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Jose de Sousa e Brito

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Political Minorities and the Right to Tolerance: The Development of a Right to Conscientious Objection in Constitutional Law

*Honorable José de Sousa e Brito**

I. INTRODUCTION

As a general rule, political minorities should obey the general will, which is in principle the will of the majority. However, they should not whenever a new law, deemed to be the expression of the general will, is unjust because it offends human rights, which are more "fundamental" than the pretended rights created by such a law. There is then a conflict between the democratic principle and the principle of the rule of law. But as these are both principles of democracy, as a system of principles, the conflict is resolved by considering the law invalid, subject to judicial review, exposed to civil disobedience or to a right of resistance, or even capable of justifying revolution. The law in such conflicting cases is not the true expression of the general will.

One hypothesis promoted by United States Supreme Court Justice Stone states that while a law is a just, untouchable expression of the general will, there are cases where the minorities should not "surrender . . . to the popular will."[1] It is the hypothesis of conscientious objection. Minorities in a modern constitutional state thus have a recognized right to tolerance. In earlier times they simply had the last resort right of political dissenters: the right to emigrate,[2] which, in the context of the United States, could be easily translated into the right to travel from state to state.

The right to conscientious objection is indeed the right to refuse a legal duty in the name of individual conscience; the

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* Justice, Constitutional Court of Portugal.

1. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 608 (1940) (Stone, J., dissenting), *overruled by* West Virginia State Bd. Of Educ. v. Barnette, 319 U.S. 624 (1943).

2. *See* JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT (Donald A. Cress ed. & trans., Hackett Publ'g. Co. 1983) (1762).

conflict is resolved when the principle of the inviolability of conscience prevails over the principle of generality of law. It is true that the conflict that exists, *prima facie*, is formally removed since the objection is generally recognized in the Constitution and is regulated in its exercise by general laws. But if the principle of generality of law is formally protected, it nevertheless remains true that the legal exception often arises for reasons which are not included in those that were the basis of the constitutional and legal deliberations that create the legal duty, but which instead directly and entirely oppose them. In other words, it is not, for example, because the reasons for the duty to military service do not apply to the conscientious objectors that this duty is removed; it is because the objectors are allowed to make their reasons prevail over those of the law—not because the law adopts them, but because the law tolerates them out of respect for freedom of conscience. The conscientious objection represents the transformation of the principle of tolerance, previous to the constitutional state in a human right.

As might be expected, the general right to conscientious objection is a very sensitive matter that has not yet gained general recognition. In this paper I show some of the problems of its definition in contemporary constitutional law. It will be an essay both on comparative constitutional law and on public reason. Public reason, I submit in Part II, is the proper method of comparative constitutional law. Part III discusses the general right to conscientious objection to military service. Part IV addresses limits to the right of conscientious objection. Part V explores the possibility of a right to conscientious objection to substitute duty.

II. THE METHOD OF COMPARATIVE CONSTITUTIONAL LAW

A. *The Method of Comparative Law*

The possibility of comparative constitutional law depends on the availability of a *tertium comparationis*; i.e., in a simple case of two different laws to compare, we need a third element common to both which reflects all the aspects of each law that will be compared. Such a third element allows us to compare two samples of the same kind of thing, where before we had things of different kinds which were altogether incomparable. Each feature of the kind is a possible point or measure of comparison. The more features the third element has, the richer the compari-

son. It is the framework of comparison. The ideal framework should reflect all aspects of the diverse laws to be compared.

One possible framework of comparison is formed by the fundamental legal conceptions of Wesley Newcomb Hohfeld.[3] According to Hohfeld, the legal positions that result from the application of the law are related to each other in pairs of correlatives. For example, if A has a right, B has a correlative duty. He speaks, therefore, of jural relations. A cannot have the correlative duty—for him right and duty are not correlatives but contraries—but can owe another duty to B—which is eventually an equal duty, such as the duty not to kill B. It will thus be seen that the jural relations entail all possible positions of A. These positions are logically related in the following two opposite squares:

Right Liberty[4] Power Immunity	Duty No-right Liability Disability

Let us say that the positions of the first square are the results of the application of rules of duty, and the positions of the second square result from the application of rules of power.

Let us assume that they map all possible ways in which social conduct may be regulated by law. If so, they reflect, indeed, all aspects of law, but only insofar as law intends to influence conduct. An essential function of the law is to rule social conduct, but it is not the only one. For that reason, Hohfeld's jural relations allow for a conceptual analysis of the laws to be compared and allows for a common language of translation and of possible comparison. But the jural relations are reductive. Hohfeld's reductionism considers only one, however essential, function of the law and is therefore unable to compare everything the law is meant to express.

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3. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 35 (Walter Wheeler Cook ed., Greenwood Press, Inc. 1978) (1919). For a logical analysis of Hohfeld's theory, see LARS LINDAHL, POSITION AND CHANGE (1977).

4. "Liberty" is used instead of "privilege," which is less suited to constitutional law usage.

B. *Public Reason as a Comparative Method*

Even if the best way to express the results of the application of the legal rules is to use Hohfeld's terminology, the law cannot be understood if you do not consider how the rules are obtained. The rationale underlying the creation of constitutional law is no less important than the law itself, since most of the law is not expressed in a formal way. The constitutional laws are implicit in the sources and are obtained pursuant to a rationale based upon premises or conclusions of constitutional reasoning.

The ideal framework for comparison in constitutional law is public reason. Public reason is ethical reason with legal constraints, and, in particular, constraints imposed by the sources of law, the legislative procedure, and the judicial process. But these legal constraints must be ethically justified or they are objectionable; reasoning based merely upon public reason is disapproved by ethics. In this way, public reason encompasses the differences between the various constitutional laws, as the reasoning developing them has in each case some different premises. But as such premises are at some point ethically validated or invalidated, the conclusions based on them are for better or worse accounted for by public reason.

Let us now consider how public reason relates to constitutional law. The reasoned development of constitutional law is done in the first place by constitutional jurisprudence. Regarding the United States Supreme Court, John Rawls writes:

> public reason is the sole reason the court exercises . . . .
>
> To say that the court is the exemplar of public reason also means that it is the task of the justices to try to develop and express in their reasoned opinions the best interpretation of the constitution they can, using their knowledge of what the constitution and constitutional precedents require. Here the best interpretation is the one that best fits the relevant body of those constitutional materials, and justifies it in terms of the public conception of justice or a reasonable variant thereof.[5]

But constitutional jurisprudence cannot be the model of public reason for the simple reason that constitutional jurisprudence is not always what it ought to be. The existence of dissenting opin-

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5. JOHN RAWLS, POLITICAL LIBERALISM 235-36 (1993).

ions proves this, since dissenting opinions intend to show that the opinion of the court is contrary to public reason. Rawls himself agrees with this. He asks us not to think of the Supreme Court as an actual constitutional court but "as part of a constitutional regime ideally conceived."[6] However, the jurisprudence of the constitutional courts is still an excellent field for the study of the relation between public reason and law because an essential part of such jurisprudence consists of the evaluation of the positive law from the point of view of conformity with public reason. By the same token, public reason should serve as a framework for comparison of different constitutional laws.

III. TOWARD A GENERAL RIGHT TO CONSCIENTIOUS OBJECTION

A. *At the Level of the Constitutional Sources*

A general right to conscientious objection was first recognized in the constitution of a sovereign state in the Portuguese Constitution when it was revised in 1982.[7] It states, "The right to be a conscientious objector is gnaranteed by the law."[8] I know of only one other similar article, found in the Cape Verde Islands Constitution, which has the same wording and was clearly influenced by the Portuguese model.[9]

Previously, only the right to conscientious objection to the military service was constitutionally recognized. The 1949 *Grundgesetz* of the Federal Republic of Germany states, "No one may be forced against his conscience into military service involving armed combat. Details shall be the subject of a federal law."[10] The Austrian constitution followed,[11] along with the constitutions of Portugal of 1976[12] and of Spain of 1978.[13] The Dutch constitution of 1983 simply states "that there is a statute that formulates on what conditions exemption of military service will be granted" and so avoids to state clearly a constitutional right.[14]

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6. *Id.* at 254 n.43.
7. PORT. CONST. art. 41, § 6.
8. *Id.*
9. *See* CAPE VERDE CONST. art. 48, § 8.
10. GRUNDGESETZ [Constitution] [GG] art. IV, § 3 (F.R.G.).
11. *See* AUS. CONST. art. 9a, § 3.
12. *See* PORT. CONST. of 1976, art. 41, § 5.
13. *See* SPAIN CONST. art. 30, § 2.
14. NETH. CONST. of 1983, art. 99; *see also* Ben. P. Vermeulen, *Conscientious Objection in Dutch Law*, *in* CONSCIENTIOUS OBJECTION IN THE EC COUNTRIES: PROCEEDINGS OF THE MEETING, BRUSSELS-LEUVEN, DECEMBER 7-8, 1990, at 273 (1992).

In the wave of new constitutions of the former communist countries, the constitutional right to conscientious objection to military service was recognized in Croatia,[15] Slovenia,[16] Estonia,[17] Slovakia,[18] the Czech Republic,[19] and Russia.[20] The constitution of Malta of 1974 recognizes the same right if conscription is introduced.[21] Outside Europe, we find the same right at least in the constitutions of Brazil, Uruguay, Guyana, Suriname and Zambia.[22]

Important antecedents to the right of conscientious objection are found in 18th century United States constitutional history. First, the Constitution of Pennsylvania of 1776 establishes the right to conscientious objection to military service: "[N]or can any man who is conscientiously scrupulous of bearing arms be justly compelled thereto if he will pay such equivalent; nor are the people bound by any laws but such as they have in like manner assented to, for their common good."[23] Later, the identical terms appear in the Constitution of Vermont of 1777[24] and, only as to military service, it appears in the constitutions of Delaware of 1776[25] and New Hampshire of 1784.[26]

The constitutional history of the right to conscientious objection is intimately interweaved with that of liberty of conscience and its relation to religious liberty. The beginnings are again to be found in the United States. Already in the Rhode Island Charter granted in 1663 by Charles II, the liberty of conscience was regarded as the fundamental religious liberty,[27] and we

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15. *See* CROAT. CONST. art. 47.

16. *See* SLOVN. CONST. art. 123.

17. *See* EST. CONST. art. 124.

18. *See* SLOVK. CONST. art. 25, §.2.

19. *See* CZECH REP. CONST. art. 15, § 3.

20. *See* RUSS. CONST. of 1993, art. 28.

21. *See* MALTA CONST. art. 36, § 2c.

22. *See* U.N. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, CONSCIENTIOUS OBJECTION TO MILITARY SERVICE, 23, U.N. Doc. E/CN.4/Sub.2/1983/30/Rev.1, U.N. Sales No. E.85.XIV.1 (1985) (summarizing the official answers).

23. PA. CONST. of 1776, art. 8.

24. *See* VT. CONST. of 1777, art. 9.

25. *See* DEL. CONST. § 10.

26. *See* N.H. CONST. art. 13; *see also* SOURCES OF OUR LIBERTIES 330, 339, 365, 393 (Richard L. Perry & John C. Cooper eds., 1972).

27. *See* SOURCES OF OUR LIBERTIES, *supra* note 26, at 170 ("All and everye person and persons may, from tyme to tyme, and all tymes hereafter, freelye and fullye hav and enjoye his and theire owne judgments and consciences, in matters of religious concernments.").

have seen that the Pennsylvania Constitution does not give any separate attention to religious liberty, which is supposed to be sufficiently based in the liberty of conscience.

The evolution of the right to conscientious objection in Europe takes three successive steps. The first step is the separation of the liberty of conscience from religious liberty. Liberty of conscience and religion are guaranteed separately in the Swiss Constitution of 1874,[28] and in the German Constitution of 1849, which was approved in Paulskirche, but was never in force.[29] The German Constitution of Weimar of 1919[30] repeats the formula of the Paulskirche; and among others, the Portuguese constitution of 1911 repeats the Swiss formula.[31]

The second step is the one from the inner freedom of conscience to outer freedom, and even public expression of it. A corresponding right, restricted to the free exercise of religion and limited by "the Basic Law,"[32] or the "public order and morality,"[33] was already recognized in the previously mentioned constitutions. But even broader than that is the "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" recognized in the Universal Declaration of Human Rights of 1948,[34] followed by the European Convention of Human Rights of 1950[35] and by the International Covenant on Civil and Political Rights of 1966.[36] How much broader is subject to debate, but it is impossible to describe the freedom, let alone take a position on it, without leaving the level of the sources.[37]

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28. *See* SWITZ. CONST. art. 49 ("la liberté de conscience et de croyance est inviolable").

29. *See* GRUNDGESETZ of 1849, §144.

30. *See* GRUNDGESETZ OF WEIMAR of 1919, art. 144.

31. *See* PORT. CONST. of 1911, art. 3, § 4.

32. *See* GRUNDGESETZ OF WEIMAR of 1919, art. 144.

33. *See* SWITZ. CONST. art. 50, §2.

34. U.N. GAOR, UNIVERSAL DECLARATION OF HUMAN RIGHTS OF 1948, art. 18, §1, U.N. Res. 217 A (III) [hereinafter UNIVERSAL DECLARATION].

35. *See* COUNCIL OF EUROPE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, art. 9, §1, ETS No. 5 (1950).

36. *See* THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS OF 1966, art. 18, §1, 999 U.N.T.S. 171.

37. The European Commission said that conscientious objections fall into the realm of article 9 of the European Convention. *See* 11-10-1984 Eur. Comm'n H.R. Dec. & Rep. 203 (1985). They also recognized a *lex specialis* in article 4, § 3(b) about conscientious objection to military service, so that "article 9, as qualified by article 4(3)(b) of the Convention does not impose on a state the obligation to recognize

The third step is the freedom to act in the general practice of life without violating the conscience, which implies the right to conscientious objection whenever there is a contrary legal duty. The great leap forward which the German Fundamental Law and, in a more general form, the Portuguese Constitution takes here, besides the constitutional antecedents and the international declarations of human rights, is to recognize the right to external manifestation of freedom of conscience, outside of religious or similar practice, in life's general practice. Such a step forward reveals itself in the recognition of the conscientious objection, which becomes the true touchstone of the constitutional interpretation of freedom of conscience.

The priority of the recognition is explained by the historical circumstances of both Germany and Portugal. It was not only the recent denial of freedom of conscience by dictatorships that made an understanding of freedom easier, it was the understanding that the individual conscience is the main ethical support of a democratic state of the rule of law, which bases the power of its principles on the intimate conviction of those people that defend their values and give them reason, more than in the fear of its sanctions. The individual conscience is also the last and decisive barrier against dictatorships. In the Portuguese case, this reevaluation of the role of conscience is especially linked to a new understanding of the relations between the Catholic Church and the State, and consequently of religious freedom. Today, total secularization of the State, as well as its separation from the church, is assumed. At the same time, freedom of religion is founded on the freedom of conscience. This aspect was clearly underlined in the Constitutional Assembly of Portugal by the declaration of vote from the Popular Democratic Party, to whom the essential composition of the article is due:

> in it, is clearly synthesized and with no place for excuses a basic system of rules for the freedom of conscience, religion and cult in accordance with the respect due by the state, concerning this essential dimension of human being. Number one

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conscientious objectors." 2-4-1973 Eur. Comm'n H.R. Dec. & Rep. 161, CD 43 (1973). But at another time, the European Commission said that "when the actions of the individuals do not actually express the belief concerned they cannot be considered, as such, protected by article 9.1, even when they are motivated by it." 12-10-1978 Eur. Comm'n H.R. Dec. & Rep. 5, 19 (1980); *see also* Vermeulen, *supra* note 14, at 264-66, 274-76.

> of this article declares the inviolability of conscience, of religion and cult in each person individually, which obviously includes the right of everyone to the inviolability of conscience. The especial reference made to the problem of military service can be explained by well known historical reasons and by the fact that it is a perfect instance of the guarantee of the inviolability of conscience.[38]

In a personal declaration of vote, parliament member Pedro Roseta stated the difference as follows:

> [S]tarting at the approval of this article a definite turning point is settled: The Constitution will consecrate a new era of real reciprocal independence between the state and the churches, namely the Catholic Church . . . . [T]he recognition of the conscientious objection is a very important innovation and is another landmark in the construction of a society based on the human being . . . .[39]

The background of such positions is undoubtedly the profound revision of the official doctrine of the Catholic Church, which in 1832 condemned, in the *Mirari Vos*, the freedom of conscience,[40] and in 1864 condemned, in *Syllabus*, the freedom of religion as one of "the age errors."[41] In contrast, the Council Vatican II, in the 1965 declaration about religious freedom (*Dignitatis humanae*), declared:

> that in religious matter nobody against his own conscience will be forced to act or hindered from acting in private or in public, alone or associated with others in due limits. Further he declares that the right to religious freedom is actually based in the very dignity of the human being . . . .[42]

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38. Member of parliament Leite Castro, *Diário da Assembleia Constituinte* [*English translation*], Sept. 3, 1975, 1150/1.

39. *Id.* at 1151/2.

40. *See Encyclical of Pope Gregory XVI*, *in* MIRARI VOS ON LIBERALISM AND RELIGIOUS INDIFFERENTISM (1832).

41. HENRICUS DENZINGER & PETER HÜNERMANN, ENCHIRIDION SYMBOLORUM 2915 (Verlag Herder KG 37th ed. 1991).

42. *Id.* at 4290. Regarding the evolution of Catholic doctrine, *see* Cardinal Franz König, *Religions-bekenntnis und Gewissensfreiheit* [*Freedom of Religion, Confession, and Conscience*], *in* FOLTERVERBOT SOWIE RELIGIONS-UND GEWISSENSFREIHEIT IM RECHTSVERGLEICH [THE PROHIBITION OF TORTURE AND FREEDOM OF RELIGION AND OF CONSCIENCE COMPARATIVE ASPECTS] 15 (Franz Matscher ed., 1994) (1990).

B. At the Level of Rights and Powers and at the Level of Principles

By referring to the ideological background of the Portuguese Constitution, I had to pass from the level of constitutional sources to the level of principles. This was done, however, merely in a descriptive way. It is time to begin comparing, at the heart of the matter, the constitutional norms that establish the rights, duties, powers, and subjections of individuals, and the reasons for the acceptance of such norms. Now, at the level of norms, there are no such differences as we have found at the level of the sources of constitutional law. All European countries, for example, recognize the right to conscientious objection to military service at the level of ordinary legislation. This implies a greater similarity at the normative level than at the level of the constitutional sources, regardless of the force, constitutional or not, of the resulting norms. It may happen that the extension of the right is inverse to its force.

So, in the Netherlands, political objections against NATO and capitalism, selective objection against service in the Dutch army without rejecting participation in armed violence of certain liberation movements, and even conscientious objections based on the conviction that NATO is dominated by the Roman Church are recognized.[43] Such objections would probably be accepted in Danish law as falling under the concept of "a deep-rooted ethical conviction of a political nature,"[44] but it is not likely that any of these objections will be accepted in most other countries, including Portugal, which has the broadest constitutional consecration of conscientious objection. We have seen, however, that no general right to conscientious objection exists in the Dutch Constitution, and it is doubtful if there is a similar right with regard to military service.

By contrast, the Portuguese statute of 1992 on military and substitute civic service restricts the objectors to those who "for reasons of religion, moral, humanistic or philosophical nature are convinced that they are not legitimated to use any violent means of any nature against other people, even if only for ends

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43. *See* Vermeulen, *supra* note 14, at 276 n.42.

44. Erik Siesly, *Conscientious Objection in Danish Law*, *in* CONSCIENTIOUS OBJECTION IN EC COUNTRIES 161 (1992).

of collective national or personal defense."[45] Such a far-reaching restriction explains that, according to the Portuguese statute, causing an objector to lose his *status* if he commits a violent crime against another person, is unconstitutional.

I shall concentrate only on constitutional norms and principles. The statutes have to conform to constitutional law, and there is a clear tendency of a common doctrine of human rights among all constitutional and international human rights courts. There are also good philosophical reasons for such a tendency, which belong to the theory of public reason and exceed the scope of this paper. My purpose is just to show some aspects of the tendency to develop a common doctrine: first, the tendency towards a general right to conscientious objection;[46] second, the tendency to limit the right to cases where the moral integrity, the whole personality of the objector, is at stake;[47] and third, I will try to defend my personal opinion about a possible consequence of the general right upon the limits of the particular right to conscientious objection to military service.[48]

1. The jurisprudence of the United States Supreme Court

Before its final reception in the Portuguese constitution, the contours of a general right to conscientious objection were already worked out by the constitutional jurisprudence of the United States Supreme Court, the German Bundesverfassungsgericht, and the Italian Corte Costituzionale. Neither the American nor the Italian constitution explicitly recognized the right to conscientious objection or even the freedom of conscience. I shall limit myself to the jurisprudence of the Supreme Court, which is by far the most challenging.

James Madison's original proposal for what became the religion clauses of the First Amendment referred to the rights of conscience: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence infringed."[49] This clause on

45. Law 7/92, 12-5-19/92, art. 2 (1992).

46. *See infra* Part III.B.1.

47. *See infra* Part IV.

48. *See infra* Part V.

49. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 963 (Johnny H. Killian & Leland E. Beck eds., GPO 1987) (quoting 1

the rights of conscience was clearly intended to encompass the free exercise of religion. In the final version of the House of Representatives, a new clause on free exercise of religion was introduced: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[50] At first, the Senate weakened the Establishment Clause and eliminated the rights of conscience clause by adopting the following reading: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . . ."[51] It was in the conference committee of the two bodies, chaired by Madison, that the final text was adopted, restoring an enlarged Establishment Clause: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[52]

The work of the Supreme Court during a period of thirty years in this century between 1943 and 1972 reinstalled the rights of conscience in the Constitution. The first group of cases had to do with the direct manifestation of conviction; they were cases of refusal to express oneself against conviction. The objectors refused to salute the American flag, to swear to defend the country, or to swear by God. Lilian and William Gobitis, aged twelve and ten, were Jehovah's Witnesses who had been taught not to worship any graven image. They refused therefore to participate in daily flag salute ceremonies at their school in Pennsylvania. The flag salute was required as a condition for attendance in the public schools, and so they were expelled.

In *Minersville School District v. Gobitis*,[53] the Supreme Court voted 8-1 to sustain the flag salute requirement. Only Justice Stone dissented, claiming in a famous sentence that the majority's opinion was "no less than the surrender of the constitutional protection of the liberty of small minorities to the popular

ANNALS OF CONGRESS 434 (1789)).

50. *Id.* (quoting 1 ANNALS OF CONGRESS 729-31 (Joseph Gales ed. 1789)).

51. *Id.* (quoting 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153 (Bernard Schwartz ed. 1971)).

52. *Id.* at 963. This book provides a valuable overview of the history of the Establishment Clause text. Laws subsidizing religion are "respecting the establishment of religion" without establishing it directly and letting down the rights of conscience clause.

53. 310 U.S. 586 (1940) (Stone, J., dissenting), *overruled by* West Virginia State Bd. Of Educ. v. Barnette, 319 U.S. 624 (1943).

will."[54] Justice Stone concluded that the guarantees of the First and Fourteenth Amendments must "be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions."[55]

Three years later, *Gobitis* was overruled by *West Virginia State Board of Education v. Barnette*.[56] After the *Gobitis* decision, the West Virginia State Board of Education required all schools to make daily flag salutes, in which all teachers and pupils were required to participate. Several Jehovah's Witness families sued for an injunction to stop enforcement. By a 6-3 vote the Supreme Court reversed *Gobitis*. The opinion of the Court, given by Justice Jackson, was announced on Flag Day 1943. He wrote:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[57]

The Court took a very strong position in *Barnette*. It dismissed the utilitarian argument that would restrict the objection to cases when it is harmless to others or to the State.[58] And

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54. *Id.* at 606.
55. *Id.* at 604.
56. 319 U.S. 624 (1943).
57. *Id.* at 641-42.
58. These are the cases of objections against duties created by paternalistic laws, cases of objection to duties to avoid harm to others or to the State that can be substituted by other duties in alternative service or indemnity, and perhaps cases of public-interest laws concerned with the provision of common goods (taxation, anti-pollution laws, etc.) where the exemption of a single individual makes no difference to the envisaged good. *See* JOSEPH RAZ, THE AUTHORITY OF LAW 283-86 (1979). Raz is not a utilitarian but he admits that "the argument outlined agrees in principle with the utilitarian approach . . . ." *Id.* at 281.

it did not recognize any exception, without excluding such a possibility.

Another group of cases relates to the naturalization oath. Applicants had to swear to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic . . . ."[59] The naturalization service interpreted this to require willingness to bear arms in defense of the country. So it denied citizenship to two women pacifists and to a fifty-year-old Yale Divinity School professor, who said he would fight only in wars he believed to be morally justified. In a series of decisions between 1929 and 1931, the Court upheld the position of the naturalization service as reasonable.[60] But, in *Girouard v. United States*,[61] the Court reversed these holdings and stated that the oath did not expressly require persons seeking naturalization to swear to bear arms, ruling that this interpretation did not need to be read into the oath.[62] The Court concluded that Congress could not have intended to deny citizenship, in a country noted for its protection of religious beliefs, to persons whose religious beliefs prevented them from bearing arms.

Finally, in *Torcaso v. Watkins*,[63] the Court held that the provision of the Maryland Constitution which required a declaration of belief in the existence of God as part of an oath for public officers was unconstitutional. The Court, besides invoking the First and Fourteenth Amendments, noted that Article 6 of the United States Constitution provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[64] Speaking through Justice Black, the Court also noted that

> neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the

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59. United States v. Schwimmer, 279 U.S. 644, 646 (1929) (quoting 8 U.S.C. § 381 (1994)).

60. *See id.*; United States v. Bland, 283 U.S. 636 (1931); United States v. Macintosh, 283 U.S. 605 (1931).

61. 328 U.S. 61 (1946).

62. *See id.*

63. 367 U.S. 488 (1961).

64. *Id.* at 491 (quoting U.S. CONST. art. VI).

> existence of God as against those religions founded on different beliefs.[65]

And, a footnote explained, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[66]

By admitting a right to conscientious objection in the flag salute and oath cases, the Court remained in the field of belief. It had already extended in *Torcaso* the concept of belief to cover beliefs that are not religious in the traditional sense because they do not presuppose the existence of God. The most sweeping definition of belief before *Torcaso* was given by Justice Augustus Hand who equated conscience with religion, stating that it "may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."[67]

But the step from belief to action was only taken in the 1960s. For this the Court had to overcome an historical distinction on the basis of which the Court had upheld federal legislation against the Mormon practice of polygamy.[68] In *Braunfeld v. Brown,* Chief Justice Warren, writing the Court's opinion, generally assessed this doctrine and introduced important qualifications:

> [I]n *Reynolds v. United States,* this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the *duty* to practice polygamy. And, in *Prince v. Massachusetts,* . . . this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious *duty* to perform this work.
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65. *Id.* at 495.
66. *Id.* at 495 n.11.
67. United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).
68. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) (Although laws "cannot interfere with mere religious belief and opinions, they may with practices."). A similar situation arose in *Davis v. Beason,* 133 U.S. 333, 345 (1890) ("Crime is not the less odious because sanctioned by what any particular sect may designate as religion.").

> Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[69]

In conclusion, the Court upheld the validity of a Sunday closing law of Pennsylvania, challenged by an Orthodox Jew who observed the Jewish Sabbath, closing his clothing and furniture store on Saturday.[70] The Court observed that, although the law imposed an indirect burden by making certain religious practices more expensive, it advanced the secular purpose of providing citizens with a uniform day of rest.[71]

Two years later, the Court made the decisive step from belief to practice in *Sherbert v. Verner*.[72] Adell Sherbert was fired from her South Carolina textile mill job because, as a Seventh-Day Adventist, she refused to work on Saturdays.[73] On the ground that she refused available work, the state denied her unemployment compensation benefits.[74]

Overturning the state ruling by a 7-2 vote, the Court, speaking through Justice William J. Brennan, Jr., explained that the state's action forced Sherbert either to abandon her religious principles in order to work, or to maintain her religious precepts and forfeit unemployment compensation benefits.[75] Justice Brennan wrote, "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[76]

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69. 366 U.S. 599, 605, 607 (1961).
70. *See id.* at 609.
71. *See id.*
72. 374 U.S. 398 (1963).
73. *See id.* at 399.
74. *See id.* at 400-01.
75. *See id.* at 404.
76. *Id.*

"Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation," Brennan said.[77] Prevention of fraudulent claims, Brennan noted, was the only reason the state advanced for denying benefits to Sherbert, and to justify that denial, the state must show that it cannot prevent such fraud by means that are less restrictive of religious liberty.[78] In *Sherbert*, the Court introduced the so-called *Sherbert* test: governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.

If the extension from belief to practice dates from *Sherbert*, the *Sherbert* test could, however, be said to have been prepared by earlier decisions such as *Cantwell v. Connecticut*,[79] where the Court stated that "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[80] Additionally, in *Prince v. Massachussets*, the Court denied a religious exemption from child labor laws because of the state interest in protecting children.[81]

The jurisprudence of the Supreme Court after *Sherbert* can be conveniently divided into applications, and sometimes developments, until the 1990 decision *Employment Division, Department of Human Resources of Oregon v. Smith*,[82] and retrogressions afterwards. The first applications of the *Sherbert* test were indeed developments about the interpretation of the main concepts: "substantial burden" and "compelling interest." They were conscription cases. When Congress instituted compulsory conscription in 1917, it exempted those persons who were adherents of a "well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form."[83] In 1940, Congress enlarged the exemption to include persons who, "by reason of religious training and belief, are conscientiously opposed to participation in war in any form."[84] In 1965, in *United States v. Seeger*, the Court defined

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77. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
78. *See id.*
79. 310 U.S. 296 (1940).
80. *Id.* at 304.
81. 321 U.S. 158, 168-70 (1944).
82. 494 U.S. 872 (1990).
83. The Selective Draft Act of 1917, ch. 15, § 4, 40 Stat. 78 (repealed 1966).
84. Military Select Service Act of 1948, 50 U.S.C. app. § 456(j) (1994).

"religious training and belief" to mean an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation but not including "essentially political, sociological, or philosophical views, or a merely personal moral code."[85]

In *Seeger*, the Supreme Court said, "the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[86] This was the main tenet of *Torcaso*, and was reaffirmed by the Court in *Welsh v. United States*, which stated that opposition to the war must "stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and . . . these beliefs [must] be held with the strength of traditional religious convictions."[87] These definitions were given as an interpretation of statutory law, but are what in European constitutional jurisprudence is called interpretation "in conformity with the Constitution,"[88] which is indeed a way of applying the Constitution. Such applications actually contribute to making sense of the concept of "substantial burden": a practice which violates a belief which occupies a place in life parallel to the orthodox core traditional belief in God puts the same burden on the belief holder.

In *Gillette v. United States*, the Court addressed whether the statutory section in question, covering only objectors to all wars, violated the religion clauses of the First Amendment.[89] Petitioner's first contention was that Congress interfered with the free exercise of religion clause by failing to relieve objectors to a particular war from military service when the objection was religious or conscientious in nature.[90] The Court said that its past cases did not support the proposition that a posture of conscientious objection relieves an objector from any colliding duty fixed by a democratic government. The conscription law, applied to objectors to particular wars, is far from unjustified. Justifica-

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85. 380 U.S. 163 (1965).
86. *Id.* at 165-66 (citation omitted).
87. 398 U.S. 333, 340 (1970).
88. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 58 (1989).
89. 401 U.S. 437 (1971).
90. *See id.*

tions include the government's interest in procuring the manpower necessary for military purposes and the government's interest in maintaining a fairly administered draft service, which would be threatened by the difficulty of separating sincere conscientious objectors from fraudulent claimants.[91] Decided this way, *Gillette* clarified the concept of "compelling interest." Such a "narrow interest," as Justice Blackmun defined it in his dissenting opinion in *Smith*,[92] must be tailored to the same plane of generality as the competing interest of the objector, i.e., to the governmental interest in refusing to make an exception for the religious practice.

Another important application and development of *Sherbert* was made in *Wisconsin v. Yoder*,[93] in which conscientious objection was made to compulsory school attendance. In *Yoder*, Old Order Amish parents refused to send their children to school beyond grade eight because high school education engendered values contrary to Amish beliefs, which hold that salvation may be obtained only by living in religious, agrarian communities separate from the world and worldly influences.[94] The Supreme Court said through Chief Justice Burger,

> A state's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment.
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> [C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.
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> Where fundamental claims of religious freedom are at stake, . . . [the Court] cannot accept such a sweeping claim that its interest in compulsory education is compelling despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to pro-

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91. *See id.*
92. 494 U.S. 872, 910 (1990).
93. 406 U.S. 205 (1972).
94. *See id.*

> mote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.
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> . . . .
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> The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relationships with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eight grade at the price of . . . their free exercise of religious belief.[95]

But *Yoder* developed equally the concept of substantial or severe burden. So, the Court upheld the Amish parents' conscientious objection, accepting "the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion—indeed as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others."[96] Enforcement of a state compulsory education law would "gravely endanger if not destroy the free exercise of respondents' religious beliefs."[97] As Justice Blackmun again rightly interprets, it is not a matter of religious doctrine, which "is not within the judicial ken, about the centrality of such a practice to such a religion, but a matter of evaluating the severity of burden, to ask if it endangers or destroys free exercise or" if the exception is vital "to the protection of values promoted by the right of free exercise."[98]

Unhappily, these inspiring standards of *Yoder,* which could bring the American jurisprudence in line with the European, were later not further developed. We find in the eighties three applications of the *Sherbert* test to similar cases of state unemployment compensation rules that conditioned benefits upon the willingness to work under conditions forbidden by religion. All ended with the same positive result: invalidation.[99] Besides

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95. *Id.* at 214, 218, 221, 225.

96. *Id.* at 219.

97. *Id.*

98. *Id.* at 221.

99. This was also the case in *Thomas v. Review Bd.*, 450 U.S. 707 (1981), in *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987), and in *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 832 (1989).

those decisions, we also have some applications—and some nonapplications—of the *Sherbert* test, all with negative results.[100]

In *Hernandez v. Commissioner*, the Supreme Court redefined the *Sherbert* test in a more exact formulation: "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[101]

Shortly thereafter, in *Employment Division, Department of Human Resources v. Smith*,[102] the Court retrogressed to *Reynolds v. United States*, which bluntly held that although laws "cannot interfere with mere religious belief and opinions, they may with practices."[103] *Smith* upheld a state law disqualifying employees for unemployment compensation because of their sacramental use of peyote at a ceremony of their Native American Church. Justice Scalia, who delivered the opinion of the Court, did not apply the *Sherbert* test as Justice O'Connor, who concurred in judgment, proposed to do, saying that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens. Speaking as if *Sherbert* were already a dead letter, Scalia wrote: "Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."[104] So, Scalia would find it acceptable that during Prohibition the federal government exempted sacramental use of wine by the Roman Catholic Church from the general prohibition on possession and use of alcohol,[105] but that Oregon

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100. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (upholding road-building and timber-harvesting on sacred areas, even though such activities "could have devastating effects on traditional Indian religious practices . . . ."); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (upholding prison regulation against worship services); Bowen v. Roy, 476 U.S. 693 (1986) (upholding conditioning of social benefits by obtaining social security number, against religious belief that it is evil); Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding military dress regulations against wearing of yarmulkes); United States v. Lee, 455 U.S. 252 (1982) (upholding Social Security tax liability).

101. 490 U.S. 680, 680 (1989).

102. 494 U.S. 872 (1990).

103. 98 U.S. 145, 166 (1878).

104. *Smith*, 494 U.S. at 884.

105. National Prohibition Act, ch. 85, title II, § 3, 41 Stat. 308 (1919) (repealed 1935).

prohibits sacramental use of peyote to the Native American Church.[106] That is why this is retrogression—the dynamics of the jurisprudence of the Supreme Court entered in contradiction with its own logic.

Smith has been followed by *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[107] The ordinances in question, in a clearly discriminatory way, prohibited the killing of animals in Santeria rituals by cutting their carotid arteries (compared with kosher killing of animals, for example).[108] The ordinances would not pass the test of *Reynolds* or of *Smith*, which was directly invoked. *Smith* has been followed again expressly in *City of Boerne v. Flores*[109] to uphold an ordinance governing historic preservation in a district against enlarging a Catholic church in the same district. The important difference is that not to enlarge a church is not such a severe burden and does not affect a central tenet of religious practice for the Catholic Church as sacramental use of peyote does for the Native Americans. This leads to the next question about the limits of conscientious objection.

IV. TOWARDS A RESTRICTION TO CASES WHERE THE MORAL INTEGRITY OF THE INDIVIDUAL IS AT STAKE

Are there common tendencies in the definition of the limits of the general right to conscientious objection? The precise definition of the limits covers the entire field. I shall only try to argue for a general inner limit—a limit based on the logic of the principles of public reason that legitimize the right to conscientious objection. This right should be limited to cases where the moral integrity of the objector is at stake. I think that comparative constitutional law shows a tendency to limit the right in this way.

In fact, the right to conscientious objection derives from the basic dignity of the human being[110] only when the non-recognition of the conscience imperative implies the violation of the moral integrity. The Portuguese Constitution considers the per-

106. *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (recognizing "the right to differ as to things that touch the heart of the existing order").

107. 508 U.S. 520 (1993).

108. *See id.*

109. 521 U.S. 507 (1997).

110. *See* UNIVERSAL DECLARATION, *supra* note 34, art. 1; GRUNDGESETZ §1; PORT. CONST. of 1976, art. 1.

sonality of the individual inviolable.[111] We are not dealing, therefore, with the conflict between the will of the minority and the will of the majority, which is intimate to democratic principles and is solved, without impairing the pluralism of expression or of the political organizations, by a general duty of obedience to law, to which the minorities are subordinated. We are dealing with the conflict between two basic principles of the constitution, that of the people's will and that of the dignity of human beings which comes up when the democratic law gets into conflict with a rule that structures the personality of the individual and is considered as being dictated by individual conscience.

Whether a belief or a rule contributes to the structure of the personality depends on the formation of individual personality and not on its conformity with the contents of constitution and law. The constitution recognizes the right to conscientious objection to the "fundamentalist," religious or other, not because of the constitutional compatibility of the rules that he invokes, but because it considers them as structural of his personality. This foundation of the right to conscientious objection is not hindered by being submitted to the restrictions of fundamental rights allowed by the constitution.

The constitutional understanding thus exposed is confirmed by the constitutional history formerly described, where the inviolability of conscience is thought as an inviolability of the individual moral integrity, integrity which is traditionally put into question by those people who consider the supreme rule of action of religious origin, the unconditional prohibition, without exception, of killing, and therefore refuse to bear arms and to do military service.

The constitutional history is the continuity of an older history of ideas, where some of the highlights include: (1) certainly the recognition by the apostle Paul of individual conscience as a source of the supreme law of action, coincident with the law revealed by God for those who did not receive such;[112] (2) the invocation of conscience, as a principle of ecclesiastic and civil disobedience in religious matter done by Luther in the Worms diet of 1521 and by the Protestant princes in the Espira diet of

111. *See* PORT. CONST. of 1976, art. 25, §1.

112. *See* Romans 2:14-15 (King James) ("[T]hese, having not the law are a law unto themselves . . . their conscience also bearing witness and their thoughts the mean while accusing or else excusing one another . . . .").

1529;[113] and (3) the above mentioned declaration about religious freedom in Council Vatican II. As to the conscientious objection to military service, it must be remembered that an unconditional interpretation of the prohibition of killing as the ground of the objection is often founded in Christian time before Constantine, and it partially explains the historical clergy exemption from military service. It bases also equally the conscientious objection, sometimes "total," of certain Protestant confessions, as the Menonites and the Quakers, whose conscientious objections were already recognized by the enlightened absolutism[114] and again in the United States, Canada, and Great Britain during the conscription of World War I.[115]

This understanding is shared by German jurisprudence and doctrine, which have a peculiar weight because of the historical influence of the *Grundgesetz*.[116] The German Constitutional Court defined "conscientious decision" as

> any serious ethical decision, that is, guided by the categories of good and bad, of which the individual has an internal experience as being binding and unconditionally obligatory for him in such a way that he would not be capable of acting against it without a serious cohesion of conscience.[117]

From such a conception some literature rightly derives two consequences. First, it is not the freedom of acting in accordance with conscience which is protected against the law, but it is the immunity against the state of being coerced into a decision which is unbearable by the conscience that is guaranteed before the law. As Böckenförde says "insofar as it is an imperative instance, as it appeals, the conscience begins to act only when the personality as such, in its identity, is critically menaced."[118] Second, "the question of conscience cannot be limited neither by subject nor by the content of conscience, nor by reasons or mo-

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113. *See* Jean-Marie Salamito, *in* HISTOIRE DU CHRISTIANISME [HISTORY OF CHRISTIANITY] 675, 702 (Jean-Marie Mayeur et al. eds., 1994); Pierre Maravol, *in* HISTOIRE DU CHRISTIANISME [HISTORY OF CHRISTIANITY] 719, 732 (Jean-Marie Mayeur et al. eds., 1994).

114. *See* ERNST-WOLFGANG BÖCKENFÖRDE, STAAT, VERFASSUNG, DEMOKRATIE [STATE, CONSTITUTION, DEMOCRACY] 206 (1991).

115. *See* WALTER GUEST KELLOGG, THE CONSCIENTIOUS OBJECTOR 7-24 (1919).

116. *See* GRUNDGESETZ [Constitution] [GG] (F.R.G.).

117. BverfGE 12, 45 (55); *see* BVerfGE 62, 1 (22).

118. BÖCKENFÖRDE, *supra* note 113, at 243.

tives."[119] "The person who has the fundamental right determines by herself—within the limits of the legal order of the constitutional State, which limit each exertion of freedom—the content, the dignity and the value of her own freedom."[120] It is true that the German Constitutional Court admits that the *Grundgesetz* imposes limits to the content or to the grounds of conscientious objection to military service when it accepts that the objection is based in the prohibition by conscience of making any kind of war, even if it is eventually conditioned in time by the way of contemporary wars (any kind of war nowadays). Such limits, however, can only be thought of as compatible with the general doctrine insofar as the objection to a particular war for circumstantial political or moral reasons has no such fundamental character, keeping in mind that, in cases of aggressive or criminal war, even civil disobedience and right to resistance may be invoked. I think that in such cases that allow for a general definition as unjust war on conscience grounds, the objection should also be recognized. The German Federal Constitutional Court is wrong: it would have to deny the right to objectors to Poland's invasion in 1939.

V. TOWARDS A RIGHT TO CONSCIENTIOUS OBJECTION TO THE CONTENTS OF THE SUBSTITUTE DUTY

The total objector objects not only to military service, but also to the substitute service. During the time of the conscription in the United States for World War I, an important group of total objectors was formed by the Menonites.[121] Today the Jehovah's Witnesses constitute the main group. Besides interpreting unconditionally the Biblical prohibition to kill, the Jehovah's Witnesses object to any service rendered to the state, and therefore object by religious imperative to substitute service as well as to military service. According to their doctrine, the Jehovah's Witness "spends his time, energy and life exclusively serving the Almighty God."[122] That means, "if he puts aside this duty . . . to execute any other work conferred by the State, he would violate

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119. *Id.* at 242.

120. Herbert Behtge, *Gewissensfreiheit*, *in* HANDBUCH DES STAATSRECHTS [HANDBOOK OF STATE LAW] § 137, 7, VI, (Issensee & Kirchhof eds., 1989).

121. *See* KELLOGG, *supra* note 114, at 35.

122. RUDOLFO VENDITI, L'OBIEZIONI DI COSCIENZA AL SERVICIO MILITARE [CONSCIENTIOUS OBJECTION TO MILITARY SERVICE] (1994).

his pact to the eyes of Jehovah's" and would "[suffer] the punishment inflicted to the deserters of Jehovah's army" to which he belongs.[123]

The total objector is liable to be punished for refusing the substitute service. In Portugal if he does not declare his willingness to substitute civil service, he does not even acquire the status of an objector to military service and will be punished for desertion.

In any case, it is clear that punishment will not prevent the refusal of any Jehovah's Witness and that such a believer will not recognize culpability, since he lives under strong cohesion from his community of belief. So, from the point of view of the ends of punishment, there is not much reason for it. It is understandable that the European Commission argued in favor of an exemption of the Jehovah's Witnesses from the duty to substitute service:

> Members of Jehovah's Witnesses adhere to a comprehensive set of rules of behaviour which cover many aspects of every day life. Compliance with these rules is the object of strict informal social control amongst the members of the community. One of these rules requires the rejection of military and substitute service. It follows that membership of Jehovah's Witnesses constitutes strong evidence that the objections to compulsory service are based on genuine religious convictions. No comparable evidence exists in regard to individuals who object to compulsory service without being members of a community with similar characteristics.
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> The Commission therefore finds that membership of such a religious sect as Jehovah's Witnesses is an objective fact which creates a high probability that exemption is not granted to persons who simply wish to escape service, since it is unlikely that a person would join such a sect only for the purpose of not having to perform military or substitute service. The same high probability would not exist if exemption was also granted to individuals claiming to have objections of conscience to such a service or to members of various pacifist groups or organizations.
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> For these reasons the Commission considers that there are reasonable grounds for the distinctions made.[124]

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123. *Id.*
124. 11-10-1984 Eur. Comm'n H.R. Dec. & Rep. 40 (1985), 207.

The recommendation of the European Commission followed the decision of the Netherlands' government since 1974 to grant the Jehovah's Witnesses an unlimited delay of the duty to do military service, which means a *de facto* exemption.[125]

It appears very doubtful that no other community of belief with characteristics similar to the Jehovah's Witnesses exists. This difficulty could be met by modifying the proposal of the European Commission to give a definition of such characteristics. A more decisive reason against such a solution is the blatant offense of the principle of equality: citizens should bear equal burdens.

A much better solution was found by the German legislature. The *Ersatzdienstgesetz* says that substitute service may be dispensed because of conscientious objection if the objector is already working or begins to work at a health care institution within a reasonable time. If he works there at least two and one-half years before age 23, he will not be asked to do any more substitute service.

This solution was certainly inspired by Article 12 of the *Grundgesetz*, which says that the "[substitute service law] shall not impair the freedom to decide in accordance with the dictates of conscience,"[126] but it is much better derived from the general right to conscientious objection. This right does not apply to the existence of a duty to substitute service, but it should apply to impose, as far as possible, a duty that is compatible with conscience.

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125. *See* Vermeulen, *supra* note 14, at 280.
126. GRUNDGESETZ art. 12a, §2.