. This argument was illustrated by analysis of the Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience.

The analysis revealed several issues. Firstly, this Treaty is intended to be an international human rights treaty.<sup>276</sup> As such it would gain primacy over domestic laws after its ratification.<sup>277</sup> The Treaty grants the exercise of conscientious objection on the basis of Catholic teaching of faith and morals and therefore it would give special protection to people that follow this system of belief and morals.<sup>278</sup> It has been argued that Catholic moral teaching is the most comprehensible one and therefore everyone can invoke conscientious objection that is based on Catholic moral system.<sup>279</sup> However, this argument does not seem to be in conformity with the definition of freedom of religion.

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<sup>272</sup> Wood, jr., 2004, p. 763.

<sup>273</sup> Ibidem, p. 762.

<sup>274</sup> Evans & Thomas, 2006, p. 700.

<sup>275</sup> Ibidem.

<sup>276</sup> Lajčáková, 2005, 3.

<sup>277</sup> Ibidem.

<sup>278</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 3 (1)

<sup>279</sup> Saunders, Kubik & Daniska, 2012.

In addition, the Treaty states that manner of exercise of conscientious objection and its limits shall be regulated by domestic legal act.<sup>280</sup> At the same time the Treaty acknowledges that exercise of conscientious objection can be limited only for protection of life and health.<sup>281</sup> Therefore, more extensive limitation imposed by domestic legislation can be claimed ungrounded and be overruled by the Treaty itself. Yet the very nature of conscientious objection that allows refusal to perform law-imposed duties requires that the limitation would take into consideration right of others as ability to avoid fulfilling one's obligation might result in disabling other to exercise their rights. Moreover, hospitals associated with the Catholic Church and its organisations would not have obligation to perform even therapeutic abortions or any other reproductive health procedures.<sup>282</sup> Therefore, the Treaty basically grants the exercise of conscientious objection for these institutions which is contrary to the Slovak Constitution.<sup>283</sup> Furthermore, the definition of "to act" is unacceptably broad.<sup>284</sup> It includes virtually any act performed in areas enumerated in Article 4 (1) of the Treaty. It is against generally accepted rule is that objection of conscience should be exercise only to direct participation on objectionable act and it significantly endangers provision of services in those areas.<sup>285</sup>

Examination of the Revised Draft Treaty in context of the Constitution of the Slovak Republic revealed incompatibility of these two documents. Adoption of the Revised Draft Treaty would lead to breach of the Constitution of the Slovak Republic which states in Article 1 that the Slovak Republic is not linked to any ideology or religion.<sup>286</sup> Moreover, it has the potential of violating equality and non-discrimination principle because it grants different level of protection on the basis of religious affiliation. The attempt to remedy this effect of adoption of the Revised Draft Treaty by concluding Agreement with Registered Churches and Religious Societies that contains

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<sup>280</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 5.

<sup>281</sup> *Ibidem*, Article 6 (2).

<sup>282</sup> *Ibidem*, Article 4 (2).

<sup>283</sup> Drgonec, 2007, p. 107.

<sup>284</sup> Revised Draft Treaty between the Slovak Republic and the Holy See on the right to exercise objection of conscience, Article 3 (3).

<sup>285</sup> Dickens and Cook, 2000, p. 74.

<sup>286</sup> Constitution of the Slovak Republic, Article 1 (1).

identical provisions as the Revised Draft Treaty is insufficient because of different position of these two documents within Slovak legal system. Moreover, religions that are not registered and non-believers would be still disadvantaged. In addition, protection of constitutional right to health is endangered because the Revised Draft Treaty does not contain appropriate limitation of exercise of conscientious objection. It is true that it states that manner and limitation of exercise should be regulated by legal act. However, international human rights treaties such as Revised Draft Treaty if adopted and ratified have supremacy over domestic legislation, and therefore limitation imposed by the domestic legal act can be overruled by referring to supremacy of the Revised Draft Treaty.<sup>287</sup>

If adopted, the Revised Draft Treaty would affect also the fulfilment of human right obligations set by international human rights instruments that Slovakia signed and ratified before the Basic Treaty with the Holy See. Respect and protection of articles on freedom of religion, conscience and thought, right to health and non-discrimination on the grounds of gender and religion as well as the fulfilment of respective obligations are endangered in case of the Revised Draft Treaty entering into force in current version.

Therefore, it can be argued that regulation of the exercise of conscientious objection as proposed in the Revised Draft Treaty is improper and incompatible with human rights obligations and the Constitution of the Slovak Republic.

However, generalisation of results of the analysis is not possible. The Revised Draft Treaty has some specific characteristics such as the status of international human rights that distinguish it from other concordats. Nevertheless, it is worth to give some thought to question whether concordats are not obsolete in world that recognises human rights.

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<sup>287</sup> Lajčáková, 2005, 3.

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