

# IDEOLOGICAL FREEDOM AND RELATED LEGAL WORDING

MARC-ABRAHAM PUIG HERNÁNDEZ<sup>1</sup>

**Abstract:** In practical discourse, we can find out legal wording that is associated with ideological freedom and applied interchangeably: freedom of thought, freedom of conscience and religious freedom. In this essay, our aim consists in determining which the proper use of each expression is. For this purpose, we have observed: how the concept of ideological freedom is established in some legal systems; how it can be differentiated from religious freedom clearly but not from freedom of conscience on account of a vague material scope of validity; and why these difficulties move from conceptual to legal areas. In order to propose a convenient use to the latter expressions, we draw on BERLIN's two concepts of liberty.

**Keywords:** ideological freedom; freedom of thought; freedom of conscience; religious freedom; conscience objection.

**Summary:** 1. INTRODUCTION. 2. THE CONCEPT OF «IDEOLOGICAL FREEDOM». 3. THE CONNECTION BETWEEN IDEOLOGICAL FREEDOM AND RELIGIOUS FREEDOM. 3.1. Normative connection. 3.2. Two types of guarantees. 3.3. Conceptual difference. 4. IDEOLOGICAL FREEDOM, FREEDOM OF THOUGHT AND FREEDOM OF CONSCIENCE. 4.1. Normative connection and SCC interpretation. 4.2. Conscientious objection as a guarantee. 4.3. BERLIN's two concepts of liberty. 5. CONCLUSION.

## 1. INTRODUCTION

In the practical discourse, we can find out legal wording that is associated with ideological freedom and applied interchangeably by virtue of this association. We are speaking of freedom of thought, freedom of conscience and religious freedom. The Constitution of Spain proclaims ideological freedom and religious freedom together and the Spanish Constitutional Court has considered freedom thought and freedom of conscience equivalent expressions to ideological freedom, as they appear in ECHR. Another example is the Canadian Chapter of Rights. However, this act proclaims that one freedom denotes conscience and religion whilst thought, belief, opinion and expression belong to another liberty. During this paper, we will observe some examples (rules, legal doctrine and case law) in other legal traditions, although we are focusing on the Spanish one. As long as a link between these expressions stands out, it could mean that we can use them indistinctly. If so, we should explain why the Spanish Constitution introduces a new one among a wide variety of expressions. In addition, we could take an alternative point of view to consider that each expression establishes its own scope. If this would be the case, we should revise this current analogous use and appeal to an appropriate one. Given this parameters, there are two issues to consider.

First, ideological freedom, on the one hand, and freedoms of thought and of conscience, on the other hand, do not figure in the same catalogue of freedoms, that is, they are part of different legal standards. While the Constitution of Spain contains the

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<sup>1</sup> *Postdoctoral researcher. Faculty of Law, University of Barcelona, Spain (marcpuig@ub.edu)*

expression «ideological freedom», the ECHR, among some other examples, frames the other two. Despite having different normative origins, we invoke them such a synonymous, for instance, the STC 145/2015, June 25<sup>th</sup> (we will draw on «STC» abbreviation to refer a Spanish Constitutional Court Decision in this text); notwithstanding, we should not accept such a terminological equivalence in advance from any equivalence between rights. At least, because some connotations could belong to a singular freedom. By mentioning them, we should use that specific expression avoiding establishing an indirect interrelation by using a non-specific word. At the end of the day, indirect speech would create confusion over terminology (if we talk about some concrete connotations with a non-specific word, are we trying to denote some other characteristics or is it just a figure of speech? Alternatively, we might as well compare those connotations with the ones that define the non-specific word). Before a specific conceptual scope, there would be reasons to refuse this indistinct use.

Second, religious freedom would apparently escalate the first issue, because this expression usually joins the previous ones in all legal standards. Does it mean religious freedom is always a synonym? No one will likely maintain that. Again, there is a normative link but no confusion between the expressions ideological and religious freedom. In other words, religious freedom indicates a body of facts regardless normative correlation.

Our hypothesis tries to show that the legal reasons that allow us to distinguish conceptually religious freedom from ideological freedom cannot operate to distinguish ideological freedom from freedom of conscience because of a vague material scope of validity. Hence the need to resort to an external source, which would give effect to such conceptual distinction. We propose to do so by attending BERLIN work and his two concepts of liberty. While the legal guarantees of freedom of conscience lead us to explain it as a negative liberty, ideological freedom would encompass generically both conceptions of liberty, positive and negative.

The main purpose of this work is to offer an answer to the questions we have just raised and to justify the convenient option of each of these wording in practical discourse. The study can lead us to define this terminological correlation in one of the following directions: confirming the indistinct use we observe in practical discourse; rejecting said use and, subsequently, calling for proposing a precise use; or confirming ones and rejecting others.

This subject matter requires highlighting a series of methodological preferences. First, the kind of sources we handle. Ideological freedom is the expression we need to differentiate. As it is proclaimed in CS, materials such bibliographical sources and case law are essentially those related to the Spanish constitutional doctrine, without this implying discarding other applicable sources, such as comparative and international law. Second, a previous or preliminary definition of the concept of ideological freedom, although not as exhaustive as we will develop it through the essay. We understand that ideological freedom means the capacity to form a personal conception (freethinking) about the surrounding world as well as acting pursuant to that.

According to the objectives and to how we are achieving them, we can define the structure of the work as follows. In the first place, we are observing how other legal and

philosophical traditions use the concept of ideological freedom. In the second place, we will explain that the legal relationship between ideological freedom and religious freedom does not prevent differentiating both concepts. Finally, we will see that the previous explanation unsatisfactory distinguish ideological freedom from freedom of conscience, which encourages us to utilise a concept that allows it.

## 2. THE CONCEPT OF «IDEOLOGICAL FREEDOM»

In this first section, our aim is to determine the affinity between the notion of ideological freedom, the one we have exposed in Introduction, and the typical legal wording from other legal traditions. With this purpose, we will illustrate this notion with some examples, will rise some common grounds of the law and will evidence that in the end it could be quite confuse choosing one expression or another in practical discourse. It is not our intention to deepen exhaustively in this traditions; our claim is rather explanatory than analytical. A profound study of each tradition would exceed our goal, albeit sometimes it has been out of question to focus our attention on certain doctrinal or legal issues.

Bringing up some expressions could develop into a heterogeneous concept of that freedom. For this reason, we are taking into account legal precepts as far as possible. As could not be otherwise, law would act as a common ground in this essay.

Among those expressions, we are noting freedom of «thought» or «conscience», «*liberté de pensée*» et «*de coscienza*», «*libertà di pensiero*» i «*di coscienza*», or «*Glaubensfreiheit*», «*Gewissensfreiheit*» and «*Gedankenfreiheit*». We are also indicating how to refer to «religious freedom» in those traditions. The theoretical development of these concepts will help us in the discussion about the proper use of ideological freedom regarding freedom of thought, freedom of conscience and religious freedom.

We can find «freedom of thought» in BURY's 1913 classic *A History of Freedom of Thought*. The author went back to J. S. MILL to suggest, first, that freedom thought designates the rational thought of the individual, as a general term, and second, that it constitutes a precondition to act. We must be careful with BURY's work, because his essay delved into some traits that currently connect with freedom of expression, free speech, according to our legal tradition. Said that, it is possible to highlight some features we have previously identified:

If we are to act at all, we must assume our own opinion to be true. To this Mill acutely replies: “There is the greatest difference between assuming an opinion to be true, because with every opportunity for contesting it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action”.<sup>2</sup>

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<sup>2</sup> BURY, J.B.; *A History of freedom of thought*, Cosimo Classics, New York, 2005: 238-239.

In addition, freedom of thought has its roots on «free-thinking». Within the path of individual's rational thought, to prefer a judgement of the own reason over the ones of any authority gives form to intellectual independence. In words of Anthony COLLINS

We have a right to know or may lawfully know any truth. And a right to know truth whatsoever implies a right to think freely.<sup>3</sup>

It was a matter of time to materialise this type of independence in “a right to think freely”, but we cannot assert which liberty it refers. This lines might as well depict freedom of thought, but, does not an own judgement refer to freedom of conscience?

In fact, we could use both expressions in legal discourse speaking of this liberty, for instance, under the Canadian Charter of Rights, which proclaims «Everyone has the following fundamental freedoms: a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression...».<sup>4</sup> Let us look now at the nature of these rights.

Freedom of thought takes part in the rest of liberties of letter «b». Individual rights guarantee it against “governmental interferences” because of being established as a fundamental freedom.<sup>5</sup> A previous Canada-USA comparative analysis has shown these same two points in the interpretation of the First Amendment: freedom of thought plays a part in others liberties (especially in freedom of expression) and it constitutes a right against interferences as a fundamental liberty<sup>6</sup> (we could explain it in Dworkin's account of rights as “trumps”).<sup>7</sup>

On the other hand, we can reach similar impressions about freedom of conscience, concretely about the notion of the alienability of conscience, which stems from Baruch SPINOZA vindication of a sphere of inner liberty. This author wrote

No man's mind can possibly lie wholly at the disposition of another, for no one can willingly transfer his natural right of free reason and judgment, or be compelled so to do.<sup>8</sup>

Liberty of conscience had become a notion of inalienable right, from which one person cannot surrender it by any means. Furthermore, on RUGGIERO's *The History of European Liberalism* freedom of conscience implies, formerly, religious liberty and

<sup>3</sup> COLLINS, A.; *A Discourse of Free-Thinking*, Garland, New York, 1978: 6.

<sup>4</sup> Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Section 2.

<sup>5</sup> SEDLER, R.A.; *Constitutional protection of individual rights in Canada: The impact of the New Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV., 1984: 1202.

<sup>6</sup> SCANLON, “A Theory of Freedom of Expression”, *Philosophy and Public Affairs*, Vol. 1, No. 2, 1972: 204-226, and SEDLER, R.A.; *The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis*, 20 CASE W. RES. J. INT'L L. 577, 1988. Available at: <https://scholarlycommons.law.case.edu/jil/vol20/iss2/7>

<sup>7</sup> DWORKIN, R.; “Rights as Trumps”, in *Theories of Rights*, Oxford University Press, Oxford, 1984: 153-167.

<sup>8</sup> SPINOZA, B.; *Tractatus Theologico-Politicus*, Hackett, Samuel Shirley, trans., Indianapolis, IN, 1998.

liberty of thought as part of human's personality and, latterly, "all that concerns his relations to other individuals: freedom of express and communicate his own thought, personal security against all oppression..."<sup>9</sup> Transferring it into legal discourse, we can expose it in freedom of thought account. According to Lucas SWAINE, freedom of thought originates some other liberties, such religious freedom, and freedom of speech or freedom of expression.<sup>10</sup>

With these references, we have observed there are two features that would constitute the basis of our concept. 1) the capacity to assume any system of thought, particular ethics, vision or idea about life as well as acting according to that, which reveals human's nature as a moral and rational agent; and 2) the generic concept which encompasses specific liberties, such the religious or the expression ones. Our aim is to bring the idea that this concept is named either freedom of thought or freedom of conscience while, in Spain, it is also called «ideological freedom» and, despite this, we can uphold a particular use of each one.

Let us put the focus on Italian legal tradition in order to find out if those legal expressions refer to these features. Such reference will also contribute to introduce the notion of religious freedom.

In Italy, some clarifications has contribute to develop this concept. While freedom of thought («*libertà di pensiero*») would be that liberty which endorses each way and form of thought, we should make use of freedom of conscience («*libertà di coscienza*») when someone acts according to any thought-system assumed by the individual. They identify the two parts of our previous point «1)» as different freedoms: thinking vs. acting. This distinction corresponds to Italian courts interpretation of Article 9 ECHR.<sup>11</sup>

Freedom of conscience revolves around beliefs and convictions to define human personality, essential in social relations. Both freedoms, of conscience and religious, protect those acts, behaviours, conducts, which belongs to individual's conscience, that is, actually, beliefs and convictions.<sup>12</sup>

The French legal tradition has particular features. The right to freedom of thought has its French counterpart in «*liberté de pensée*». According to this legal system, such liberty lays down the right to determine which content should have intellectual, moral,

<sup>9</sup> De RUGGIERO, G.; *The History of European Liberalism*, Beacon Paperback, R.G. Collingwood, trans. (1927), Beacon Hill, Boston, 1959: 26.

<sup>10</sup> SWAINE, L.; "Freedom of Thought as a Basic Liberty", *Political Theory*, Vol. 46, n. 3, 2018: 407.

<sup>11</sup> See BIFULCO, R., CARATABIA, M., and CELOTTO, A.; *L'Europa dei diritti*, Il Mulino, Bologna, 2001: C. XIII, and MARTÍN DE AGAR, J.T.; "Diritto e obiezione di coscienza", in *I diritti fondamentali nell'Unione Europea*, Zanichelli Editore Bologna – Il Foro Italiano Roma, Bologna, 2013: 974-1010. Similarly, we could find this distinction in the Greek legal system, though Article 13.1 of the Greek Constitution establishes «freedom of religious conscience» to protect this action.

<sup>12</sup> RUFFINI, F.; *La libertà religiosa come diritto pubblico subiettivo*, Il Mulino, Bologna, 1992: 279 and GUARINO, A.; *Obiezione di coscienza e valori costituzionali*, Jovene, Univ. NA Federico II, Napoli, 1992: 15-16.

political and religious thinking. This right has internal and external implications. On the one hand, beliefs and convictions configure the absolute nature of the internal implications. On the other hand, the respect for other rights determines the external dimension and restricts how a person can manifest, or externalise, those convictions or beliefs.<sup>13</sup>

Freedom of conscience («*liberté de conscience*») appeared expressly in the standards and principles added by the preamble of the Constitution of 1946 first, and subsequently, in a landmark decision by Constitutional Council (71-44 DC). Nevertheless, as PINON explained, ECHR extended the range of constitutional rights. Since the adoption of it, freedom of thought, freedom of conscience and religious freedom («*liberté religieuse*») have appeared regularly in French legal discourse.<sup>14</sup>

French legal system establishes two ways of using these expressions. The first one comes from the Constitution of France (CF). The principle of secularism guarantees equality before the law and non-discrimination on religion or beliefs (Article 1 CF). The protection of both traits would lead to use the expressions of freedom as the capacity to adopt them. The second one derives from the Declaration of the Rights of Man and of the Citizen (DRMC), approved by the National Assembly of France on August 26<sup>th</sup> 1789, annexed to CF.

What we have presented as internal and external implications (dimensions, spheres or areas), figures respectively in Articles 10 and 11 DRMC. In Article 10 is set that «No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law». From Article 11, individuals can communicate thoughts and opinions freely through a series of means; such speak, write and print, «but shall be responsible for such abuses of this freedom as shall be defined by law».

As both Articles, 10 and 11 DRMC, has placed us before a legal content that we will elaborate throughout the following sections, we are insisting now on FC. The main reason to do so is to put forward that these rights usually bound public and government authorities.

The Constitution of the Fifth Republic has some references to «public freedoms», all of which can be found in one of the three texts included in the constitutional block: the DRMC, the preamble of the Constitution of 1946 and the Charter for the Environment of 2004. The debates and interpretations of these freedoms allows us to find out wording such freedom of beliefs («*liberté de croyance*»), even ideological pluralism («*pluralisme idéologique*»).<sup>15</sup> The concept of public freedoms ties with that right against government

<sup>13</sup> VELU, J. and ERGEC R., *La Convention Européenne des Droits de l'Homme*, Bruylant, Bruxelles, 1990: 584.

<sup>14</sup> PINON, S.; “Sistema constitucional de Francia”, *Revista de Derecho Constitucional Europeo*, no. 14, 2010: 17-74.

<sup>15</sup> DJORDJEVIĆ, K and YASRI-LABRIQUE, E.; *Médias et pluralisme: la diversité à l'épreuve*, Éd. des Archives Contemporaines, Paris, 2014. About the notion of «pluralisme idéologique» in Belgium, see DUMONT, H.; *Le pluralisme idéologique et l'autonomie culturelle en droit public belge*, vol. 2, Bruylant-Publications des Facultés Universitaires Saint-Louis, Bruxelles, 1996: 265-267.

interferences or “trumps”, although French constitutional case law and doctrine would force us to clarify the principle of secularism. At least, providing more rigour than a sole mention.

Among some authors, POULAT explained that the principle of secularism conveys the principles of democracy and both religious and ideological pluralism. It started as assertion of professing different beliefs, particularly religious, but it resulted into that respect that State must display to any intellectual approach, in other words, into a principle of secularism with barely axiological limitations.<sup>16</sup> In any case, this open-scope should not result in the State avoiding its burden on protecting conscience or religious freedom,<sup>17</sup> it is just appearing when any belief, conviction or, as it also happen in Spain, «*idéologie*» should be guaranteed by public or government authorities.<sup>18</sup>

Whilst the recognition of this liberties developed a perfect separation of State and Church powers in France (and in Netherland), the rest of European states were structured through a State model in which, although both functions are divided, there are some combined tasks in selected areas.<sup>19</sup> It is time to consider these other models via Germany.

Legal doctrine has deemed religious freedom («*Religionsfreiheit*») as umbrella term to encompass freedom of beliefs («*Glaubensfreiheit*»), freedom of conscience («*Gewissensfreiheit*») and freedom of thought («*Gedankenfreiheit*»).<sup>20</sup> This assumption stems from framing each liberty, in German legal system, within one concept that would cover them all. That is the reason why it has been understood that religious freedom, and no other liberty, empowers the individual to live, alone or collectively, in accordance with the assumed ideological system or religion and “with no other limitation than public order”.<sup>21</sup>

Taking the Constitution of Germany (CG) into consideration, freedom of faith («*Glaubens*») and conscience («*Gewissens*») as well as freedom of ideological and religion confession («*religiösen und weltanschaulichen Bekenntnisses*») draw Article 4 CG up. We have noted above those liberties mould a fundamental right in a religious manner. Let us see how Germanic academics have grasped this article. So far, just remark that there is

<sup>16</sup> POULAT, E.; “Les quatre étapes de la laïcité”, in *Nouveaux enjeux de la laïcité. Actes des Colloques*, Centurion, Paris, 1990: 32.

<sup>17</sup> GARAY, A., “La France en face des sectes”, *ADEE*, XVII, 2001:161-178.

<sup>18</sup> RIVERO, J.; “De l’idéologie à la règle de droit: la notion de laïcité”, in *La Laïcité. Centre de Sciences Politiques de l’Institut d’Études Juridiques de Nice*, PUF (Presses Universitaires de France), Paris, 1960.

<sup>19</sup> For a comprehensive study on these different models, see ROBBERS, G. (ed.); *Staat und Kirche in der Europäischen Union*, Nomos Verlagsgesellschaft, Baden-Baden, 1996.

<sup>20</sup> GONZÁLEZ DEL VALLE, J. M., *La libertad religiosa y el objetivo del Derecho Eclesiástico*, *Persona y Derecho*, No. 18, 1988: 89.

<sup>21</sup> See LISTL, J. and PIRSON, D.; *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland* (2nd ed.), vol. 1, Duncker & Humblot, Berlin, 1994: 651, JURINA, J.; *Der Rechtsstatus der Kirchen und Religionsgemeinschaften im Bereich ihrer eigenen Angelegenheiten*, *Schriften zum Öffentlichen Recht (SÖR)*, 1972, and IBAN, I.C.; “Concreciones y protección de la libertad religiosa”, *Cuadernos de la Facultad de Derecho*, Mallorca, 1986: 235.

a fundamental right to ideological confession in CG, resembling that fundamental right to ideological freedom, which turns up in CS.

To reckon religious freedom as a generic right, we must bring the principle of secularism back, whose primary objective consists in ensuring it. State ought to uphold cultural diversity and individual's conscience. That is, that compliance links religious freedom with neutrality or respecting any belief taken by the individual.<sup>22</sup> At this point, it is also necessary to demonstrate, to exhibit, to express, such belief or religion. As a democratic standard, freedom of expression preserves the manifestation of the human personality in society.<sup>23</sup>

At this point, we have noticed religious freedom could be protected both by freedom of expression and by the respect of beliefs or convictions, by virtue of which some other liberties and rights could be limited at the same time.<sup>24</sup> The thing protected is religious freedom, not just religion, because no one can intend any religious conception would be exempt from exercising other freedoms,<sup>25</sup> e.g. expression itself. On this, the principle of secularism compels the State to protect «public peace», inasmuch as different freedoms can collide.<sup>26</sup>

All this proves there is a generic concept with an absolute protection to its internal dimension while public order could limit its external one. They use religious freedom as the generic expression, but the CG ensures to have right to freedom of conscience, of faith and of religious or ideological confession. That is why we can assume all of these freedoms could emanate from the same source. However, we will return to this point later.

Now it is interesting to focus our attention on a regulation that has similarities with the Spanish one. We could find some other examples of the concept of ideological freedom beyond Common Law or Continental Law traditions. The reason is UDHR introduced a similar notion of its rights and freedoms everywhere. To touch upon other legal systems could be interesting to reinforce the idea that ideological freedom has a meaning that involves freedom of thought and freedom of conscience similarly. For this propose, Japanese legal system shares more than a generic concept with the Spanish one, such generic-specific scopes. We need to make use of the expressions we have already seen.

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<sup>22</sup> BÖCKENFÖRDE, E.-W.; “Einleitung: Erklärung über die Religionsfreiheit”, in *Zur Geschichte der Toleranz und Religionsfreiheit*, Wissenschaftliche Buchgesellschaft, Darmstadt, 1977: 61.

<sup>23</sup> HOCHHUTH, M., *Die Meinungsfreiheit im System des Grundgesetzes* (2nd ed.), Mohr Siebeck, Tübingen, 2008: 4-5 and 50.

<sup>24</sup> HILLGRUBER, C.; “Die Religion und die Grenzen der Kunst”, in *Essener Gespräche zum Thema Staat und Kirche*, no. 36, 2002: 53.

<sup>25</sup> BVerfGE 93, 1, 16.

<sup>26</sup> BAMBERGER, C.; “Vorbehaltlose Grundrechte unter Staatlichem Vorbehalt? Zur Auflösung eines grundrechtsdogmatischen Paradoxons”, in *Der Staat*, no. 3, vol. 39: 375-365.



From Japanese Constitution (JC) we could detect «religion» in two ways. According to Kôji SATÔ, the first one would be extensive, providing religious freedom as we have already exposed (Article 20 JC), and the second one would be restrictive, representing a sort of principle of secularism, that is, the separation of the State powers from Churches and religious faiths.<sup>27</sup> Makoto ÔISHI explained the former way as a “feeling of confrontation towards an absolute being of transcendent nature” and thus without including the notion of deity that Japanese constitutional case law had previously reflected.<sup>28</sup>

Concerning the concept of ideological freedom, JC embodies «conscience» (*ryôshin* 良心) and «thought» (*shisô* 思想) into Article 19. At first, Japanese doctrine wondered about the nature of this article. There were two possibilities: it could protect the very same liberty, which different concepts could structure it (those of conscience and of thought), or it could protect two different liberties, then these two concepts would denote specific scopes of protection. SATÔ distinguished conscience as moral feeling, or the ability to distinguish between good and evil, from thought as the rationality of the human being. Nevertheless, taking into account the scope of protection, this author thereupon considered this article proclaims a right that casts *ad intra*, the right would ultimately protect one sole scope guaranteeing its immunity, and *ad extra*, by means of other constitutional freedoms, e.g. religious and academic freedom or freedom of expression or of assembly.<sup>29</sup>

The concept of ideological freedom figures in both Articles, 19 and 20 JC. As umbrella term through the former, and as its transcendental variation through the latter. This clarification falls into the generic-specific frame.<sup>30</sup>

In short, we could summarize this section outlining the following points.

First, we have seen the concept of ideological freedom in different legal traditions and we can assert a conceptual equivalence: the rational capacity to form any thought, or to adopt any belief or conviction, pairs with the ability to manifest it; the first enjoys immunity, but public order limits the second one.

Second, religious freedom circumscribes our concept to its transcendental variation.

Finally, despite of that equivalence, we were unable to identify a proper use for «freedom of thought» and «freedom of conscience» expressions. Sometimes one plays as the umbrella term sometimes the other and we have also seen that both set the subject matter of a right, which casts *ad intra*.

<sup>27</sup> SATÔ K., *Kenpô (daisanban)* 憲法 (第3版) (Constitutional Law, 3.<sup>a</sup> ed.), Seirinshôin, Tokyo, 1995: 500.

<sup>28</sup> ÔISHI, M. *Kenpô to shûkyô seido* 憲法と宗教制度 (Constitution and religious system), Yûhikaku, Tokyo, 1997: 236.

<sup>29</sup> SATÔ K., *Kenpô (daisanban)* 憲法 (第3版) (Constitutional Law, 3.<sup>a</sup> ed.), Seirinshôin, Tokio, 1995: 484.

<sup>30</sup> PEDRIZA, L.; “La libertad de creencias en la Constitución Japonesa”, *Revista de Derecho Político*, no. 89, 2014: 279.

This lack of specificity has stepped into legal field. Given a series of mutual guarantees (to all these liberties; we will see why), there is no confusion with religious freedom due to that conceptual distinction. However, regarding freedom of thought and freedom of conscience, those guarantees contribute to increase confusion without stipulating how to use each expression.

### **3. THE CONNECTION BETWEEN IDEOLOGICAL FREEDOM AND RELIGIOUS FREEDOM**

As we have seen, ideological freedom is a concept related with more expressions than freedom of thought and freedom of conscience. On the normative front, it shares Article 16.1 CS with religious freedom. A quick glance at international standards would show us this relation through Articles 9 ECHR, 18 ICCPR, 18 UDHR or 10 CFREU too.

In this work, we assume that «having the right to ideological freedom» refers to a right different from that «having the right to religious freedom» because each right protects different goods. However similar these goods would be, it is possible to differentiate both terms. Certainly, there is a series of common elements between these two freedoms, which crystalizes into legal field. We must argue during the section that identical guarantees do not generate confusion about if the protection falls to one or another. As this section has tended to focus on describing the general frame of such guarantees, we have paid less attention to a profound researches and doctrinal debates on this subject. To our mind, exposing the former justifies any lack the reader would miss on the latter.

For this purpose, firstly, we will try to explain what this normative connection denotes; secondly, we will expose how the same guarantees can protect different rights; and, finally, we will see how it is possible to differentiate both concepts.

#### **3.1. Normative connection**

The articles that we have just indicated depict similarly the connection between ideological and religious freedom. Through the structure of these standards, we can list a series of rights with a common origin. At the sight of commenting Article 9 ECHR, Jim Murdoch pointed out that, among those articles mentioned *ab initio*, Article 18 of the ICCPR offers the best possible wording about what the normative content of these freedoms is.<sup>31</sup> That is, this article can be useful to us so as to identify which are the rights connected to the intimate sphere of the individual. By observing how it is composed, we can identify this article is divided in three sections. The first one proclaims these freedoms. In addition, it refers to its scope as the possibility to manifest one's religion or belief, individually or collectively and publicly or privately. The second one establishes that the individual «internal forum» has protection against others, which allow us to underpin it as a protected area against any coercion. The third point features that manifesting religion or beliefs «may be subject only to such limitations as are prescribed by law and are necessary

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<sup>31</sup> MURDOCH, J.; "Freedom of thought, conscience and religion. A guide to implementation of Article 9 of the European Convention on Human Rights", *Human Rights Handbook*, n. 9, Strasbourg, 2007: 6.

to protect public, safety, order, health, or morals or the fundamental rights and freedoms of others», which we can abbreviate as «public order clause».<sup>32</sup>

It happens in a similar way in Article 16 CS. Ideological freedom (for now we just note that Article 18 ICCPR establishes freedom of thought) and religious freedom appear together in the same article. Thought, beliefs or religion of the individual have protection against coercion. Moreover, there is a limitation of public order. The reason is these articles hint at the common origin of all these freedoms: the personal, intimate, moral sphere of the individual.<sup>33</sup>

The «intimate sphere» of the person links both freedoms. The relevance of this sphere lies in the axiological basis, which stems from human dignity and free development of the personality. In PÉREZ LUÑO's approach, human dignity is the center point to all faculties, all of which constituted to recognize and to affirm the moral dimension of the individual.<sup>34</sup> What is more, human dignity would allow justifying a freedom of a public nature and explaining that some rights related to individual privacy could limit the intervention of public authorities. Spanish Constitutional case law has reflected this limitation. Spanish Constitutional Court (SCC) explained that legislator has a delimited margin for acting. A limited margin defined by those rights “that belong to the person as such and not as a citizen [...], those that are essential for the guarantee of human dignity, in accordance with the Article 10.1 of CS, and the foundation of the Spanish political order”.<sup>35</sup>

In short, among the rights that arise from individual's intimate sphere, we especially find guarantees for exercising public liberties. These articles have a common minimum and it explains why to proclaim them together. Next, we are deepening on such guarantees.

### 3.2. Two types of guarantees

Two dimensions are the common basis of ideological freedom and religious freedom. The first one consists in the individual, or internal, projection and the second one in its external. Each dimension configures a source of specific guarantees.

On the normative front, this double dimension is expressly included in Article 2 of the Spanish Organic Law 8/1980, of Religious Freedom (LOLR), which only regulates

<sup>32</sup> See some references in Spanish doctrine: CASTRO Y BRAVO, F.; “Notas sobre las limitaciones intrínsecas de la autonomía de la voluntad. La defensa de la competencia. El orden público. La protección del consumidor”, *Anuario de Derecho Civil*, vol. IV, 1982: 1025.; FERNANDO PABLO, M.M., “Sobre la cláusula de orden público en materia de nacionalidad”, *Revista de administración pública*, n. 121, 1990: 270.; and MÉNDEZ BAIGES, V.; “Sobre derechos humanos y democracia”, in *En el límite de los derechos*, EUB, Barcelona, 1996.

<sup>33</sup> MARTÍNEZ-TORRÓN, J.; “La protección internacional de la libertad religiosa y de conciencia, cincuenta años después”, *Revista de la Facultad de Derecho de la Universidad de Granada*, n. 2, Granada, 1999: 63-66.

<sup>34</sup> PÉREZ LUÑO, A. E.; *Derechos Humanos, Estado de Derecho y Constitución*, Madrid, 2010: 49.

<sup>35</sup> STC 107/1984, 23th November.

religious freedom. The protection of the «internal dimension» is based on the immunity of the individual's beliefs. It lists a series of specific assumptions, those where this protection plays, such as professing, or not professing, free-chosen religious beliefs or practicing worship acts. Indeed, these guarantees operate against coercion similarly as Article 16.2 CS, the article that proclaims together ideological and religious freedoms.

In respect of the «external dimension» guarantees, we must understand them as the ones related with expression, with manifesting thoughts, beliefs or convictions. In LOLR, public order appears again as the order defined by law, that is, by the rights and freedoms recognized in any legal relationship. With this baseline, such guarantees submit the exercise of these freedoms to a right-weighting or legal ponderation.

It is also interesting to highlight, from LOLR, that religious freedom admits collective exercise, a collective variant with regard to churches, confessions and religious communities which have power to exercise a fundamental right (Article 16 CS) and to establish their own organizational structure (Articles 2 and 6 LORL).

This variant must be understood according to «non-confessional principle» (the principle of secularism in the Spanish legal system), also called the principle of neutrality, and its constitutional interpretation. Given a margin to the State to cooperate with the Church and other religious confessions, there must be “a positive attitude regarding the collective exercise of religious freedom. The principle of neutrality in Article 16 CS [...] prevents any kind of confusion between religious and state functions [...], thus introducing an idea of non-confessional or positive secularism”.<sup>36</sup>

This collective exercise has led to some constitutional scholars to assert that religious freedom, and not the ideological one, gives reason to the structure of the Article 16 CS.<sup>37</sup> This affirmation stems from the fact that Catholic Church holds broad powers despite the normative separation of the powers. These powers come from the Agreements between the Holy See and the Spanish State, of January 3, 1979, while other religious entities do not hold such powers. Hence, they observed that the collective exercise of this fundamental right is limited to a preferential treatment of the Catholic Church, albeit the principle of neutrality disposes a positive attitude of the State towards any entity.<sup>38</sup>

The collective exercise feature on Spanish regulation, but we cannot affirm that constitutes a specific guarantee to protect these freedoms or to establish a conceptual distinction between ideological and religious freedom. That is because the exercise of ideological freedom is also collective. It may seem strange to say so, but it is only necessary to bring up some examples in which a group of people is organized in line with a particular ideology or ethics, such the cases of the so-called «trend companies»<sup>39</sup> or

<sup>36</sup> STC 38/2007, 15th February.

<sup>37</sup> GIMENO SENDRA, V.; *Los Derechos Fundamentales y su Protección Jurisdiccional*, Madrid, 2017: 160-162.

<sup>38</sup> CAÑAMARES ARRIBAS, S.; “Libertad religiosa e igualdad. Algunos supuestos discutidos”, *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, n. 25, Madrid, 2011, p. 19-20.

<sup>39</sup> Companies can adopt an ideology and it has legal foresight. Article 4 of Directive 2000/78/EC was the first regulation of that included that expression.

political parties. Actually, different thought-traits determine the guarantees (those traits that make up ideology, a particular ethics, beliefs, convictions, religion...). The guarantees protect its collective exercise, e.g. to declare the immunity of the intimate sphere or to prepare the ground for the classic rights-weighting when manifesting thoughts concur with the exercise of other identically legitimate rights and freedoms, as we saw previously.

Then, concisely, the guarantees of ideological and religious freedoms arise from the two typical dimensions of thought: internal, where the rational activity of the individual takes place; and external, where it happens to manifest it. The external dimension could stretch a collective exercise of the right and we saw that its regulation took place on the account of religious freedom.

### 3.3. Conceptual difference

After having been exposed the common nexus and its guarantees, now it is time to fall on the concepts of ideological and religious freedom. Even though it is usual to assume that each one is conceived as an autonomous right, authors like CAVAS MARTÍNEZ stated that the common point of them lies in ideological freedom, a «complex» right, in his words, which is composed of the rights to freedom of thought, freedom of conscience and religious freedom.<sup>40</sup>

Accepting this position, we assume religion as a subtype or category of ideology. On the other hand, if we assume each freedom is a particular concept, despite the internal forum nexus, we must conceive religious freedom as the transcendental dimension of that individual intimate sphere. It would represent a freedom that structures faith as a substantial content for the individual. That is why its external manifestation exhibits variety,<sup>41</sup> that is, individual, collective, public, and personal, through preaching, worship, teaching or observance.<sup>42</sup> Religious freedom establishes a consonance: the individual acting in accordance with a faith and its postulates, and is the reference standard to those who decide to live adopting a religious theory or morality.

By considering that both freedoms, ideological and religious, come from the individual's internal sphere, we should assume transcendental dimension would play as particular stage of a generic freedom that encompasses all rational activity. We could even agree with the previous two positions, as they would be compatible. In other words, albeit

<sup>40</sup> CAVAS MARTÍNEZ, F.; “Libertad ideológica y contrato de trabajo”, in *Libertad de empresa y poder de dirección del empresario en las relaciones laborales. Estudios ofrecidos al profesor Alfred Montoya Melgar*, Aranzadi, Cizur Menor, 2011: 58.

<sup>41</sup> VILADRICH, P.J.; *Los principios informadores del Derecho eclesiástico español*, Pamplona, 1996: 127-129.

<sup>42</sup> Spanish Ecclesiastical Law scholars usually uses this definition. See CALVO ÁLVAREZ, J.; “Los principios informadores del Derecho Eclesiástico Español en la Doctrina”, *Anuario de Derecho Eclesiástico del Estado*, n. 14, Madrid, 1998: 187-234. This doctrine emphasizes «individual's transcendence» concept instead of one regarding deity. As ORTEGA Y GASSET (*Ideas y creencias y otros ensayos de filosofía*, Alianza, Madrid, 1986, p. 56) suggested, an implicit reference to some kind of deity, in the use of «religion» word, would exclude religions such as Buddhism, as a belief not based on god existing faith.

each liberty would hold its own specific object, it is possible to describe the ideological one as generic and the religion one as particular. We would identify the as the transcendental area of the intimate sphere.

At this point, we must differentiate these objects with greater precision. Therefore, we need to refer to «idea» and «belief». As defined in SCC case law, a «belief» *lato sensu*, religious or not religious, is any conception of the world that the individual may have as long as it is rooted in the thought in such a way as acting is conditioned by it, whereas an «idea» means a mental picture of the world made by the subject.<sup>43</sup> In this way, SCC has indicated two things: those ideas and beliefs that go beyond a religious dogma fit in autonomous thinking and that dogma, when it constitutes beliefs basis, constitutes the object of religious freedom.<sup>44</sup> Similarly, a previous study of ECHR case law would lead us to prove the direct connection between acts, or omissions, and beliefs, convictions or a faith precept that obligates the believer to behave according to it.<sup>45</sup>

In conclusion, individuals can adopt ideas in order to form thoughts or opinions related to any subject, and they can also have convictions or beliefs, based or not on a precept of faith, that lead them to behave in accordance with that system of principles. While all this can be the object of ideological freedom, only beliefs based on a faith dogma belongs to religious.

#### **4. IDEOLOGICAL FREEDOM, FREEDOM OF THOUGHT AND FREEDOM OF CONSCIENCE**

Through the connection between ideological and religious freedom we have seen that law protects several elements of thought, all of which gives form to the individual's rational activity. Among these elements, we have been able to differentiate any idea that the individual assumes in his particular conception of life from those others that that assume as a dogma and pivot on the axis of faith. We have come to this point through the study of legal guarantees, from which we have considered the internal and external dimensions of thought and appreciated their objects. We could have done it through studying the different elements that make up thought, but then having had inferred a legal frame for each element to evaluate them later and finally concluding in one sense or another.

In this section, we intend to defend that we cannot reach the same conclusion via studying the guarantees of ideological, of thought and of conscience freedoms. However, we are defending it is possible to establish a conceptual distinction between them. This would lead us to opt for a particular use of each expression. Here, we will follow the previous methodological path to show the following topics. 1) A different normative relation, since we are facing equivalent rights proclaimed in similar precepts and not in

<sup>43</sup> We can see it in both STC 129/1990, 16<sup>th</sup> July and STC 292/1993, 18<sup>th</sup> October.

<sup>44</sup> PERALTA MARTÍNEZ, R.; "Libertad ideológica y libertad de expresión como garantías institucionales", *Anuario Iberoamericano de Justicia Constitucional*, n. 16, Madrid, 2012: 257.

<sup>45</sup> See ECHR Decisions *Skugar and others vs. Russia*, on December 3<sup>rd</sup> 2009 and *Cha'are Shalom Ve Tsedek vs. France*, on June 27<sup>th</sup> 2000.

the same norm, and how the SCC assumes this link between them. 2) The impossibility of distinguishing concepts legally despite being established specific guarantees such as conscientious objection. 3) Finally, the convenient use for each term through invoking Isaiah BERLIN's two concepts of liberty.

#### 4.1. Normative connection and SCC interpretation

The normative link between these expressions comes from another connection, that between fundamental and human rights. Ideological freedom takes part of this link because it is the right proclaimed in Article 16 CS. In this way, the Spanish Constitution contains the fundamental right to «ideological, religious and cult freedom». At the international level, its correlative is the right to «freedom of thought, conscience and religion», since treaties and international standards ratified by Spain shows these wording, as proclaimed in Article 9.1 ECHR (and identically collected in articles 10.1 of the CFREU, 18 of the UDHR and 18.1 of the ICCPR).

Given this relationship, we can affirm *prima facie* that «ideological freedom» finds its correlative in «freedom of thought» and «freedom of conscience» in the international legal field. Hence, in legal discourse, courts use any of them indistinctly. For instance, the Spanish Supreme Court Decision (SSCD) has used them in this way:

An ideology and its practice, as an external manifestation of ideological freedom, freedom of thought and freedom of beliefs according to Article 16.1 CS...<sup>46</sup>

This fact could indicate the intention of the Spanish constituent to identify ideological freedom with any type of individual has thought to which the international texts refer.<sup>47</sup> It may be was for this purpose to which Article 16.1 draft<sup>48</sup> was placed within the section «public liberties» and written as follows:

Religious and religious freedom of individuals and communities is guaranteed, as well as that of philosophical or ideological profession, with the only limitation of public order protected by law.

Bearing in mind that the intention of the Spanish constituent could be to protect any form of thought, the expression «philosophical profession» contained in said draft seems

<sup>46</sup> STS 1013/2016, 9<sup>th</sup> May. See as well as STC 74/2018, 5<sup>th</sup> June. It also occurs with freedom of conscience; see STS 4404/2008, 11<sup>th</sup> May and STC 151/2014, 25<sup>th</sup> September.

<sup>47</sup> Additionally, to illustrate this intention of the Spanish constituent, we can look at the Congress of Deputies publication and the expression «of any kind». There, it was explained that, during Spanish constituent process, the right not to declare on religious beliefs was added the same right regarding ideology, when an amendment of Mr. TAMAMES was approved. Finally, the constitutional text materialized in the right not to declare on ideology, religion or beliefs of any kind. This last expression, «of any kind», was the SCC interpretation of the second paragraph 2 of Article 16 CS. This process can be consulted on the website: <http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=16&tipo=2>

<sup>48</sup> A Spanish Constitution draft was published on January 5, 1978, in BOE.

to be more appropriate to achieve that end. However, the current wording, ideological freedom, has also allowed to accept an open and generic conception of thought without encountering major objections.

Beyond this stylistic assessment, the terminological connection we are considering now and its use constitute an ongoing discussion to legal scholars. In that regard, we could identify two currents:

On the one hand, the doctrine which advocates for an indifferent use between the expressions «freedom of conscience» and «ideological freedom», that is, one and the same, and that, in turn, would incorporate freedom of thought as a particular instance. Göran ROLLNERT, who studied SCC case law on this fundamental right, noticed the following difference. SCC referred to freedom of thought, which would happen only in the internal sphere, to differentiate it from freedom of conscience as that faculty “guaranteed by the legal order to act according to one’s conscience [and which is used] indistinctly as synonymous with «ideological freedom» including both the internal and external dimensions of the right”.<sup>49</sup>

On the other hand, the doctrine expressed by PRIETO SANCHÍS, among others, by which it would be freedom of thought, in an extensive way, the alternative expression to ideological freedom. This author believes that freedom of thought is the “practical and fully social faculty that protects the individual against external coercion or interference that may suffer to behave according to their beliefs or convictions”.<sup>50</sup> This generic freedom, ideological or of thought, would encompass freedom of conscience and its exercise. This doctrine is also based on case law, as observed in STC 15/1982, 23th April and STC 53/1985, 11th April.<sup>51</sup> An explanation for this position comes from justifying, through freedom of conscience, the conscientious objection as a guarantee that does not frame a single objection assumption in the Spanish legal system. According to CS, this assumption is just what Article 30.2 regulates for military service. However, as we will see in the next section, conscientious objection is part of the fundamental right to ideological freedom, a right that enables to object to in cases not expressly provided for in our legal system.

In short, we have seen two positions that we can summarize as follows. On the one hand, ideological freedom is synonymous of freedom of conscience and in this way freedom of thought would be a subtype of them. On the other hand, ideological freedom is synonymous of freedom of thought and freedom of conscience would be a type, or subtype, thereof. In any case, we can infer that ideological freedom is a generic and broad concept, since in both positions it encompasses the other liberties, either as a synonym, or as a particular instance.

<sup>49</sup> ROLLNERT, G.; “Ideología y libertad ideológica en la jurisprudencia del Tribunal Constitucional (1980-1990)”, *Revista de Estudios Políticos (Nueva Época)*, n. 99, Madrid, 1998: 234.

<sup>50</sup> PRIETO SANCHÍS, L.; “El derecho fundamental de la libertad religiosa”, in *Manual de derecho eclesiástico*, Trotta, Madrid: 57.

<sup>51</sup> PRIETO SANCHÍS, L.; “Libertad y objeción de conciencia. STC 15/1982, de 23 de abril”, *Persona y derecho, Revista de fundamentación de las Instituciones Jurídicas y de Derechos Humanos*, no. 54, Pamplona, 2006: 266.



Let us refer to how the SCC has interpreted this connection. For the SCC, freedom of thought does not pose serious complications, since it is the expression contained in Article 9.1 ECHR, linked to Article 16 CS guarantees in the ECHR forum. As ROLLNERT pointed out, the SCC case law finally defined the concept of ideological freedom as a synonym of freedom of thought.<sup>52</sup> Therefore, a previous study of both articles leads us to conclude that, actually, they are equivalent rights. Ever since the SCC, maximum CS interpreter, has determined the use of ideological freedom and freedom of thought as synonymous, we can conclude what kind of link exists between them. However, the connection between ideological freedom and freedom of conscience requires higher accuracy. The same author explained the concept of freedom of conscience is abstract, generic and independent of ideological freedom.<sup>53</sup>

Regarding the statement «freedom of conscience is an abstract concept, generic and independent of ideological freedom», we can observe what follows. In the STC 15/1982, 23th April (on the conscientious objection to the military service as planned in Article 30.2 CS), the SCC identified the relationship between ideological freedom, freedom of conscience and conscientious objection in a descending line from gender to species. In other words, conscientious objection is a specific manifestation of freedom of conscience and the latter, in turn, constitutes a specific instance of ideological freedom.<sup>54</sup> With freedom of conscience, a moral judgment about beliefs or convictions, of any nature, becomes latent. Along with those beliefs rooted in consciousness, SCC case law also affirms the commitment of the individual's actions to individual's convictions. However, this is not far from the premises we previously observed for ideological freedom.

At this point, we could make the following two observations: that, in fact, freedom of conscience has a specific meaning, particular, different from the generic one that give rise to ideological freedom; and that, following this connection, conscientious objection is one of the possible manifestations of the right to ideological freedom, through the exercise of freedom of conscience.

Regarding the first objection, we could ask if a belief rooted in a moral judgment differs substantially from that generic object of the ideological freedom, that is, from any idea, thought or conception of life. Nevertheless, does not a moral judgment on any belief, religious or not, designate a conception of life and an equal and generic concept? It is difficult to establish a criterion to decide which beliefs are sufficiently rooted in an individual and not in another one. In our opinion, this is the origin of the terminological confusion. Our proposal will go through looking for a solution through the field of individual's action. In other words, we believe the important thing, in differentiating both concepts, is not what each scope, object or concept is, but rather how we can manifest

<sup>52</sup> This constitutes statement of the law since the STC 19/1985, 13th February, by using the expressions freedom of thought and ideological freedom as synonyms.

<sup>53</sup> ROLLNERT, G.; *La libertad ideológica en la jurisprudencia del Tribunal Constitucional (1980-2001)*, CEPC, Madrid, 2002: 71.

<sup>54</sup> Through this concretion, SCC incorporated Resolution 337, of 1967, of the Council of Europe, in which that conscientious objection derived from the individual liberties of conscience and of religion was recognized.

each liberty. However, let us leave aside this question for now to focus on the second observation and thereby show that conscientious objection guarantees do not ensure a clear distinction between them.

#### 4.2. Conscientious objection as a guarantee

We have seen that the normative link between ideological and conscience freedoms is different from the one that binds the former with religious freedom. From how SCC have been using those expressions, we have concluded that freedom of thought and ideological freedom are expressions that we ought to consider synonyms in practical discourse. Moreover, its connection with the freedom of conscience is that of gender to species, in such a way that conscientious objection is a manifestation of the freedom of conscience and the latter an instance of the ideological one.

As we saw on religious freedom section, the same type of guarantees does not complicate the subsequent conceptual distinction between both expressions. Through these following lines and making use of conscientious objection, we will reinforce we cannot reach the same conceptual distinction, or at least as clear as we did in the first case.

A good definition of what we should understand by conscientious objection was the one offered by Guillermo ESCOBAR ROCA, who explained it as follows:

Conscientious objection consists in an opposition, sustained in moral reasons, of an individual to the fulfilment of an authority's order or mandate or, what amounts to the same thing, of a legal duty, understood in the broad sense [...].

Regardless of the nuances about such duty, there seems to be agreement among the supporters of this strict concept in which the objection is not directed against anything, but only against a rule of a coercive type backed by the state legal order.<sup>55</sup>

From these remises we can observe two norms with contradictory content and in conflict. On the one hand, an obligation established in one norm, and, on the other, the prohibition of violating beliefs in other one. Within these coordinates we can affirm that the right to avail one's beliefs arises from facing a legal obligation contrary to liberty to adhere oneself to any conviction. This right is configured both on freedom of conscience and on ideological freedom, because the respect for beliefs can be explained following the terms in which we have exposed each one. In addition, we can make this clearer through exposing how ideological freedom assumes conscientious objection as one of its possible manifestations.

Although we already saw that the SCC established the connection between conscientious objection and ideological freedom by means of freedom of conscience, this

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<sup>55</sup> ESCOBAR ROCA, G.; *La objeción de conciencia en la Constitución Española*, Madrid, 1993: 42.

line has not always responded to the same logic, because, on the normative front, Article 16.1 CS does not contain expressly this right. In this sense, the beginnings of ideological freedom and freedom of conscience terminological correlation were not peaceful in the Spanish legal system, since different articles than the ideological freedom one included specified assumptions of conscientious objection. What is more, one of these articles is located outside the fundamental rights and freedoms list.<sup>56</sup> Actually, in the CS there are two specific objection cases, that of article 30.2 and that of 20.1.d, relating to military service, already mentioned, and the so-called «conscience clause» of the communication's professionals, respectively, and a third implicit assumption, according to the interpretation of the SCC, concerning a general right to conscientious objection under Article 16.1 CS.

ESCOBAR ROCA carried out this classification, explicit and implicit, of conscientious objection in the CS, to indicate that

- 1) Only the necessary suppositions are given for the exercise of the right to object when we are in the presence of an objective conflict of conscience (that is, when there are typical characteristics of moral judgment), which also (except in the special cases of Articles 30.2 and 20.1.d) must have its foundation in the postulates characteristic of a known ideology or religion.
- 2) The general right of conscientious objection is not an absolute right, but a *prima facie* position that can yield in the presence of various limits, whose only common characteristic is its constitutional seat. Obviously, the game of such limits cannot be of such a nature that it reduces the content of the right to its practical disappearance.<sup>57</sup>

We must understand the link between conscientious objection and the ideological freedom pointed out by the SCC according to the following premises. 1) ideological freedom can be expressed specifically as a “legally guaranteed possibility of accommodating the subject’s behaviour and way of life to its own convictions”<sup>58</sup>; 2) and, also, as a “legal guarantee of the abstention of a certain conduct”<sup>59</sup> required from the powers of the State, provided that it constitutes an affront to such convictions. Of course, when this link is

<sup>56</sup> The opinion of GIMENO SENDRA (*Los Derechos Fundamentales y su Protección Jurisdiccional*, Madrid, 2017:163-164) is that “here is a problem that is that no more” after the abolition of the compulsory military service and the army professionalization. Conscientious objection, as regulated in the Conscientious Objection Law of December 26th, 1984, and already repealed, did not contemplate not joining the ranks, but obtaining the status of objector to defend the State militarily. Among objecting reasons, “religious and ideological motivations were included, but not the political reasons that could be used as religious or ideologically [...]. On the other hand, other emerging conscientious objections take as paradigm the previous one, for example, the one of doctors and other health professionals to performing abortions or to intervening in them, the faithful of certain religions to receive certain medical treatments, the citizens to be part of a jury or a polling station [...], the objection of fiscal awareness [...]. An eventual conscientious objection has emerged to teach a subject in certain schools, etc.”

<sup>57</sup> *La objeción de conciencia en la Constitución Española*, *op. cit.*: 203.

<sup>58</sup> This freedom of conscience definition, as ideological freedom concretization, was included in a SCC Order (ATC) after the mentioned sentence, *cfr.* ATC 617/1984, 31th October.

<sup>59</sup> STC 15/1982, 23th April.

given, the limits of ideological freedom, as indicated in CS, are applicable to the exercise of this right.

We find the real limitation to its exercise in Article 16.1 CS, which, as a matter of principle, could be only that necessary for the maintenance of public order defined by law.<sup>60</sup> The limit of these freedoms does not complicate the possible generic scope about the exercise of conscientious objection: if the only limit lies in public order defined by law, it would be possible to object to legal obligations beyond the assumptions foreseen in the constitution itself, which would send us again to the legal configuration of any legal relationship.

This has not always been the case. A public order «as defined by law» seemed to indicate the need to regulate the exercise of conscientious objection. The Spanish constitutional case law initially assumed this conception. Fernando ARLETTAZ has explained the SCC expressed this position by specifying that the generic right to conscientious objection would only be possible when the constituent or the common legislator expressly provided for it.<sup>61</sup> Thus, although freedom of conscience designates a “specification of ideological freedom” in whose content the “legal guarantee of abstaining from a certain conduct” prevails,<sup>62</sup> according to the SCC interpretation, a legal development would be mandatory to grant effect to the right to conscientious objection with generic scope, that is, as a manifestation of the fundamental right to ideological freedom.

A mandatory legal development for exercising the generic right to conscientious objection would imply that the legal system would establish the conditions for that exercise and, at the same time, define the assumptions in which this right works. We can summarize this position as follows: it seems that, without the legal reference, it would not be possible to object to any legal norm.

This debate definitively concluded with STC 145/2015, 25<sup>th</sup> June. The SCC admitted the «protection»<sup>63</sup> of the right to conscientious objection as a manifestation of the fundamental right to ideological freedom. By doing so, it is unnecessary that a norm enables the exercise of this right (the so-called *interpositio legislatoris*) but, in any case, it becomes evident the need for an external reference, that of public order defined by law. In the end, the law specifies how to weight its exercise rather than regulating it. In the absence of the legal external reference, we would be facing what some authors have called a “natural law lacunae”.<sup>64</sup>

In essence, this path (how conscientious objection operates as a manifestation of ideological freedom) has shown us that, at first, it seemed to be possible to sustain a

<sup>60</sup> For instance, as STC 141/2000, 29th May confirmed.

<sup>61</sup> ARLETTAZ, F.; “Objeción de conciencia: consideraciones sobre España a la luz de la jurisprudencia europea”, *Revista Internacional de Derechos Humanos*, n. 3, Mendoza, 2013: 193-194.

<sup>62</sup> See STC 15/1982, 23th April.

<sup>63</sup> We use the word «protection» by lacking of any better word for the Spanish «amparo».

<sup>64</sup> GONZÁLEZ PÉREZ, J.; *La dignidad de la persona*, Pamplona, 2017: 201-208.

normative origin distinction: conscientious objection and freedom of conscience looked different concepts from the ideological freedom one. However, it is a patent fact at present that those constitutional precepts that contemplate conscientious objection are just specific assumptions of it because of there is a general right to conscientious objection by virtue of the fundamental right to ideological freedom. Therefore, a moral judgment based on beliefs or convictions connects with both freedoms, ideological and of conscience, and the exercise of this right belongs to the realm of a fundamental right, which also standardise the two of them. Let us return to the point where beliefs rooted in conscience, religious or not, are the object of this right. As a fundamental right, they have protection against public powers. To find the appropriate use of each wording we must insist in this last sense.

#### 4.3. BERLIN's two concepts of liberty

We have verified that both the CS and the ECHR, among other norms, announce a series of freedoms linked to the rational activity of the individual in a similar way. We have also seen that freedom of thought can be homologous to the ideological one according to the SCC case law and that both conscience and religious freedom reflect particular instances with respect to the generic scope designated by the former. In this way, the rational activity of the individual and particularly any idea, belief, opinion, thought, etc., that is formed on life corresponds to the object of ideological freedom (or freedom of thought). Religious freedom confines beliefs to a specific background, a dogma of faith, but conscientious freedom places us before beliefs, not necessarily religious, strongly rooted in the individual's internal forum, what we call, strictly speaking, conscience. As long as we speak of any type of belief, the object of freedom of conscience elevates its level of abstraction to that generic one designated by the ideological freedom. We have come up with a vague concept that certainly lends itself to confusion.

Here, we could justify that, while religious freedom and freedom of conscience belong *prima facie* to the scope of individual's action, namely in acting in accordance with any rooted belief; ideological freedom lines with the capacity to assume any conceptual ideal.<sup>65</sup> We must warn that this identification would proceed provisionally to describe the theoretical distinction of the concepts, since a rigorous exposition of them forces us not to prioritize the scope of action on the ideal or *vice versa*. Certainly, by dispensing on of the two planes, action or ideal, we would be mutilating these freedoms. That is why, according to the above, we believe BERLIN's work can help to deal with it in order to justify our hypothesis within widely accepted theoretical margins, as we think that is what happens with his work.

BERLIN proposed the concepts of negative and positive liberty.<sup>66</sup> In his work, «positive» and «negative» are not evaluative attributes, but descriptive. In this way, the author explains both concepts as follows:

<sup>65</sup> Some academics suggest this position, for example, GONZÁLEZ PÉREZ, *La dignidad de la persona, op.cit.*, and Díez-Picazo Giménez, *Sistema de derechos fundamentales*, Aranzadi, Cizur Menor, 2013.

<sup>66</sup> Which other authors had previously treated. BERLIN himself takes into account the notion of negative freedom of SCHOPENHAUER's work in his essay. That said we find that BERLIN's work offers a series of

On the one hand, negative liberty would place us before the absence of obstacles, created by man, to the action of individuals. The absence of these hindrances contributes to freedom insofar as such obstacles disappear. Throughout Section I of his text, we can observe the concept of negative liberty in the liberal institutions related to the protection of individual rights, in the limitation of political power and in the defence of pluralism.<sup>67</sup> We can define the concept of freedom of conscience within these margins.

Indeed, these features characterize this freedom: firstly, because freedom of conscience offers a series of guarantees for protecting individual's convictions. Among them, we have placed special emphasis on the right to conscientious objection, which is why we will not insist again on it.

Secondly, because these guarantees display a limitation to public powers, and particularly to legislator, the one that, incapable of knowing all the convictions and beliefs of its citizens, regulates human behaviour in any field, through arranging a series of means, that is, legal obligations, to achieve the aims pursued with intervening. Moreover, the ethical minimum contained in these means can be at odds with the ethical minimum that any individual, in his deep conscience, is convinced that the right should respect to achieve the proposed aims. Given this affront, this right is born to accept the ethical minimum that the public powers cannot trespass. As we explained, the law arises from the contradictory sense of two rules, which, on the one hand, creates the legislator to establish a conduct as mandatory and which, on the other, prohibits exceeding the margin established by the freedom of conscience. In this sense, we affirm the protection of the individual against the activity of the public powers.

Finally, the negative notion of freedom allows us to accommodate pluralism, since one's own convictions manifest particular views on the ethical character of the law, but not with the norms that public authorities imposed. It is necessary to insist here that, in order to carry out their functions, it is materially impossible for public authorities to know each citizen's ethical convictions and to show the correct observance of the principle of proportionality. In other words, legislator must act causing minimal injury to the margin of freedom attributed to citizens when what is not prohibited is allowed. In this context, guarantees of freedom of conscience enact pluralism. We cannot incardinate the principle of proportionality in a kind of arithmetical operation that weighs each individual's ethical point of view. On the contrary, proportionality requires another scale, not arithmetical or quantitative, but qualitative, in this case, observing and respecting the «constitutional essentials»<sup>68</sup> that delimit the margins to public powers to intervene. Of course, among constitutional essentials we find freedom of conscience, from which we can derive the citizen's guarantees to respect a moral conviction rooted in conscience. Those guarantees which allows citizens to assess the legal system or the whole of society.

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elements, which fit better in our work, as we will see throughout this section.

<sup>67</sup> BERLIN, I; *Four essays on liberty*, Oxford University Press, 1986: 121-131.

<sup>68</sup> We have taken this expression from John RAWLS' *Political Liberalism*, Columbia University Press, New York, 1993.

For illustrating this idea, it may be helpful to make use of Aristotelian notions, such as equity. From laws' generality injustices are born. It is not because the laws being unjust, but because they must be general, universal, and that necessary, justice to regulate generality can lead to injustices in specific cases.

Equity, therefore, is justness and fairness: the justice we observe when applying the law, we take into account the nature of things. Therefore, as Ricardo GARCIA MANRIQUE explained, equity is to seek justice in a specific case when law or its application cannot achieve it.<sup>69</sup> In seeking justice in a concrete case, we must have an influence on the nature of things and regarding freedom of conscience, on the diversity of moral judgments that each individual forms on their beliefs, namely, on their individualized vision of life. Is not respecting that individual vision the best example of ideological plurality? If so, the guarantees that allows constraining, or reducing, those obstacles that the public power puts on the freedom of conscience are nothing but the guarantees of pluralism.

On the other hand, positive freedom refers to exercising political power, that is, that freedom is given in relation to the margin to act according to one's will without having to obey another one. In addition, of course, the individual's will and not any other.<sup>70</sup> In BERLIN words

For it is this -the positive conception of liberty: not freedom from, but freedom to- to lead one prescribed form of life -which the adherents of the negative notion represent as being, at times, no better than a specious disguise for brutal tyranny.<sup>71</sup>

The author's vision is markedly political. We must realize that this notion of freedom is not really far from the negative one, at least in the theoretical aspect. In the «negative» side, the need not to find obstacles to act according to one's will is evident, while positive freedom demands the exercise of power and action according to one's will without the obstacle of another power. Indeed, both notions emphasize two characters of the same freedom and hence the author explained that defending the one or the other brings very different consequences. BERLIN valued positively the absence of limitations highlighting its historical performance (which leads us to think of classical liberalism) and compared it with exercising power without any limitation (and in this case makes us thinking of emancipatory theories). It revealed two irreconcilable meanings of freedom, since they obey hardly compatible demands related to the ability to satisfy the aims or purposes of life: limiting obstacles to hold power vs. holding all power.

What we notice with this is that the two notions proposed by the author demonstrate the same generic freedom that, adjusted to the rational scope of the individual, we legally identify as ideological freedom, or freedom of thought. If so, BERLIN's two concepts of freedom allow us to justify a different use of ideological freedom regarding freedom

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<sup>69</sup> GARCÍA MANRIQUE, R.; *El valor de la seguridad jurídica*, Iustel, Madrid, 2012: 293.

<sup>70</sup> *Four essays on liberty*, *op. cit.*: 131-134.

<sup>71</sup> *Four essays on liberty*, *op. cit.*: 131.

of conscience. While ideological freedom would encompass both concepts of freedom, freedom of conscience genuinely corresponds to the salient attributes we saw on negative freedom.

## 5. CONCLUSION

The connection between ideological freedom and freedom of thought does not seem particularly controversial. In accordance with the normative link between Article 16 CS and Article 9 ECHR, a previous study of its guarantees and objects leads us to assume that, in fact, these are equivalent rights. Ideological freedom and freedom of thought are equivalent expressions, which evidence the same generic reality of thought and, therefore, we can accept a synonymous use.

Freedom of conscience and ideological freedom, or freedom of thought, indicate that the individual, on the one hand, is notionally positioned before life and, on the other hand, has an own idealistic system on which that person acts consequently. That is, being able to carry out “a rational activity by means of which an ideological system is created based on convictions or autonomous beliefs born in the light of free-thinking”, or “issuing an opinion or judgment of the reason practice about the morality of an action”.<sup>72</sup>

When these wording appears indiscriminately as synonyms in the legal discourse it would be appropriate to use a generic expression to refer to the positioning of the person as comprehending the surrounding reality. That is, to use freedom of thought or ideological freedom. We saw the SCC case law and most of the Spanish legal scholars, considered both of them liberties that encompass other specific freedoms.

Finally, freedom of conscience evidences that the individual acts in accordance with any beliefs or ideas aiming to limit some interferences that usually comes from public powers. That is a freedom in its negative meaning. Hence, using this expression indistinctly, as synonym of ideological freedom, is not convenient, since it genuinely represents a specific institution for protecting an individual right, which also limits public powers and allows to defence of pluralism. By using freedom of conscience, the plausible thing will not be to think about the rational activity of the individual, that is, as a particular instance of ideological or thought freedom, but rather about the specific meanings that we have pointed out, such as exercising the right to conscientious objection.

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