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CONSCIENTIOUS OBJECTION AND BIOETHICS

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Presentation

The NBC has perceived the need to address in general the issue of conscientious objection in bioethics, as previously called for on several occasions with regard to specific questions, and it has set up a working group coordinated by Prof. Andrea Nicolussi, and composed of the following members, Profs. Salvatore Amato, Luisella Battaglia, Adriano Bompiani, Stefano Canestrari, Roberto Colombo, Francesco D'Agostino, Antonio Da Re, Lorenzo d'Avack, Emma Fattorini, Carlo Flamigni, Silvio Garattini, Marianna Gensabella, Assuntina Morresi, Demetrio Neri, Laura Palazzani, Vittorio Possenti, Giancarlo Umani Ronchi and Monica Toraldo di Francia.

The document examines the moral aspects of conscientious objection and focuses on the legal side, to which the objector ultimately turns to when requesting to be allowed not to fulfill legal commands contrary to his conscience.

The new frontiers of bioethics increasingly offer a new challenge to the democratic constitutional and pluralistic State. On the one hand, this is to avoid imposing obligations contrary to conscience and the instrumental use of those who exercise a profession. It is often overlooked that the recognition of rights implies a projection of requirements and therefore the claim to behaviours that may even not be compatible with professional deontology. What emerges is, a larger problem of the protection of professional autonomy both from the viewpoint of freedom of the community of professionals to personally reflect and to determine the specific purposes of the profession exercised, as well as from the viewpoint of the freedom of the professional individual in relation to a possible legal hetero-determination regarding the aims of their work. The exercise of a profession involves not only technical discretion, but also deontology.

Moreover, the consciousness of the individual is not confined to the deontological dimension; it concerns the individual as a person not just a professional. The right to conscientious objection (CO) presents itself, therefore, in the first place as a right of the person which a State that is constitutionalised and sensitive to freedom of conscience can not but legally safeguard. But it is precisely because it is legally protected that this right should be integrated into the legal system, as is the case with all rights, and also because the power to evade a legal command must be justified and not mortify the principles of legality and legal certainty indispensable to the experience of law. First of all conscientious objection can not be limited to an arbitrary refusal to obey, but - with the exception of individual reasons - it must also have an intersubjective significance which in bioethics can be perceived in reference to inviolable human rights recognised at the basis of constitutionalised right. In this perspective, CO not only protects the freedom of the individual conscience, but it is a democratic institution, because it prevents, in the case of highly controversial matters inherent to fundamental values, a majority of them from "requisitioning" even the problematicity and rejection of doubt. However, the recognition of CO does not imply a kind of power to boycott the law, whose validity must be guaranteed as well as that of the exercise of rights provided for therein. It is in this perspective that legally tenable CO is configured.

For these main reasons, the opinion, with the favorable vote of all and only one abstention, concludes that "conscientious objection in bioethics is a constitutionally founded right (with reference to inviolable human rights), and constitutes a democratic institution, in that it preserves the problematic nature of the issues related to the protection of fundamental rights without binding them to in an absolute way to the power of the majority, and it must be exercised on a sustainable basis." Therefore, the legal protection of conscientious objection should neither restrict nor make more difficult the exercise of rights conferred by law or weaken the bonds of solidarity deriving from their common membership of the social body.

These findings give rise to some recommendations: in the protection of conscientious objection, which follows from its being constitutionally founded, it is necessary to take adequate measures to ensure the provision of services, taking care not to discriminate neither objectors nor non-objectors, and therefore the organisation of tasks and recruitment that can balance, on the basis of available data, objectors or non-objectors.

The opinion also deals with the main points of detail regarding the topic of CO in bioethics, such as the need for consistency controls, the distinction between obligations to act and not to act and the difficult question of the criteria for determining who may claim CO.

The document was drawn up by Profs. Andrea Nicolussi and Antonio Da Re, respectively, with regard to the moral and legal perspective, relying on extensive written contributions submitted by Prof. Demetrio Neri, as well as those by Profs. Salvatore Amato, Stefano Canestrari, Marianna Gensabella, Assuntina Morresi and Laura Palazzani. The opinion was finally approved in plenary session by those present (Profs. Salvatore Amato, Luisella Battaglia, Adriano Bompiani, Stefano Canestrari, Francesco D'Agostino, Antonio Da Re, Lorenzo d'Avack, Marialuisa Di Pietro, Romano Forleo, Silvio Garattini, Marianna Gensabella, Assuntina Morresi, Demetrio Neri, Andrea Nicolussi, Vittorio Possenti, Monica Toraldo di Francia, Giancarlo Umani Ronchi, Grazia Zuffa) with only one dissenting vote by Prof. Carlo Flamigni.

Profs. Cinzia Caporale, Bruno Dallapiccola, Riccardo Di Segni, Silvio Garattini, and Rodolfo Proietti absent from the plenary session subsequently voted in favor.

The President
Prof. Francesco Paolo Casavola

1. Reasons for the opinion and consideration of the definition of CO

The NBC has dealt with conscientious objection concerning specific bioethical and biogiuridical issues[1] in a number of opinions. This opinion aims instead to address the issue from a broader bioethical and biogiuridical point of view considering conscientious objection (CO) as the claim of individuals to be exempted from a legal obligation[2] because they believe that this obligation is inconsistent with a command coming from their own conscience and that it also infringes an important fundamental right in bioethical and biojuridical fields.

In this sense, CO is understood according to a more specific meaning than a general attitude of intentional dissent towards the command of authority, which is expressed in the refusal to obey a precept of the legal system considered in conflict with the obligations arising from their moral convictions. In addition, it presents itself as distinct from both the right of resistance, meaning the denial of the validity of law of the State and the legitimacy of state authority, as well as from civil disobedience that tends to be a collective phenomenon with the purpose of highlighting the injustice of a law and induce the legislator to reform it.

The objector does not challenge the validity of the law as such or the legal system as a whole nor even the legitimacy of state authority, but asks to be allowed not to obey the law in order to act a manner consistent with his own moral values. Hence the personal nature of CO, consequence of the contrast between legal command and moral obligation, this element is not found in what has been defined as structural (or institutional) objection (see Resolution 1763/2010 of the Parliament Assembly of the Council of Europe), and therefore, not dealt with in this opinion.

In synthesis, fundamental and minimal points that characterise CO under consideration are: 1) the refusal to obey a significant law in the bioethical field 2) the fact that this rejection is due to the will not to violate their moral convictions or religious principles 3) the desire to bear witness through their behaviour adherence to a certain vision of the world 4) the request (addressed to the legal system to

[1] The following documents directly or indirectly refer to conscientious objection: *Issues related to the collection and treatment of human seminal plasma for diagnostic purposes* (5 May 1991); *Ethical committees* (27 February 1992); *Prenatal diagnosis* (18 July 1992); *End-of-life issues in bioethics* (14 July 1995); *Vaccinations* (22 September 1995); *Identity and status of the human embryo* (22 June 1996); *Opinion on the "Convention for the protection of human rights and biomedicine"* (21 February 1997); *Animal testing and health of living beings* (8 July 1997); *Pregnancy and childbirth from the bioethical standpoint* (17 April 1998); *Advanced treatment statements* (18 December 2003); *Note on emergency contraception* (28 May 2004); *Alternative medicine and the problem of informed consent* (18 March 2005); *Bioethics in dentistry* (24 June 2005); *Assistance to pregnant women and post-partum depression* (16 December 2005); *Differentiated alimentation and interculturalism* (17 March 2006); *Conscious refusal and renunciation of healthcare in the patient-doctor relationship* (24 October 2008); *Alternative methods, ethics committees and conscientious objection to animal testing* (18 December 2009); *Note on the pharmacist's conscientious objection to the sale of emergency contraceptive products* (25 February 2011).

[2] In what follows in § 6 we will also examine the question of the content of the obligation against which objections can be made, that is, whether it refers to obligations to act or even not to act.

legitimise disobedience so as not to be subjected to sanctions and therefore the need to anchor CO to constitutional values that make it consistent with the duty of loyalty to the Republic and to uphold the law and the Constitution (Article 54 of the Constitution).

In this perspective, different from the one which places CO within a dualistic perspective of contrast between a formal law (e.g. the law as such) and a just law from which the objector draws the reasons for his objection, CO loses the purely negative connotation of rejection of law and authority from 'contra legem' it tends to become 'secundum legem', because it searches and finds, precisely in law, the space to express a personal moral or religious view that is not incommunicable. When CO is envisaged and governed by the law it can be viewed as a possible object of an option legally allocated to those finding themselves in conflict with an obligation imposed by the law and an obligation of their conscience, they prefer to opt for equally legitimate alternative behaviour according to limits and appropriate methods to ensure that the space for individual choice is compatible with the orderly conduct of social life. However, it remains the symbol of a contrast not remedied by single legislative provisions, despite the will to stay within the dictates of the legal system. However, this will, allows differentiation of CO from civil disobedience, which has a distinct nature of generalised revolt. However, the distinction is less clear in the option (or clause) of conscience that intends to preserve the principles of "good faith" of the individual professional in specific and particular situations, as for example emphasised in Art. 22 of the Code of Medical Deontology. With respect to this, the CO recognised by law has a more general and abstract nature, as it follows a statement made by the subject who intends to abstain in the future from certain services without his actually waiting to be in the particular situation of conflict of conscience. Moreover, as the NBC has already noted in its Opinion on *Vaccinations* (22 September 1995) it is not conscientious objection which invalidates an obligation of conscience, but a different scientific evaluation compared to the one at the basis of a legal precept, such as supporting the idea of the uselessness of vaccination.

The question of conscientious objection, especially when claimed by a professional, on whom the law imposes duties that may conflict with obligations deriving from his conscience for the protection of fundamental rights, is proposed to an increasing extent because of the problematicity and the sensitivity of the bioethical and biogiuridical issues which involve fundamental human rights in a new and often controversial way. As CO can be invoked in many areas of social life, it is especially in healthcare that there is the greatest frequency of issues that seek recognition or at least debate about it and its implications. At the same time, the spread of requests for self-determination encourages conflict between various freedoms of conscience to the extent that the implementation of the autonomy of one requires the collaboration of others, especially those who exercise a professional activity distinguished by specific aims. Hence the difficult balance between the protection of individual liberty, addressed to someone for expertise and experience capable of providing a specific professional activity, and the protection of the freedom of those who provide such activities and decide to follow their conscience even when not fulfilling the requests that have been put forward; hence also the need to protect the autonomy of the community of professionals to

form and maintain their professional status, not only when the technical appropriateness of the required professional act is at stake[3] but also when what is called into question is the purpose, in the axiological sense, of the actual professional activity[4]. But the need to secure a clear zone of respect of individual conscience emerges even according to the pluralist principle that characterises contemporary democracies, as well as the principle of laicity understood as non-interference of the State in respect of individual morality. Indeed there are those who attribute conscientious objection to "the technical nature of the pluralistic society" emphasising also that "the lack of shared values can not be replaced by 'the ethics of many' "imposed by legislative instrument, therefore by means of the most typical of majoritarian procedures". The question of conscientious objection, in other words, challenges the same liberal conception, which encourages the idea of self-determination, calling on this concept to remain faithful to the primacy of the individual related to the State organisation that can be threatened even from the claim to total implementation of the will of the majority.

Moreover, there is no denying the serious problematicity of conscientious objection itself imputed, not always wrongly, that can be misused as an instrument of sabotage in the hands of highly organised minorities or abused by opportunistic individuals. In addition, CO takes on public importance to the extent that they are presented as a possible cause for socially relevant justification, not purely internal, of the failure to comply with of a command, and entails the intersubjective communicability of the consciential reasons that oppose the fulfillment of the command. In short, CO even raises the issue of internal and external limits and the methods for exercising it compatible with the duty of loyalty to the social community.

2. The moral perspective

To fully understand the meaning of conscientious objection, it is important to first reflect on the value and meaning of the conscience, which in fact objects to and, opposes an order or a law in force in the name of a moral or religious reference regarded as superior and binding in the strict sense. The etymology of

[3] We tend to talk about scientific objection although the distinction is not always perspicuous. One can think of several borderline cases. For example, the objector to the removal of an organ from a person believed dead according to existing criteria of assessment could legally found the objection on the basis of his ethical opposition to the removal itself, or because of his scientific opposition to those assessment criteria.

[4] In bioethical literature, at opposite poles of the debate are, on the one hand, the so-called 'incompatibilists', that is, those who believe that the CO of the doctor is incompatible with his profession (the doctor must never claim CO) as a) his professional duty requires him to operate in the service of patients, b) the patient has the right to be treated by the doctor, c) CO produces inefficiency and inequity in medical care (cf. J. Savulescu, *Conscienscious Objection in Medicine*, "British Medical Journal", 2006, 332, pp. 294-297) and on the other, so-called 'compatibilists', ie those who believe that the doctor can and should always claim CO, as a) he can / should precede his moral values-professional values in relation to what is requested by the patient, b) the medical profession is not mere execution of the patient's request, c) the doctor can not act against his moral and professional conscience (see M.R. Wicclair, *Is Conscientious Objection Incompatible with a Physician's Professional Obligation?,* "Theoretical Medicine and Bioethics", 2008, 29, p.171 ff.).

the word (*cum-scientia*) can in this way help to capture some important aspects. First of all conscience has to do with knowing, knowledge (*scientia*), the moment of knowing, even before that of personal awareness, well exemplified by terms such as "to be conscious of" or "be aware of" qualifies the experience of consciousness, even when this is exerted, as in the case of CO, in a strictly moral sense. The element of knowledge is therefore linked to the purely moral dimension. This link appears to be fundamental: the appeal to an ethical request of additional rigour is not based on mere subjective experience or on some extemporaneous opinion. The moral judgment on the virtue or otherwise of the act and the subsequent activation of the volitional component of the subject which then leads to the choice stand on knowledge, which among other things should be recognisable and communicable (something like a *cum-scientia*). The originary and constitutive relational and interpersonal nature of the conscience shows how this is not interpretable in terms of closure and self-reference. When this kind of self-sufficiency[5] is given, the meaning of CO is inevitably affected and often declined in purely subjectivist terms, if not, in extreme cases, of depreciation or even rejection of the bond of belonging to the legally regulated community. This aspect, however, does not challenge the primacy of the moral and subjective point of view in relation to impositions of the community, when they seek justification only through the claim to substitute the actual individual in defining his interests and values; although it should be pointed out that, this is not strictly normativity with respect to which the question of conscientious objection arises, and which however concerns commands justified by a public interest or the need for protection of persons other than the actual objector.

More generally, a simplistic and distorting interpretation of CO would inevitably regard those who intentionally want to evade the general observance of the principle of legality and, at the same time, expect that their choice, while morally justified, would be for no reason attributable to the ruling of the law, in which case these would be forms of civil disobedience or resistance to power which, as we mentioned, are not covered here.

Equally distorting are the applications of an opportunistic type which debase the very meaning of CO. As will be seen, the challenge lies in being able to combine the respect for personal freedom, especially when this makes an appeal to intimate and deep convictions, perceived as inevitable, with respect for the rights of others and the bonds of solidarity deriving from their commonly appertaining to the social body. In this sense, the refusal to obey a particular rule, for reasons of conscience, contextually implies basic adhesion to the legal system as a whole, and in particular to those principles and values, established constitutionally which readily seem to be a possible *trait d'union* between personal

[5] Niklas Luhmann writes to this regard: "The conscience is no longer syn-eidesis, con-scientia, con-science, common knowledge, it is no longer, in absolute, any knowledge, but a kind of erudition of the originality of the self which we can only take note of with surprised tolerance and respect it, but which can not be tested with regard to content "(freedom of conscience and consciousness, in Id, The differentiation of law, Il Mulino, Bologna, 1990, p. 267). It follows that "everyone has the right to his conscience. The content of consciousness, therefore, can not be related to super-positive law and bound to it"(ibid., p. 268).

innermost convictions of a moral nature, and positive legal norms: in other words, the CO as it is understood in this document manifests a conflict between different possible interpretations of constitutional values.

From the above it emerges that CO is qualified in the properly moral sense. It refers us to a further perspective, compared to the strictly legal one, in which it highlighted the limitations and rigidity. Recalling the fruitfulness of such a moral perspective does not exclude possible legal formalisation. Indeed, the complexity of the many issues relating to CO stems from the fact that this was originally a moral phenomenon, which however, needs to come under consideration by the law. The protection of an area of effective communication between moral and juridical elements, although presumably often problematic and difficult, is a prerequisite for the proper recognition of CO, and this area of communication finds clear exemplification in the reference values and principles of the Constitution.

3. Conscientious objection and constitutionalised right

As regards the juridical context the contemporary issue of conscientious objection marks and intercepts a thorough revision of the very concept of right compared to the one commonly widespread in the juridical culture formed in nineteenth-century continental Europe and predominant until before the second half of the twentieth century[6]. Formally, this evolution has occurred in what could be defined as Constitutions after Auschwitz (as in Italy and Germany), which in the late twentieth century redirect law by recognising the human person as being the center of the legal system and therefore the purpose of it. This overrides a conception of law as a mere result of the power to enforce laws: it is no longer considered as a simple product of the power of ruling, but finds its justification precisely in some fundamental values recognised in Constitutions (see, for example, Art. 2 and 3 of the Italian Constitution)[7]. In this sense right, without losing its autonomy with respect to other points of view (moral, religious, economic, technical, etc..), divests the claim of self-referentiality and embraces the principle of inclusion and debate on fundamental values according to reason as temperament of a legality understood in a rigid and abstract manner without limits[8].

Moreover, a right that is secularised can not accept fundamentalism of any kind, but must be open to the balance between values that are in genuine collision (conflicting in actual fact and not only apparently) without falling into the paradox of

[6] In some respects the accreditation of conscientious objection brings continental law closer to the sensitivity of common law countries, where, within a context of plurality of religions, the recognition of conscientious objection was favored by the refractoriness toward the legalistic monopoly that constituted however the model of the countries of the European continent.

[7] The establishment of the judgment of the Constitutional Court - the so-called judge laws - proves that legal rules can no longer be conceived exclusively as the product of the will of the majority, who instead is not invested with absolute power but encounters the limits of the constitutionality of laws.

[8] In other words constitutionalised right, aware of the problematicity of certain issues, endeavours to reconcile the principle of legality and protection of the conscience of those who refuse to fulfill a command which is considered contrary to a fundamental constitutional value (in the words of Antigone, "with rules not of an hour ago, nor of a day ago... [but] of mysteriously eternal life").

surrogating the reference to the absolute with the absoluteness of the point of view of the majority.

Hence the idea that the Constitution implicates an opening, within certain limits, to conscientious objection as a result of the balance between the value at the basis of the foundation of the legal command object of CO on the one hand, and the principles of freedom of conscience, pluralism and secularism on the other. Even the German Constitution goes so far as to expressly provide for CO to military service which is an extreme hypothesis, as it inheres functionally to a duty to defend the homeland, which for example our Constitution qualifies as a "sacred duty of the citizen" expressly providing for the obligation of military service (Art. 52 of the Constitution)[9]. Therefore, if a legislative provision was considered necessary for CO to military service, considerably less problematic is CO in areas, such as health care in which we can not speak purely and simply of the derogating nature of CO to a constitutional principle[10]. Whenever it comes to issues that are inherent to supreme constitutional values such as human life (see Constitutional Court No. 27/1975 and No.35/1987), the CO invoked in defense of a particular interpretation of these values can not be said to be bluntly derogatory and its constitutionality is founded *a fortiori* compared to cases where it is relevant in the military context[11]. In these controversial areas CO takes on the function of democratic institute preventing that parliamentary majorities or other organs of the State deny in an authoritarian manner the problematicity concerning the boundaries of the protection of inviolable rights. Coherently therefore Law No.194/78 on voluntary interruption of pregnancy and Law No.40/2004 on medically assisted procreation, in providing for forms of intervention on prenatal human life, have safeguarded the possibility of CO by the subjects professionally involved.

And then on the basis of the recognised need for the protection of animals Law No.413/1993 has also introduced CO to animal testing, in addition to the context of the protection of human life.

[9] In Italy it is precisely on deciding on conscientious objection that the Constitutional Court (164/1985) has accepted a distinction between the sacred duty of defense (mandatory) and the obligation of military service (derogable by law). In any case, the recognition of the constitutional compatibility of the legal discipline that Italy has admitted CO to military service, resolving a doubt that the German Constitution clarifies directly, implies a very extensive act of opening to CO in general.

[10] Full legal recognition of CO to military service, which took place also in Italy following the spread of the culture of "non-violence", was very significant for the accreditation of CO generally, since the Constitution already states that Italy repudiates war as an instrument of aggression to the freedom of other peoples and as a means of resolving international disputes (Article 11): CO has in fact given the opportunity of reassessment of the same sacred duty of defending the fatherland, distinguishing it from the military service whose obligation laid down by Art. 52, was considered susceptible to fulfillment by 'objectors even by way of alternative activities.

[11] Otherwise, one should accept the thesis which devaluates freedom of conscience degrading it to a purely individualistic phenomenon in respect of which the principle of legality would always prevail. According to this perspective, CO would always have a derogatory nature, regardless of the context of values in which it is invoked, precisely due to the general consideration of the irrelevance of the individual's inner convictions in relation to the cogency of the law.

4. Laws in highly controversial areas of constitutional importance and CO for the safeguard not only of freedom of conscience, but also tension to fundamental values

This comparison also shows that the debate on CO can not be reduced to the simple claim of freedom of conscience. The valuation of the freedom of conscience and religion as a founding value of a pluralistic legal system remains undisputed, but the same need for balance between the constitutional values which underlie the right to CO prevent configuring it as an absolute right and at the same time lead to a differentiated consideration of the reasons of conscience that can be invoked in support of the objection itself. A differentiation seems necessary due to the different constitutional weight of the reason put forward in support of CO.

In addition, a differentiation is also necessary as regards the question of the possible need for the legal regulation of CO and its methods of being exercised, depending on the reasons of conscience invoked by the objector and their corresponding or not to fundamental constitutional values. Moreover, only in this way, is it possible to avert the danger of indiscriminate CO not regulated by law, just as, on the other hand, the iniquity of constitutionally founded CO, deferred however exclusively to the will of the same majority that imposed the legal order against which CO may be invoked[12]. In this way the legal system would recoil on itself in an authoritarian sense, reducing CO to a concession of the majority even when the objector makes claim to a reason presented as an extension of the protection of a primary constitutional value. In other words, it would deny its democratic nature in a constant tension to fundamental values, by depriving itself precisely in the experience of that critical request invoked with regard to the very constitutionality of that right[13] In addition, CO in this way marks a further distancing from the idea of "the ethical State" as a pretext to impose *ex lege* only one moral point of view. This democratic connotation of constitutional legal systems is a conquest of civilisation, to be regained continuously and laboriously and it is not easy to preserve, because every majority can succumb to the temptation to overcome those same limitations that may justify the democratic formation of the majority. This characteristic of the contemporary pluralistic and democratic State is also confirmed by the provision of CO in numerous international texts ratified by Italy (Art. 18, para. 1, Universal Declaration of Human Rights; Art. 9, co. 1, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 18, para. 1, International Covenant on Civil and Political Rights, Art. 10, co. 1, the Charter of Fundamental Rights of the European Union)[14] In this perspective CO should not be regarded as a threat by a majority conscious of the democratic foundation of its very existence and eager not to close authoritatively

[12] Of course, even when CO is deemed constitutionally founded, it always needs to be legally regulated so that it does not become indiscriminate CO, otherwise, a judicial evaluation (in the hypothesis even of the Constitutional Court) that knows how to accept their request, notwithstanding the possible legislative inertia, without however allowing it indiscriminately.

[13] Another cause of exoneration from liability for breach of obligations is, as is well known, is the constitutionally recognised right to strike.

[14] The European Parliament resolution of 7 February 1983 states that the right to freedom of thought, conscience and religion must be counted among the fundamental rights. For internal legislation, cf., Art. 1, Law No. 230/1998 (New provisions on conscientious objection).

the discourse on the understanding and scope of the protection of fundamental values. Moreover, many of the bioethical issues move in very problematic contexts (*hard cases or casus perplexi*) or gray areas in which the need for right to establish certainty in one way or another should not be paid at the dear price of imposing ex lege the negation of the same problematic issue. Therefore, at least in the more serious cases of "tragic" contraposition between (constraint of) legality and conscience, it is the constitution itself (culture, constitutionalistic ethos) that aspire to avert it, in the sense that constitutionalised right accepts a space for criticism of the decisions of the majority.

5. Communicable and coherent CO with the autonomous formation of professional ethos (a principle of legal non hetero-determination of professions)

If in the final analysis the right to CO can be configured constitutionally as a fundamental right of the person (Articles 2, 3, 10, 19, 21 of the Constitution), nevertheless a purely subjectivist conception is not admissible, that is, a conception that excludes consideration of the contents of the objection and therefore eventually leads to the a comparison between the values reiterated by the objector and the values protected by the law, against which the objection is directed. A subjectivist approach may be valid only when the conflict exclusively relates to the rights or interests of the subject himself; here one remains within the perspective of the individual, whose conscience is undoubtedly inviolable[15]. If, however, the recognition of juridical significance is also called for, then an objective exteriorisation is needed, which takes into consideration the rights and interests of all the parties involved in various ways and that makes it possible to evaluate the balance between colliding values. Regardless of the most adequate reconstruction of CO, in any case, the freedom of conscience alone is not sufficient to establish CO *secundum legem* but it must be integrated by the value recalled by the objector so as to be able to conduct the balance between the same freedom of conscience and the value which was invoked by the objector,, on the one hand, and the value protected by law, on the other.

When the law acts on the protection of a fundamental good such as life or health (the main assumptions for CO in bioethics and bio-law), the value recalled by the medical objector represents a different interpretation of the value protected by the Constitution; and the tendency of legislation to provide for in such cases the legitimacy of CO testifies, on the one hand, the fact - mentioned previously - that

[15] In these cases, however, rather than recourse to CO one might suppose the constitutional illegitimacy of the norm that claims to replace the subject in the evaluation of his own individual interest when the consequences are borne by the same subject, and the decision does not involve the active collaboration of others, but rather abstention. The responsibility of the individual towards himself is a pre-eminent value over the impositions of the community on him. For example, if a norm imposed a Jehovah's Witness, to protect his health, to undergo a blood transfusion which he would refuse according to the precepts of his religion, the reason for the refusal becomes irrelevant for the State, as in the sphere of the individual the will of the individual prevails. Equally irrelevant for the State is the reason why others, although not motivated by religious reasons, refuse, any other type of treatment, even through advance directives.

constitutionalised right accepts a space for criticism of the decisions of the majority; and, on the other, that the recognition of CO constitutes an application of a general principle, so that, outside of these cases directly provided for, there is still at stake a constitutional value of equal status, the right to CO would be the result not of a mere analogical extension of these rules, but directly of the general principle they express.

On the other hand, CO assumes a distinctive importance when it is invoked by a person in the exercise of a professional activity, as shown by the fact that in general it is duly provided for in the deontological codes of professional Orders. Very clear in this respect is the deontological Code Italian doctors (2006) in which the general assumed principle is that "the practice of medicine is based on the freedom and independence of the profession which are the inalienable right of the doctor '(Article 4)[16] and in accordance with Art. 22 "the doctor to whom performances are required which are in conflict with his conscience or his clinical conviction may refuse his services, unless this behavior is not of immediate and serious harm to the health of the patient and he must provide the citizen with every useful information and clarification". Furthermore, in the oath of the deontological Code it states that the doctor is committed to respecting the legal rules only if they "are not inconsistent with the aims of my profession[17].

In addition to the purely individualistic dimension of CO, there is a professional dimension in which the conscience (cum-scientia) is formed within a professional ethos that is defined according to the purposes characterising each profession. The possibility of conscientious objection keeps alive the sense of professional identity preventing heterodetermination - by law or by external imposition - of the professional regulations of the category of professionals in consideration[18]. This does not mean that doctors who are not conscientious objectors do not identify with professional ethos or that objectors are necessarily more coherent with it, only that the possibility of CO foreseen for all doctors, provides an additional margin of appreciation and therefore the safeguard of a professional ethos that, although not necessarily crystallised nor monolithic, does not have to coincide with legal heterodermination.

A recent example of possible legal interference was recorded during the introduction of the rules governing the crime of illegal immigration, when the idea of mandatory reporting of the illegal immigrant by doctors and by social workers was debated. In both cases, the professional Orders reacted – albeit received differently - in the belief that the acts imposed on them (the reporting of illegal immigrants) seriously called into question the basic reasons for their very

[16] The professional autonomy of the doctor is recognised in the case law of the Constitutional Court: cf. Constitutional Court. 282/2002, 338/2003, 151/2009.

[17] Moreover, Article 4 (Professional standards of conduct) of the Oviedo Convention provides that "Any intervention in the health field, including research, must be carried out in accordance with the rules and professional obligations, as well as in compliance with the rules of conduct applicable in this case".

[18] In the medical field the question of professional purposes may also be conditioned by legislation aimed at defining the concept of health in a different way from how it is understood by the same health professionals.

profession[19], as well as being prejudicial to constitutional values. So any possible law obliging the doctor to administer a blood transfusion despite the refusal of the patient of age and fully aware (e.g. Jehovah's Witness) would impose a heteronomous idea of the profession as the implementation of mandatory services even for the recipient, rather than of services offered to people who are free. CO in this case would allow the doctor to comply with, as interpreted in accordance with his conscience, the principle of respect for the human beings in health care (Art. 32, para. 2 of the Constitution) to which the same deontological code seems to be inspired. Another example of heteronomy might be read in some strict interpretations of the law, more common in the past, according to which it is forbidden for doctors to give terminally ill patients in severe pain extreme doses of sedatives so as to relieve pain but which could hasten the death of the patient who accepts the risk; such an interpretation of the law would compress and ignore the duty to accompany the patient even in the last stages of life and to alleviate suffering, a duty which the doctor may perceive deontologically but also personally as cogent[20].

The formation of professional ethos seems to join personal self-reflection, of which conscientious objection is a direct expression and a wider dimension that involves the entire professional community, necessary for both the protection of members as well as to generate an evaluative synthesis between the various points of view of those who exercise the same profession. Instead the idea that a professional choice implies automatic acceptance of the duties imposed ex lege - possibly even against the deontological code - is fruit of an authoritarian conception of the law that does not allow for the autonomy of professional bodies in the definition of their purpose and consequently of their identity, and reduces the profession merely to depersonalised technique and purely methodical expertise, insensitive to the issue of purpose. Radicalising this approach, for example, if the law imposed on doctors to make themselves available to carry out death penalty sentences, not even in these cases would conscientious objection. be allowed.

6. Legally sustainable CO in bioethics: coherency checks, the principle of legality and CO related to the obligation not to act

The issue is particularly problematic given the obvious need to respect the principles of legality and legal certainty (Article 54 of the Constitution), as well as

[19] The National Council of social workers on 08.07.2009 recommended its regional councils "not to initiate disciplinary proceedings against social workers enrolled in the profession Order who were criminally prosecuted for not having complied with the obligation to report of crime of illegal immigration, in their capacity as public officials or operators of the public service ' The objector, in other words, is considered to be defending the integrity of the profession as the Order intended in its real experience: the illegal immigrant who turns to the social worker to get help, maybe even help to know his legal position, distorts the sense of the profession by bending to the requirements of public order and repression that do not seem to belong to its specific the welfare functions.

[20] The assumption, however, from the point of view of CO, is problematic because it concerns a possible obligation not to act but in the text it is referred to as an example of legal interference in the statute of the medical profession and which would be better to put to the professionals themselves and to their common thoughts.

rights by law[21] In a country such as Italy the question of respect for legality can not be underestimated and CO must be configured in such a way so as to avoid any confusion on the matter. The challenge for the legal recognition of CO consists precisely in avoiding undermining the principle of legality and to make the legitimacy of objection, especially when inherent to fundamental constitutional values, coexist with the protection of those individuals entitled to the legally foreseen rights[22].

Firstly, it is important to deal with the concern that CO can be abused and therefore the means of exercising it must be regulated in order to reduce this risk which, however, can not be completely eliminated. It is worth recalling in fact an inherent limit to the law, the impossibility of full and final determination of the inner will of individuals (through the so-called trial of intentions), which must always be kept in mind when it comes to the legal protection of expressions of will of individuals, so this limit may not become a pretext for stifling the freedom of conscience of those who invoke it. The question arises to a certain extent in terms of the functional legal safeguards to rule out CO that is reasonably (rightly) dubious.

In this respect, the need for so-called proof of coherence is normally highlighted and is deductible *a posteriori* i.e. after the person has invoked CO in general, and this proof regards the possible incompatibility of subsequent acts to conscientious objection (e.g. Art.9 of Law No.194/1978 provides that conscientious objection "is revoked immediately if the person who claims it takes part in procedures or interventions for the termination of pregnancy provided for in this law, excluding the cases referred to in the previous paragraph", This refers to cases in which" given the special circumstances their personal intervention is indispensable to save the life of the women in imminent danger").

Secondly, the need to make CO compatible with the principle of legality provides the point of view with respect to which this document can consistently address the issue of the content of the legal obligation for which CO is invoked. Indeed, reference is usually made to CO relating to *an obligation to act*, which implies abstention by the objector, but there are also those who propose the admissibility of CO related to *an obligation not to act*, which implies commissive

[21] For example, CO can not be a means to disregard the right to terminate a pregnancy in the cases provided by Law no. 194/1978, or more generally, the right to obtain the administration of pharmaceuticals appropriately prescribed.

[22] In a similar line of thinking, the Constitutional Court recognised the constitutionality of CO in judgments No. 467/1991 and 43/1997. As regards the constitutionally required character of conscientious objection there is a significant position taken in the majority report of the Justice Committees of the House Health and Hygiene (rapporteurs: Hons. Mr. G. Del Pennino and Berlinguer, who considering the possible concerns about the erosive effect of possible mass conscientious objection state: It did not appear permissible to prohibit recourse to conscientious objection in a matter involving such delicate matters of principle and in which the imposition by law of a given behaviour, would indeed, constitute a constitutional violation": cf. G. Galli, V. Italia, F. Realmonte, M. Spina and C.E. Traverso, *L'interruzione volontaria della gravidanza* Milan 1978, p. 398.

behaviour by the objector and therefore the creation of the fact possibly prohibited by law. While abstention allows others to substitute the objector and do what he is not willing to do, active behaviour *contra legem* leaves no room for a substitution that safeguards the application of the law. It follows that if one wants to perceive CO as compatible with the principle of legality, CO related to obligations not to act should be ruled out precisely because infringement of the obligation coincides with the ultimate violation of the legal precept without the possibility of organising a substitutive service that allows for the safeguarding of the principle of legality.

7. The difficult question of the criteria for determining who may claim CO

A delicate question concerns the subjective demarcation of conscientious objection on the basis of participation, of variable directness, in a specific act or activity. On this point there is a more rigid position that requires the direct causal collaboration of the person who is entitled to CO and a more open position that allows it even in cases of merely auxiliary participation. But the fact remains that morally and legally the criterion of causality is not always accurate, as when reference is made to purely naturalistic causality, because causality is always affected by the subjective criterion of attribution of responsibility (intent, negligence), so that intentional facilitation can often be more severe in terms of ascription of responsibility, of unintentional direct causation.

Moreover, with reference to the field of health, the issue becomes complicated in so far as the surgical treatments can be replaced by new treatments made possible by recent developments in pharmacology and therefore the axis of the question shifts, because there is a regression in the action of the doctor from the material act consisting in surgical treatment to prescription of the drug or, in the case of the pharmacist, to its administration. The issue is not restricted in importance to voluntary interruption of pregnancy, with regard to which, the NBC has already had the opportunity to express itself in reference to the CO of doctors and pharmacists regarding abortive drugs or whose potential for abortivity is not excluded[23]. The question also arises in other situations: consider, for example, the prescription and administration of lethal drugs, certainly illegal in Italy, but permitted in other countries.

In general, the restrictive interpretation of the legitimacy of CO as an exception to be specifically provide for, must be examined in the same way as the principle of equality, to determine if the exception is justified in relation to individuals not included by law; the exception might in fact produce unreasonable discrimination of others (objectors nevertheless, but not *secundum legem*) that could be found in conditions similar to those of the persons specifically provided for by law (objectors *secundum legem*), thereby configuring a privilege for the latter.

In any case the delicacy of the issue, together with the scarce possibility of identifying an abstract and universally applicable legal rule that does not excessively widen the number of objectors or reduce it in a discriminatory manner,

[23] Cf. *Note on emergency contraception* (28 May 2004); *Note on the pharmacist's conscientious objection to the sale of emergency contraceptive products* (25 February 2011).

may recommend the intervention of the Orders or, more generally, of professional associations to specifically define the persons entitled to CO and the situations in which it can be claimed. This suggestion is included in the recent opinion of the Spanish Bioethics Committee[24].

On the other hand the problem of the demarcation of the right to CO must be understood in the light of the principle that it is not an instrument of "sabotage" of legitimate legal disciplines, and therefore when CO is permitted there must be organisation of a service that nevertheless allows the exercise of legally recognised rights despite the non-participation of the objector[25] It could be summarised as neither sabotage of the law by the CO nor sabotage of CO by the law.

The aspect of the protection of rights is particularly relevant in cases of CO that have not been legally foreseen. In such cases, due to the lack of legal regulation of the manner of exercise, there can be an imbalance to the detriment of the individuals entitled to those rights (e.g. the right to obtain a drug by presenting the medical prescription), the decision of the objector would in fact hinder the exercise of those rights. Inevitably the matter is then put to the judicial authorities, the objector runs all the risk of how his behaviour will be assessed, taking into account that the judge can not fail to take into account the consequences. This implies that a control law for CO in general terms or for specific cases would be extremely worthwhile and that this should be accompanied by an indication suitable measures to ensure that the service is not in fact undermined, for example, with a prediction of the figures responsible for its implementation and the penalties for non-compliance, i.e. the conditions to avoid the conflicts of conscience that could be harmful for the proper conduct of social life[26].

Ultimately CO must be compatible with the system of legal order and it is this element that mitigates also the concerns of those who rightly fear a trivialisation of it. Heroic CO is not and can not be legally recognised CO: in cases of resistance or civil disobedience, the person must bear the full legal consequences of his behaviour. The legal system which has imposed a certain duty or legal obligation in the biojuridical context does not intend to contradict itself by accepting CO, it is simply not willing to close the space for discussion on fundamental values and lose its inclusive and pluralistic nature. Therefore as long as the legal system has the strength to accept CO, it manages to maintain a certain balance; when on the

[24] Comité de Bioética de España, Opinión del Comité de Bioética de España sobre la obieció de conciencia en sanidad, p. 15, found on the website: http://www.comitedebioetica.es/documentacion/docs/es/La%20objecion%20de%20conciencia%20en%20sanidad.pdf.

[25] In the opinion of the NBC on the objection of pharmacists conscientious objection is accompanied by the provision, voted by an overwhelming majority, under which in any event the provision of the service must be ensured. A different degree of protection of CO can be hypothesised depending on the directly causal or facilitating participation of the objector to the fact. For example, in American literature with regard to the objection of pharmacists it was argued that it would not be allowed when in practice the pharmacy service is located in an isolated area where the drug could not be promptly bought in a neighboring pharmacy. Cf. E. Fenton – L. Lomasky, Dispensing with Liberty: Conscientious Refusal and the "Morning-After Pill", Journal of Medicine and Philosophy, 2005, p. 589.

[26] Cf. the NBC Opinion *Note on the pharmacist's conscientious objection to the sale of emergency contraceptive products* of the 25th of February 2011, p.11.

other hand CO is not recognised or objectors are discriminated, legality once again takes on the character of Creon (authoritarian) - *sola auctoritas facit legem* - and CO is forced to assume once again the tragic features of the sacrifice of Antigone. The challenge of the democratic state is to maintain the tension to its fundamental values while respecting the principle of legality.

Conclusions and recommendations

***The NBC considers that*:**

a) Conscientious objection in bioethics is constitutionally founded (with reference to inviolable human rights) and must be exercised in a sustainable way; it is an individual's right and a democratic institution necessary to keep alive the sense of problematicity concerning the limits of the protection of inviolable rights; when CO is inherent to a professional activity, it contributes to preventing an authoritarian definition ex lege of the purpose of the same professional activity;

b) The protection of CO, for its own sustainability in the legal system, must not restrict or make more difficult the exercise of rights conferred by law or weaken the bonds of solidarity deriving from common membership of the social body.

On this basis it puts forward the following recommendations:

1. In recognising the protection of CO in the cases considered in bioethics, the law must provide appropriate measures to ensure the delivery of services, by possibly identifying a person responsible for the same services.

2. CO in bioethics must be regulated in such a way that there is no discrimination of objectors or non-objectors and therefore no burdening of either, on an exclusive basis, with services that are particularly heavy or deskilled.

3. For this purpose, we recommend the setting up of an organisation of tasks and recruitment in the fields of bioethics in which CO is applied, which may include forms of personnel mobility and differentiated recruitment so as to balance, on the basis of available data, the number of objectors and non-objectors. Checks usually *a posteriori* should also ensure that the objector does not carry out activities that are incompatible with the one to which objections were raised.

Personal Remarks

A personal remark by Prof. Carlo Flamigni

Supported by the Catholic Church, pro-life movements have, for years, been calling for the practice of conscientious objection to voluntary abortion to be recognised as an institution of constitutional status together with its recognition as an "inviolable human right." The National Bioethics Committee has now promptly satisfied this request approving by majority vote an articulate document that aims to achieve two objectives made explicit in the final page, dedicated to "Conclusions and recommendations":

1. "***Conscientious objection in bioethics is constitutionally founded (with reference to inviolable human rights) and must be exercised in a***

sustainable way; it is an individual's right and a democratic institution necessary to keep alive the sense of problematicity concerning the limits of the protection of inviolable rights".

2. "***CO in bioethics must be regulated in such a way that there is no discrimination of objectors or non-objectors and therefore no burdening of either, on an exclusive basis, with services that are particularly heavy or deskilled***".

To put it more simply (the language of the Opinions of the NBC is not always easy to decipher) conscientious objection to voluntary abortion (and in the future, who knows, even related to euthanasia) is something so noble and virtuous that the objector must be guaranteed the right to refrain from carrying out the (public) service requested by law *without any burden*, ignoring the fundamental rights and freedoms of citizens entitled to receive that service. In fact, the law one asks not to obey, would only be the result of an occasional formation of a parliamentary majority (so it may lack an appreciable ethical significance) whereas, the right to conscientious objection to that same law would be legally tenable because it would find foundation in human rights (in this case not respected by law) and it would be useful to keep alive the sense of respect for inviolable rights. Reaffirming the right to conscientious objection in bioethics, the document recognises that the services provided by the law in this area must be duly implemented. This is, in synthesis, the message contained in the proposal of the majority of the NBC.

Before going into the Opinion approved by the majority of the NBC, I would like to illustrate some of the positive aspects. The first, that is certainly acceptable in my view, is that, even implicitly, the majority of the NBC recognises the existence of a "right to abortion", since it acknowledges that the provisions of Law No.194/78 should not be obstructed, having become an unwaivable accomplishment. In fact, in the "Conclusions and Recommendations" (the only part -according to widespread opinion – which is read by journalists) the Opinion states that "***protection of CO, for its own sustainability in the legal system, must not restrict or make more difficult the exercise of rights conferred by law.***" In plain terms, the service of abortion provided by Law No.194 must be guaranteed and is not questioned. After having reiterated that all possible forms of discrimination should be avoided, both for objectors as well as for non-objectors, the document acknowledges the need to achieve "***an organisation of tasks and recruitment in the fields of bioethics in which CO is applied, which may include forms of personnel mobility and differentiated recruitment so as to balance, on the basis of available data, the number of objectors and non-objectors. Checks usually a posteriori should also ensure that the objector does not carry out activities that are incompatible with the one to which objections were raised***".

This step includes a new feature that seems to me of great importance; not only the organisation of the tasks in services but also the "***organisation of recruitment***" can (and perhaps should) take account of the situation that might arise following the spread of conscientious objection, providing for example forms of recruitment in the services reserved for non-objectors. That the majority of the NBC (always characterised by a high density of Catholics) recognises this point is certainly a considerably important step, which is combined with the other great

novelty of stating that "***ultimately conscientious objection must be compatible with the legal system***", In doing so the majority of the NBC confers albeit minimal "ethical certification" to the law, as it recognises very clearly the duty to deliver the services provided for in relation to medically assisted abortion.

What has been highlighted is a result that is anything but negligible, and it is perhaps for this reason that some lay members have subscribed to the majority Opinion. In fact, in "political" terms this conclusion is acceptable, but since the National Committee is not a substitute for Parliament in which the required mediation for legislative acts takes place, rather, it should be a centre for cultural elaboration that clarifies and identifies different ethical solutions so that citizens and the political forces can then decide what is more appropriate to accept for the common good, therefore the solution given seems totally inadequate and unacceptable both from the cultural and ethical point of view. Despite not having been always present, I must express my dissent from the majority Opinion and I will now try to articulate some of the reasons which have led me to withhold assent of the document.

The first reason is of a very general nature and regards the choice of technical language unsuitable for comprehension by citizens not accustomed to the jargon of bioethics. In actual fact what is needed is more straightforward style, written in a simple and pragmatic form, intended to present both the real data as well as the problems that may arise, clarifying also the reasons for which conscientious objection can "***be invoked in many areas of social life,*** however**, *it is especially in healthcare that there is the greatest frequency of issues that seek……..debate about it and its implications***".

We all would have expected an answer to these questions from a National Bioethics Committee; personally I considered right an objective assessment of the difficulties which can be encountered by laws of the State faced with a strikingly high percentage of objectors, so much so as to give rise to hope in some of them regarding a declaredly inapplicable rule, the legislator must go back and acknowledge his mistake.

What is the overall credibility of conscientious objection in Italy, at least as regards the voluntary interruption of pregnancy? No sensible person can believe that 90% of gynecologists who refuse to perform terminations of pregnancy in some of our regions has really listened to his conscience and not instead to other, certainly more vulgar appeals. Unable to separate the wheat from the chaff, taking into account the consequences of these objections (often involving entire health facilities, to the point of configuring a real conspiracy against State law) it is only natural to wonder why, as the lesser of two evils, public health units and hospital directorates have not wanted at least to use the remedies that the same Law No.194/78 establishes first and foremost staff mobility. These are important issues that deserved further detail and which were not even considered. In this way, the document endorses the assumption that conscientious objection is always and solely requested on the basis of sincere moral scruples. According to logic and common sense this should indicate to all that the rapid growth in the number of objectors could be (and in many cases is) the consequence of opportunistic choices which have nothing to do with morality. I am personally convinced that

greater attention to empirical data would have revealed a very different reality from that suggested in the document.

The second reason for my dissent is more specific and arises from the decision of the Opinion of the majority not to present in any way the problematicity of conscientious objection on a theoric level. For example, we have neglected the position of those who argue that conscientious objection should find a way to be made credible through obligations - the more burdensome the more troublesome the inconvenience caused by the non-delivery of the service – which serve to certify real and profound opposition: Garino[27] writes that this provision of treatment, in some way unfavourable to the objector, is essential to reaffirm the overall validity of the original precept and confirm its sacrificial value, as proof, of the refusal to carry out the task expected and provided for by regulation.

Even less consideration is given to the diversity of problems that arise in different historical situations. In fact, "historically", conscientious objection was to military service, it was practiced by the young conscript whose distinct moral principles induced his objection against violence and war, however he could not choose not to do military service as it was an obligation imposed by law on citizens. After suspension of forced conscription, the problem of conscientious objection to military service disappeared.

Radically different is the condition of a young man approaching higher education and who instead, can choose the profession to undertake: barring other specific barriers, he may decide to study law, engineering, economics, social communication or medicine, and therefore to accept the obligations deriving from these professions. Similarly, those who choose to enter the magistrature, or to become a journalist, must consequently accept all the tasks related to their chosen post, without any possibility of appealing to "conscientious objection" regarding services that he is in disagreement with, the same must also apply for other professions, including health care. The matter is central because one has to wonder why this structural inequality between different activities should be allowed: some elective professions (the choice to be a judge or pursue a military career) *do not* provide for conscientious objection with regard to the duties required by institutional responsibilities, as opposed to others (the choice to be a gynecologist or the scrub nurse in gynecology). A "perturbed conscience", disturbed by the possibility of having to perform unacceptable acts, should prompt youths who have to choose their lifetime profession to reflect further before choosing a job that will surely involve certain moral problems which will cause them serious difficulties: to be a gynecologist means being committed first and foremost to protection of a woman's health, to terminate an unwanted pregnancy means the same thing, protection of a woman's health. anyone who does not think that way is advised to carefully re-read Law No.194/78.

Not only has the majority opinion failed to take into account the problems and difficulties that are hidden in the institution of conscientious objection, but it has not even considered the different theoretical positions and alternatives to those included in the document. For example, there is no mention of the fact that strong reservations to conscientious objection have been put forward by authoritative

[27] Voce *Obiezione di coscienza,* in the appendix to *Novissimo Digesto Italiano,* Utet, Turin 1984, pages 338-364.

Catholic jurists such as Capograssi and Piola[28], whose claims have been completely ignored. Even as a partial remedy to this limitation, I will briefly outline the position of a constitutionalist at the University of Modena and Reggio Emilia, Gladio Gemma, who argues that objection can become the expression of a right to ideological intolerance, because frequently the objector sees the non-objector as an immoral person, so that the objection is translated into an instrument of negation of the principle of laicity because it allows the holders of a public office to put their personal convictions before the full respect of their institutional duties, i.e. those deriving from their position[29]. Conscientious objection therefore damages democratic principles because it can nullify legislation of public interest. Gemma denies the existence of a logical link between the recognition of the rights of conscience and the foreshadowing of the Institution of Conscientious Objection in positive law, an irrational Institution as it is a combination of incompatible elements. This is a legally codified right to civil disobedience. In this sense, the proposal of conscientious objection *secundum legem* involves a judicially irrational right, based on a combination of juridically irreconcilable elements, since conscientious objection *secundum legem* is configured as a right guaranteed by the State not to comply with provisions of the law issued by the State itself. It is quite obvious that this "right" would be granted to particular groups of individuals who, due to their personal convictions, disagree with the rules approved by a legitimate and democratic Parliament, and which - in this case - are confirmed by a popular referendum. It is difficult to understand how a right to not comply with juridically configured obligations can actually take substance, that is, can a legally codified right to disobedience be upheld.

According to Gemma this proposal may give rise to a number of developments, all with logical and legal inconsistencies:

1. There is a risk of recognition of the indiscriminate prevalence of individual conscience over any legal precept colliding with it. In this case, any duty of citizens would find an absolute limit in their own conscience. Given that the possible objections of human conscience to obligations established by law are virtually endless, and as it is not practically possible to identify cases where the request to disobey the law is made in the name of self-interest and not personal conscience, no rule would have the guarantee of being observed and laws would no longer have their actual meaning of indicating patterns of obligatory behaviour, but rather only the value of advice, which one can but is not compelled to abide by. This could be the start of an individualistic anarchy which might be also capable of supplanting the democratic order system.

2. The other possible implication could be to provide recognition that is not indiscriminate but delimited to individual conscience with regard to the precepts of legislation that contrast with the said conscience, This could take place, for

[28] G. Capograssi, “Obbedienza e coscienza”, in *Opere*, vol. V, Milan 1959, pages. 198-208; A. Piola, “Obiezione al servizio militare e diritto italiano dopo il Concilio”, in Id., *Stato e Chiesa dopo il Concilio*, Milan 1968, pages. 201-233.

[29] I take freely from some of his works: G. Gemma, “Brevi note critiche contro l’obiezione di coscienza”, Botta (ed), L’obiezione di coscienza tra tutela della libertà e disgregazione dello Stato democratico, Milan 1991, pages 319-338; and “Obiezione di coscienza ed osservanza dei doveri”, Mattarelli (ed), Doveri, Franco Angeli, Milan, pages. 55-74.

example, when one wants to protect certain human rights, incurring other inconsistencies of a legal and institutional nature.

To allow the refusal of services, necessary for public interest purposes, may therefore result in the nullification of legislation guidelines of public interest. It would lead to such a paradoxical situation, of a state mandated by citizens which indicates binding behaviour and at the same time allows minorities, more or less limited in number, to refuse to provide certain services, and by so doing, oppose the will of the people and in total contrast with the logic of democracy. In this case, the will of the majority, that requested the legalisation of abortion, would be overruled by a majority of objecting doctors, a clear defeat of logic as well as democracy.

For a more detailed presentation of this argument I asked Gemma to sum up his position, which he has kindly consented to do putting it in writing:

"Two theories can be sustained regarding conscientious objection, to use the language of jurists (especially lawyers): a principal and a subordinate one (in the case of non-acceptance of the first). The first is constituted by radical contestation of conscientious objection and its recognition on a legislative or jurisprudential level. The subordinate theory is represented by the delimitation of the legal scope of conscientious objection. (*This second theory is of a mediatory nature and I do not consider it essential to include in this text*).

As regards the radical contestation of the figure in question, a number of reasons can be put forward.

A) The configuration of a right to disobedience (of rules considered to be immoral by the objectors) seems incongruous. Laws, understood in an objective sense, as a set of rules with the function of (contributing to) guaranteeing the co-existence of individuals, therefore the availability of goods and resources useful for their existence (*in primis*, public safety, a minimum of social solidarity, etc.). This can be ideally conceived as a result of a social contract (which historically of course never took place), under which the members of a political community undertake, regardless of their philosophical, political, and moral convictions, etc., to comply with rules that are established for the common good. Are these juridical rules sacred and inviolable as divine precepts? Absolutely not, this is obvious. However, faced with the ethical-political contestation of juridical rules, there are two rational and legitimate solutions.

Within the framework of a legal system, accepted, on the whole, even by the objectors, the faculty must be given to the latter to propose the repeal or revision of the rules considered to be unacceptable based on the ideas (also) of moral of those contesting them. Consequently, the faculty to propose and act for the success of the proposal - a legislative amendment, without any breach of existing laws. In contrast to this is the second solution: the right to rebellion. The existence of a right to rebellion may be accepted, but only on an ethical-political level when confronted with a legal system that is rejected for its values. For example, the rebellion even with arms of the anti-fascists against the fascist regime was morally licit (indeed commendable). But the thesis is sustainable only on the ethical-political level. Besides, nobody has ever thought of criticising the fascist regime for having legally denied, the right of anti-fascists to take up arms against fascism!

The legal recognition of conscientious objection has this inconsistency: it corresponds to the legalisation of a claim to not comply with laws, which can find, if at all, only ethical and political justification, and therefore extra judicially.

B) The foregoing on the duty to comply with rules of law, save for revolutionary refusal, is reinforced by the observation that in democracies there are constitutions which acknowledge moral issues far more than authoritarian regimes do and prefigure the instruments of protection. Even our own constitution has adopted many ethical principles, inherent to the human person - think of dignity, freedom, solidarity, etc. - and confirmation of this is found if we read the speeches of the members of the Constituent Assembly, *in primis* those of the Catholic deputies, who were among the most active in the drafting of our fundamental Charter. Certainly, the Constitution, in its words and even more so in its evolution, acknowledges and protects shared moral values and leaves the door open to different ethical orientations and consequent legislative guidelines. Nevertheless, it can be said that, in general, the rules of law introduced under the force of constitutions such as ours, have either a minimum of ethical lawfulness (although, of course, questionable according to specific moral convictions) or else they can be eliminated through guarantee mechanisms (making conscientious objection superfluous).

C) Conscientious objection is configured as a right to liberty, a moment of self-determination of the individual, however a mixture of very different legal forms operate with this configuration. For instance, personal freedom is one thing, which mainly concerns an area, a range of action, of the holder of the right, while a claim that operates within the context of functions or services is quite different. To give an example, the freedom to accept or reject treatment is one thing, very different is the claim of the doctor not to treat those who have the right to be treated, similarly the right to go to court to obtain a (favorable) judgement, quite the reverse is the claim of the judge not to pass judgment and refuse to issue sentence. The right to non- compliance with obligations due to conflicts of conscience do not derive at all from the recognition of rights of conscience, such as religious freedom.

D) Conscience, that is, the good on which the right to conscientious objection is based, is a very wide and undefined matter that is not suitable for circumscribing a legal claim. Conscience has many possible manifestations: a religious fundamentalist might feel the duty not to treat or not to assist an unbeliever; an anarchist might consider the payment of taxes, etc. contrary to his conscience. The conscience of an individual can result in many different moral and political imperatives in conflict with public or professional duties, and if one wants to acknowledge a right to non-compliance with laws in the name of conscience this opens an abyss in democratic order system (for authoritarian or totalitarian systems, by definition, the problem does not exist).

E) Finally, it is an oddity that the State recognises the right to non-compliance with its own laws because they are considered immoral. That fact that the parliamentary majority may not be a moral authority, and that laws may be criticised (as well as subject to proposals for modification) for even ethical reasons is out of the question. However to go from this to the acknowledgment of a revulsion to state laws and the protection of this repugnance is a far cry. Moral rejection and the criminalisation of a juridical rule may be tolerated if not

transformed into unlawful conduct, however, that they should be legal consecrated does not seem very rational".

I will attempt to draw some simple conclusions from these considerations. In the case of the law on voluntary interruption of pregnancy a number of values are at stake that concern the respect and protection of the existence of fundamental freedoms of citizens: in principle, the approved rule could be detrimental to these values. Since they are enshrined in the Constitution, it is clear that their violation - and even an indirect insult regarding them - would make the rule constitutionally illicit. If this were demonstrated, the hypothesis to resolve the problem by allowing conscientious objection would be inadequate at the very least, equally inadequate would be the decision to grant freedom of speech to a very small number of citizens to resolve the apparent lack of legitimacy of a non-democratic government which has made the prohibition of freedom of speech its guiding principle. The correct answer would of course be to resort to legitimate instruments, always present in a civilised country, specifically created to defend the legality in similar cases. If on the contrary a law concerning protected values such as existence and freedom is recognised as constitutionally legitimate, then it must be considered functional to the defense of the values in question. Naturally, this does not mean that this is an objective and incontestable function, but much more simply that the laws approved by Parliament and the people concerning values and freedoms constitute, by implication of the system, protection of the rights in question. It would then be an incomprehensible contradiction that the same system which legitimately deemed that a given rule should protect existence and freedom allows conscientious objection with regard to its decision.

To these wise considerations Gladio Gemma adds a final personal one. The claim to object according to conscience can not rely upon irrationality and the fantasies of the applicant or of a (more or less organised) group of them, but rather it must have clear scientific credibility, within the limits of sound common sense. This means that those entitled to define and clarify what is true and what is false according to current scientific knowledge must be established - and it is on this point that the majority of the NBC should have given a precise opinion. To avoid misunderstandings I will give an actual example: any reasonable person who knows about science is aware of the latest data on the mechanisms of action of progestins used for emergency contraception and that the only direct experiences conducted with human embryos and human endometrial tissue certify that, in this case, there is no mechanism of inhibition of implantation. This means that until there is evidence to the contrary (which is not even feasible at the moment) anyone requesting to be excused from prescribing these progestins for the supposedly embryocidal effect (the possibility of it having an abortive action was ruled out long ago) is acting only in mala fide (in these cases ignorance or incompetence can not be accepted as justification).

I have expanded to present different theoretical perspectives from those adopted by the majority Opinion both to show that the problem of conscientious objection should have been dealt with in a different way from how it was set out, and also to point out that the primary task of the Committee should have been to inform correctly and objectively about the various positions on the subject,

presenting even those contrary to the ones favoured by the majority. A possible proposal could perhaps be put forward only after an objective presentation of the various positions, leaving the task of a legislative choice to other bodies.. Instead nothing of the kind: the majority of the NBC simply ignores and disregards positions that differ from its own, elevating itself to a normative source for " Italian morality", as if it had the chrism and the ability to grasp and explain authentic "Italian values" - with almost a claim to "infallibility" derived perhaps from the fact that a committee with 90% Catholic members can not fail. As I have already stated on other occasions the position taken by the majority of the NBC is mystifying and is far from interpreting the task that should be carried out by a National Committee in a secular, democratic and pluralistic State.

The third and final reason for my dissent from the majority Opinion regards the justification of the argument that conscientious objection should be seen as an exception clause *secundum legem* that, in some ways, would strengthen the legal system. According to Gemma's thesis, this proposal should be seen as incongruent at the very least; let us now see, in more detail, if it is possible to clarify the reasons that make it unacceptable.

In order to grasp the heart of the proposal of the majority Opinion one should consider the definition of **"*conscientious objection" which has been selected: the claim of individuals to be exempted from a legal obligation because they believe that this obligation is inconsistent with a command coming from their own conscience and that it also infringes an important fundamental right in bioethical and biojuridical fields*.**

Therefore there are two conditions, according to the majority of the NBC, which are the basis of conscientious objection:

1) *the "subjective" perception of a strong and deep contrast between a legal duty resulting from the obligation to obey the law and a moral obligation to follow the dictates of one's own conscience; and*

2) *the "objective" discovery that the legal obligation is detrimental to a fundamental human right.*

The key point of this definition is that the "subjective" aspect is not in itself sufficient to justify conscientious objection, because otherwise it could undermine the rule of law which is binding on compliance with legal obligations. If the subjective perception of a moral contrast were enough, one should also accept conscientious objection of all liberals the payment of taxes, or that of all lovers of hazard to the speed limits, and so on: in short, it would be the end of the social function of law. On the contrary what establishes the institute of conscientious objection in bioethics is that the moral obligation perceived by the conscience closely links to the protection of some fundamental human right that is neglected in this case: that is why conscientious objection does not would have anything to do with individual protest, it would be "communicated", and it should be clearly distinguished from civil disobedience or "scientific objection"[30].

[30] As noted in the Opinion of the majority, it would be "a simplistic and at the same time distorted" interpretation to see conscientious objection as the claim "of those who intentionally want to evade general compliance with the principle of legality and, at the same time, expect that their choice, albeit morally justified, is not for any reason attributable to the statutes of law, in which case we

The referral to human rights is the key, according to the majority of NBC, which would provide a firm legal basis to conscientious objection. Indeed, "***the refusal to obey a particular rule, for reasons of conscience, contextually implies basic adhesion to the legal system as a whole, and in particular to those principles and values, established constitutionally which readily seem to be a possible trait d'union between personal innermost convictions of a moral nature, and positive legal norms***". This overall loyalty to the legal system as a whole, is, moreover, in turn morally supported by the fact that the Italian Constitution of 1948 has abandoned the nineteenth-century conception "***law as a mere result of the power to enforce laws: it is no longer considered as a simple product of the power of ruling, but finds its justification precisely in some fundamental values recognised in Constitutions***" which are precisely human rights. Thanks to this change the law "***divests the claim of self-referentiality and embraces the principle of inclusion and debate on fundamental values according to reasonableness, temperament of legality understood, according to Creon, in a rigid and abstract manner without any limits***".

Under this happy situation in which State power (*imperium*) is constitutionally subject to human rights, we can establish that "trait d'union" or the relationship between the "intimate personal connections" and "positive legal norms "that, according to the Opinion of the majority, not only provide a firm legal basis to conscientious objection, but would also assign to it "***the function of democratic institute preventing that parliamentary majorities or other organs of the State deny in an authoritarian manner the problematicity concerning the boundaries of the protection of inviolable rights***".

Since the spheres regarding human life are those in which some "fundamental human rights", seem threatened, this explains why conscientious objection today concerns the most controversial issues in bioethics such as abortion, protection of the embryo and euthanasia. This also explains why for the majority of the NBC the institute of conscientious objection applies not only for the individual citizen but also for the whole category or class of health care workers: "***the idea that a professional choice implies automatic acceptance of the duties imposed ex lege - possibly even against the deontological code - is fruit of an authoritarian conception of the law that does not allow for the autonomy of professional bodies in the definition of their purpose and consequently of their identity, and reduces the profession merely to depersonalised technique and purely methodical expertise, insensitive to the issue of purpose***". Health care providers, in fact, would be directly involved as a class in the protection of "human rights" regarding human life, the fundamental reason for which conscientious objection is limited to this elective profession and not to others (judges, journalists, military professionals, etc.).

Lastly, this close connection between conscientious objection of health workers and "inviolable human rights" also explains the different position of conscientious objection to animal testing. The majority Opinion acknowledges that, "***on the basis of the recognised need for the protection of animals Law***

would be faced with civil disobedience or resistance to power which, as mentioned, are not dealt with here".

No.413/1993 has also introduced conscientious objection to animal testing, in addition to the context of the protection of human life". It is therefore clear that in the case of animal testing conscientious objection is allowed under the specific law approved by Parliament "***on the basis of the recognised need for the protection of animals***" and not as a consequence of the recognition of one of their "inviolable rights", which instead would be the basis of conscientious objection in the field of human medicine. Not surprisingly, the majority opinion promptly specifies that a "***differentiation seems necessar..... in relation to the different constitutional weight of the reason put forward in support of conscientious objection****", a differentiation which* ***is necessary also as regards the question of the possible need for the legal regulation of conscientious objection and its methods of being exercised, depending on the reasons of conscience invoked by the objector and their corresponding or not to fundamental constitutional values. Moreover, only in this way, is it possible to avert the danger of conscientious objection … deferred exclusively to the will of the same majority that imposed the legal order against which conscientious objection may be invoked***".

Here we come to the crux of the matter that aims to demonstrate that if conscientious objection were recognised as "***a concession of the majority even when the objector makes claim to a reason presented as an extension of the protection of a primary constitutional value*** this solution would demonstrate a recoiling of the legal system on itself, in an authoritarian sense. The legal system, "***in other words, would deny its democratic nature in a constant tension to fundamental values, by depriving itself precisely in the experience of that critical request invoked with regard to the very constitutionality of that right***". Indeed "conscientious objection ***should not be regarded as a threat***" the principle of legality and the laws passed by the majority, but it should be looked upon favorably by the same majority as the democratic institution that allows "***not to close in an authoritative way the discourse on the understanding and scope of the protection of fundamental values****"* or the chime that announces those values and rights.

That's why according to the majority of the NBC "***in the final analysis the right to conscientious objection can be configured constitutionally as a fundamental right of the individual***" and as such should be encouraged and protected by the same State which at the same time, issues a law that imposes opposite duties. This would also win "***the challenge for the legal recognition of conscientious objection*** (which) ***consists precisely in avoiding undermining the principle of legality and to bring together the legitimacy of objection, especially when inherent to fundamental constitutional values, with the protection of those who are legally entitled to the rights provided***" The final conclusion is that "***the legal system which has imposed a certain duty or legal obligation in the biojuridical context does not intend to contradict itself by accepting conscientious objection, it is simply not willing to close the space for discussion on fundamental values and lose its inclusive and pluralistic nature. Therefore as long as the legal system has the strength to accept conscientious objection it manages to maintain a certain balance; when on the other hand conscientious objection is not recognised or objectors are***

discriminated, legality once again takes on the character of Creon (authoritarian) - sola auctoritas facit legem - and conscientious objection is forced to assume once again the tragic features of the sacrifice of Antigone. The challenge of the democratic state is to maintain the tension to its fundamental values while respecting the principle of legality".

The words reported clarify that the position adopted by the Opinion of the majority is divided into three different theories:

A. Conscientious objection should be considered "***as compatible with the principle of legality***" as acceptance of its legitimacy does not undermine or contradict the duty to respect laws;

B. Conscientious objection in the health sector is not merely a "***concession of the majority***" to a group of citizens that requests exemption from obeying a law (as is the case with animal testing), but it should be configured "***constitutionally as a fundamental human right***";

C. Conscientious objection takes on "***the function of democratic institute preventing that parliamentary majorities or other organs of the State deny in an authoritarian manner the problematicity concerning the boundaries of the protection of inviolable rights***" demonstrating in a tangible manner that, "***it is not willing to close the space for discussion on fundamental values***".

As can be seen the three theses are different and each of them put forward increasing claims. Thesis (A) is opposed to the general criticism of conscientious objection portrayed as a real contradiction within the legal system: as observed by Gladio Gemma, accepting objection means legalising the right to disobey a binding rule introduced for a good purpose and that is socially beneficial.

Gemma's position could be challenged, or could find a precise limit despite its being valid in general, seeing as in certain circumstances it may be more appropriate to grant conscientious objection in order to prevent social problems that are more serious than the ones which the legal obligation actually aims to impede: at times it may be worthwhile to defer and overcome the obstacle with an ad hoc concession that decides in favor of all the positions expressed. In this sense, one could introduce an "exemption clause" to prevent or mitigate vibrant social conflicts.

Thesis (B) is opposed to this solution stating that conscientious objection is a genuine *individual right,* which has an immediate practical consequence: the exercise of conscientious objection can not require any "heroic" commitment and it can not entail extra service duties or other additional burdens of any kind. If conscientious objection were a concession of the majority accepted to avoid worse problems, one could also consider additional workloads or penalties (to be determined separately depending on the circumstances), but if this is a right it can not involve burdens of any kind. This also explains why the majority Opinion has no difficulty in acknowledging "***that conscientious objection can be abused***" and therefore "***the means of exercising it must be regulated in order to reduce this risk which, however, can not be completely eliminated***". Precisely because it is a right of the individual, this right must be protected even if it gives rise to improper use, so one must also willingly accept to tolerate a large number of "objectors for personal convenience" This would also explain why in this case

the risk of misuse should be tolerated, while in other areas (such as the possibility of conception), even a slight risk is unacceptable and must be strictly excluded.

However, the (B) thesis is in turn sustainable only on the basis of thesis (C), which provides the theoretical justification and is the "Archimedean point" of the whole proposal of the Opinion of the majority, which stands or falls with it. Not only is conscientious objection compatible with legality but it becomes an important value, a "***democratic institution***" because it keeps it open "***space for discussion on fundamental values***" that would otherwise be established in an authoritarian manner from state power.

Underlying thesis (C) is the idea regarding the change brought about by the Republican Constitution thanks to which the law would have abandoned "***the claim of self-referentiality and self-sufficiency accepting the principle of inclusion and debate on fundamental values according to reason as temperament of a legality construed in Creon's manner, that is to say in a rigid and abstract manner without limits***". This means that the legal system provides for two levels which are at the basis of the distinction between "*the law of Creon*" consistent with the respect due to the law as the fruit of state power (Creon: *sola auctoritas facit legem*), and "*constitutional law*" consistent with the respect due to the legal system on the whole which acknowledges its submissiveness to the greater values expressed in the human rights recognised by the Constitution. It is thanks to this distinction that the majority Opinion succeeds in upholding thesis (A), namely, that conscientious objection is compatible with the principle of legality. On the one hand, the law must be complied with as the expression of *Imperium* (Creon) that deserves due respect as part of the system of legal order deriving from the (legitimate and democratic) majority of citizens, but on the other hand, conscientious objection is legitimate when the law (of Creon) is not respectful of fundamental human rights recognised in the Constitution that is the basis of the same legal system.

In addition, this distinction legitimises conscientious objection as a fundamental right of the individual (thesis (B)) that would be guaranteed by the Constitution as (constitutional) law foresees that state power (the law of Creon) is respectful of human rights. Therefore, in the absence of the latter condition (i.e. when rights are violated), (constitutional) law provides a legal basis for the right to conscientious objection.

Lastly, thanks to the distinction between the two levels of the legal system (Creon's legal system and the constitutional legal system), conscientious objection becomes a democratic and positive institution (thesis (C)), because it prevents parliamentary majorities to deny "***in an authoritarian manner the problematicity concerning the boundaries of the protection of inviolable rights***" permitting to keep open the "***space for discussion on fundamental values***". It becomes quite clear why the majority Opinion intends to "***avoid undermining the principle of legality***" and at the same time attempts "***to make the legitimacy of objection, especially when inherent to fundamental constitutional values, coexist with the protection of those individuals entitled to the legally foreseen rights***". Hence the "compatibilist" solution according to which both the right to conscientious objection of the health care worker and the right of women to utilise services provided for by Law No. 194/78 must be ensured.

At first glance, the solution may seem "Solomonic" because it allocates to each applicant a little of what is requested, but more careful reflection reveals that the price to be paid is unacceptable, because it involves theoretical incongruities that are combined with a certain "cultural provincialism" that precludes gaining adequate insight into the situation.

The first of these inconsistencies is generated by the fact that the Opinion of the majority starts by taking for granted that Law No. 194/78 is the result of the mere (authoritarian) power of Creon generated by the parliamentary majority that approved it and, if anything, by the popular referendum that confirmed it, but it is essentially a (morally) unjust law that is contrary to "human rights". It almost seems to assume that such a law has been approved by a despotic power (Creon) proffered only to find a tragic remedy to the spread of illegal abortion generated by the sexual intemperance of women, even at the expense of the "human right" to life in the prenatal stage. After 34 years of Law No. 194/78 the widespread mentality is so accustomed to the legality of abortion to convince the majority of the NBC to acknowledge that at this time it is not possible to call into question the provision of services for medically assisted abortion, but it intends to affirm that the discussion on fundamental values must at least remain open, especially as regards the "right to life" of the embryo jeopardised by other practices introduced in recent years. It is thanks to this constant criticism of the permissive abortion legislation of Creon that perhaps a further enlargement of the attacks on prenatal life may be prevented as occurs with RU486 and the like, with similar expedients.

It is to say the least astonishing to see how a National Committee identifies the legal and constitutional basis of the right to conscientious objection to abortion on the basis of the implicit and predictable premise that Law No. 194/78 is a law of Creon against the "human right" to life in the pre-natal stage, so conscientious objection to abortion would become the democratic institute which, in a society accustomed to the licitness of abortion, keeps open the debate on fundamental rights and testifies in favor of that "right".

This judgment is so hard and surprising to cast doubt on the actual objectivity of the Committee and are grounds to point out once again how the overwhelming influence of Catholic culture conditions its judgment. This assessment of Law No.194/78 is so unjust and offensive that it alone justifies my clear dissent from the majority Opinion, why on earth as a citizen of a democratic and secular State should the idea cross my mind that Law No.194/78 is the result of the mere (authoritarian) power of Creon affirmed in violation of a "human right".

Not only the sense of respect for the democratic State and the laws enacted by it, but also other theoretical considerations lead me to structure this issue in a completely different way from the one underlying the Opinion of the majority. To succeed in overcoming this "cultural myopia" which usually characterises the NBC's perspective, all too careful to remain within the margins of its ideological matrix to look beyond our borders, it must be acknowledged that the protection of prenatal life is not one of the “human rights". In this regard it is sufficient to recall that in 1948 the UN Assembly did not include among the human rights neither the specific subparagraph proposed by Chile on the protection of prenatal life (*“Unborn children and incurables, mentally defectives and lunatics, shall have the right to life)* nor the alternate text backed by Lebanon that included this condition: *“Every*

one has the right to life and bodily integrity from the moment of conception, regardless of physical or mental condition, to liberty and security of person"[31].

If we look beyond the Italian Province we must acknowledge that after the UN conferences in Cairo (1994) and Beijing (1995) there is a strong tendency to include among human rights also "*sexual rights*" and "*reproductive rights*". Their affirmation is not yet certain, but at the very least the NBC should have given an account of the ongoing debate, rather than subjecting it to preemptive censorship without even a mention.

If there is no "human right" for the protection of prenatal life, then the alleged legal and constitutional basis to the right to conscientious objection in bioethics disappears and along with it the entire proposal put forward by the majority Opinion fails. In addition, it opens a new perspective: we can see that - beyond the historical problems about its genesis - Law No.194/78 was not the simple result of the mere authoritative power of Creon (exercised by a tyrannical majority"), but it turns out to be the tangible means by which in the late '70s that very "human right", that is the right to health of women was protected - almost advocating the notion of "reproductive health" which is the basis of "sexual rights" and "reproductive rights". Far from being in contrast with the non-existent "right to life in the prenatal stage," Law No. 194/78 was a forerunner in the specific protection the human rights of women: first of all, the right to health, understood in accordance with principles and limits accepted by modern states. For this reason the slogan "A good doctor does not object" launched in a recent campaign promoted by "the objectors to easy objection" seems particularly pertinent. Indeed, it is difficult to justify health care workers that exercise conscientious objection to interventions aimed at protecting the reproductive health of women[32].

At a time in history when are increasing measures to protect reproductive health one would expect a National Committee of a modern, secular and pluralist State, to be ready to value practices that increase people's freedom and to be critical of cultural survivals and other prejudices that are invoked in order to offer resistance to human rights protection, including the right to health. In contrast, the majority Opinion continues to repropose the Catholic thesis that abortion would violate an alleged but non-existent "human right" to life in the prenatal stage, a premise which is certainly not valid, but still useful to promote conscientious objection to a genuine right of the individual, with the ultimate aim to keep open the discussion on fundamental values and inviolable rights that would be trampled on by Law No. 194/78. This view tends to overturn the picture of the situation, presenting the voluntary interruption of pregnancy as a highly immoral practice, entrusted to people with no sense of ethics; this stance tends to overturn the picture of the situation, by presenting voluntary interruption of pregnancy as a

[31] Cf. M.A. Glendon, *Towards a New World. Eleanor Roosevelt and the Universal Declaration of Human Rights*, Liberilibri, Italy, 2008, p. 430. Even the Vatican diplomat scholar Ettore Balestrero acknowledges that human rights do not provide for the protection of prenatal life. See E. Balestrero *Il diritto alla vita prenatale nell'ordinamento internazionale. L'apporto della Santa Sede,* Edizioni Studio Domenicano, Bologna 1997, p. 88.

[32] It is up to the health professions to understand that the first duty is the service to women's health, including reproductive health: just as reluctance and delays in the administration of analgesics must be overcome, the same applies as regards the reproductive sphere. This is however a broader discussion to be explored separately.

highly immoral practice, entrusted to people with no sense of ethics, in this squalid picture the enlightened behaviour of conscientious objectors stands out as a noble exception, the new champions of the protection of human rights. Instead I personally feel able to declare, with a certain pride, that even with all the limitations due to historical events, Law No.194 was passed to protect the "human right" to health (including, but not limited to, reproductive health): it ensues that Law No.194 does not violate human rights, and conscientious objection to abortion is not a right of the individual. It is crucial to reaffirm this perspective both because it allows to look favourably on the new proposals of reproductive medicine (which may require changes to Law No.194 in order to increase the freedom of women) and also because awareness that law 194 is in line with human rights is liberating for everyone. It is even for this reason that I dissent from the majority Opinion that settles on the same line of criminalisation and guiltiness that has always characterised the Catholic world.

However, there is at least one other serious inconsistency in the majority Opinion that deserves to be reported. Let us try to assume, of course absurdly, that the opinion is shared and that we are all in agreement in recognising that conscientious objection in bioethics is not a protest against Law No.194/78, but only a complex clause *secundum legem* able to strengthen the legitimacy of legal system as a whole as it would constitute "***a democratic institution necessary to keep alive the sense of... protection of inviolable rights***" (rights that would naturally be violated by the provisions of the law in question).

If this were so, then we would be faced with at least two problems. First, we should ask ourselves whether a State which clearly violates human rights so cynically may be structured in such a way as to be also even willing to recognise conscientious objection in bioethics. The second question that we should ask ourselves (and here I refer to some of the considerations made above) concerns the behaviour of the NBC: is it morally acceptable for a Committee like ours to find that a certain lawful practice is clearly contrary to human rights and merely propose as a solution the right to conscientious objection, as a useful institute (?!) to keep open the discussion on fundamental values, explicitly stating willingness to "***avoid undermining the principle of legality***" that allows the delivery of abortion services? This statement, however, is equivalent to an "ethical certification" of Law No.194/78, albeit modest, but nevertheless unmistakable. So, in what way would this law be a clear violation of human rights? Moreover, if a law was actually in clear contradiction with human rights, would it be correct to avoid criticism and denunciation of it? Faced with an inhumane practice, would it be sufficient merely to request the right to conscientious objection for certain workers? If the majority of the National Committee truly believes that Law No.194/78 involves a blatant violation of human rights, then one can not understand its willingness to "***avoid undermining the principle of legality***" and its only seeking to "***to make the legitimacy of objection***... ***coexist with the protection of those individuals entitled to the legally foreseen rights***". It seems to me that this solution reveals an unacceptable moral incongruence, which is another reason for my dissent to the majority Opinion.

The final conclusion is that if one abandons - as I believe necessary - the idea that conscientious objection is regarded as the banner raised in defense of

human rights and in particular the "right to life" in the prenatal stage against a law enacted by a power of Creon, then conscientious objection in the health sector is no longer a "fundamental right", but may be permitted provided that the objector is required to accept an appropriate burden (carrying out a supplementary service that integrates the missing due service or adopting the criterion of mobility of staff may not be adequate compensations) that prove the solely and purely moral motivations underlying the request. To continue to defend the current situation which merely exonerates from service anyone who requests it means to defend the privilege of too many "objectors for convenience", that is, to continue to power widespread immorality.

A Personal Remark by Prof. Assuntina Morresi

The opinion "Conscientious objection and bioethics" addresses the issue of conscientious objection (hereafter CO) from a general point of view, without reference to specific situations provided for by Italian law: the contents of the document have a general validity and relate to any case in which CO can be invoked.

The validity of the considerations developed is however verifiable precisely in what is the most well known model in our country, namely CO as provided for by Law No.194/78 on the voluntary interruption of pregnancy (hereafter vip).

This personal remark aims to integrate the document approved (even by me) with considerations and data on CO as intended and implemented by Law No.194/78, to support and confirm the conclusions and recommendations made in the opinion.

The data on the implementation of Law No.194/78 are public and accessible thanks to the reports that the Ministry of Health presents annually to Parliament. Data collection involves the ISTAT, the regions, the National Institute of Health and the Ministry itself, in the manner described in the text of the reports, also available on the website of the Ministry of Health.

From examination of the data available to date, it is clear there is no correlation between the number of conscientious objectors and waiting times for women who access vip, but the means of access to vip depends on the organisation of each particular region.

As shown below in an example, on the basis of the available data we see that in some regions with the increase of conscientious objectors there is a decrease in the waiting time for women, and vice versa, in other regions with the decrease in the number of objectors there is an increase in waiting time, contrary to what one might imagine.

In other words, it is not the number of objectors in itself which determines access to vip, but the way in which healthcare facilities organise themselves regarding the implementation of Law No. 194/78.

Even today, in fact, it is possible for the regional healthcare organisation to implement both forms of staff mobility[33] as well as forms of differentiated

[33] Law No. 194/78, Art. 9 "Hospitals and authorised nursing homes are required in any case to ensure the accomplishment of the procedures provided for in Article 7 and carrying out of

recruitment methods, as suggested in point 3 of the conclusion of the NBC Opinion.

Recruitment limited to fixed term contracts (also referred to as "attendance fee"): possible "ad hoc" state competitions for permanent positions, not intended for objectors (without even considering the question of compatibility with the regulations on non-discrimination of workers) would still not be decisive for healthcare organisation.

It is unthinkable that a person who is employed on a permanent contract as a non-objector should be denied the opportunity, thereafter, to change his mind and become a conscientious objector. Indeed as already occurs, some doctors who at the beginning of their careers state that they are not objectors later on become conscientious objectors and vice versa. Possible forms of permanent recruitment reserved for non objectors, - even if allowed by legislation - could not therefore guarantee the provision of services, as it could not oblige a doctor or a healthcare worker, taken on as a declared non-objector to remain so forever.

But on the other hand also some of the organisations that question the implementation of CO in Law No.194 confirm that the problem is primarily organisational, in a recent press conference on the situation in Lazio in fact, the LAIGA (Free Italian Association of Gynecologists for the application of Law No.194/78) stated inter alia: "*With recourse to external contracted practitioners and doctors on attendance fee objection falls to 84%, still more serious by 80, 2% as reported by the Minister of Health, who in his report does not consider the fact that some of those not objecting in actual fact do not perform voluntary interruption of pregnancy*"[34].

In other words, the current legislation allows differentiated recruitment, specific to non-objectors, some of these, however, for unknown reasons, do not carry out vip, this fact is certainly not due to the percentage of conscientious objectors (and it would be interesting to go into the reasons for this).

The recommendations of the opinion of the NBC are, therefore, consistent with what is currently the case in Italy under Law No. 194/78 which, if applied correctly, permits both the right to CO and at the same time access to vip for whoever should request it in accordance with the same law.

Conscientious objection and application of Law No.194 - example (see table below)

Key to the table:

Ar: abortion rate: number of abortions per 1000 women of childbearing age, between 15-49 years.

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operations for interruption of pregnancy requested according to the procedures prescribed in Articles 5, 7 and 8. **The region monitors and ensures implementation through staff mobility**, the bold is mine).

[34] http://www.associazionelucacoscioni.it/rassegnastampa/aborto-consulta-decide-su-legge-194-nel-lazio-oltre-il-90-medici-obiettore.

n. ab: number of abortions in absolute value, useful to assess the numerosity of interventions.

object.: objectors, specified as a percentage among gynecologists.

w. tm. % <14 days.: waiting time, defined as time that elapses from the issue of certification and the operation. In this case, it indicates the percentage of women who wait less than 14 days. including 7 days for reflection as provided for by Article 5. It is an indicator of the efficiency of law enforcement.

w. tm. 22 to 28: the percentage of women who wait between 22 and 28 days from the issue of the certificate and the operation, including the 7 days reflection period as provided for by Article 5

Urg: indicates the percentage of abortions in which the physician has issued a certificate of urgency, for which the operation is performed as soon as possible (without the seven days reflection period).

The first line relates to national data. We see that from 2006 to 2009 the number of abortions decreased both as a rate and in numerosity. Objectors increased from 69.2 to 70.7%. The percentage of women who wait less than two weeks (let's say "little") from the issuing of the certificate and the operation increased, from 56.7% to 59.3%, which means that the "service" improved. At the same time, the percentage of women waiting for 22 to 28 days diminishes (from 12.4% to 11.1%) (let's say "a lot").

So in three years in Italy objectors have increased and waiting times have decreased, therefore improved.

The table then shows the same data, region by region, and we find that the circumstances are extremely diverse.

For example, in Lazio, objectors in three years increased from 77.7 to 80.2% and waiting time decreased (an increase from 47.8% to 54% in the women who wait "little", and a fall from 17.2% to 13.3% in those who wait "a lot"). A similar pattern occurs in Piedmont, for example.

In Lombardia, however, objectors have decreased and waiting times have increased, therefore worsened (a decrease in the women who wait "little"). In Umbria, the situation is as in Lombardia, but more marked in the figures: objectors fall from 70.2% to 63.3% and women who wait "little" decreased from 51% to 40.0%, and those who wait "a lot" increased from 13.3% to 19.0%.

In Emilia Romagna something different again happens: objectors decreased along with waiting times, which therefore improved.

From these examples we see that there is no correlation between the number of objectors and implementation of the law.

In short: the means of implementing the law depends substantially on regional organisation, the overall result of various contributions, which of course, vary from region to region (and probably even within the same region).

I would also like to draw attention to the urgency data: the regions in which more certificates are issued urgently are always Emilia Romagna and Toscana.

For a proper interpretation, the data should be contextualised, and examined together with even complex considerations regarding healthcare organisation, as demonstrated by this simple example: if this data - that Toscana and Emilia Romagna have always been the regions with the highest number of abortions as an emergency measure - were considered per se, one could infer that the women in these regions are not properly informed, and that the network of counselling is by no means efficient, the so-called "active offer" is not very effective, since a very large number of women are too late to make the request for abortion compared with the national average, and therefore many of them must resort to the urgency procedure.

However, only by contextualising can one interpret this fact as a political and healthcare orientation of the two regions, in their implementing the law they evidently tend to bypass the one week reflection period.

	2009						2006					
REGION	AR.	N. AB.	OBJECT.	**W.T M. %< 14 d**	W.T M. 22-28	URG	AR.	N. AB.	OBJECT.	**W.T. M. %< 14d**	W.T M. 22-28	URG
ITALY	**8.5**	**118579**	**70.7**	**59.3**	**11.1**	**9.2**	**9.4**	**131018**	**69.2**	**56.7**	**12.4**	**9.4**
NORTHERN ITALY	8.7	53958	65.2	**55.3**	12.3	8.6	9.8	59829	65.2	**53.2**	13.3	9.3
Piemonte	9.7	9485	63.8	**60.1**	10.8	8.6	11.4	11030	62.9	**51.1**	13.7	7.3
Valle d'Aosta	7.6	217	18.2	**66.2**	7.9	5.5	9.6	274	16.7	**40.5**	7.8	4.4
Lombardia	8.8	19646	66.9	**56.0**	11.5	7.6	10.0	22248	68.6	**58.6**	11.3	6.2
Bolzano	4.8	571	81.3	**62.4**	9.7	8.4	4.9	564	74.1	**44.7**	15.2	4.8
Trento	9.0	1078	55.9	**48.8**	17.3	8.1	11.6	1358	64.0	**62.7**	11.1	6.9
Veneto	6.0	6840	78.0	**38.7**	22.0	8.8	6.4	7090	79.1	**34.0**	23.4	7.8

Friuli V.G.	7.8	2075	60.4	**55.8**	12.6	7.1	8.0	2107	59.8	**54.4**	11.0	7.5
Liguria	9.6	3219	57.3	**49.3**	13.6	3.5	10.9	3700	56.3	**51.1**	14.1	4.4
Emilia Romagna	11.1	10872	52.4	**62.0**	8.3	12.4	12.2	11458	53.5	**56.8**	11.1	20.7
CENTRAL ITALY	9.4	25487	69.5	**56.1**	12.5	12.3	10.9	28888	71.0	**55.2**	13.4	12.9
Toscana	9.5	7819	62.2	**59.0**	11.1	19.3	11.0	8879	55.9	**63.3**	9.3	22.8
Umbria	9.5	1920	63.3	**40.0**	19.0	2.3	11.1	2178	70.2	**51.0**	13.3	2.2
Marche	6.9	2458	62.0	**71.1**	7.5	8.6	7.4	2581	78.4	**73.9**	5.6	8.1
Lazio	9.9	13290	80.2	**54.0**	13.3	10.3	11.8	15250	77.7	**47.8**	17.2	9.4
SOUTHERN ITALY	8.3	28839	80.4	**70.7**	6.8	8.7	8.8	30716	71.5	**63.6**	9.9	7.6
Abruzzo	8.1	2518	78.5	**56.8**	11.3	4.7	8.8	2709	45.5	**71.9**	4.9	5.0
Molise	9.0	666	82.8	**76.1**	9.0	4.8	8.3	620	82.8	**NR**	NR	5.0
Campania	8.3	12183	83.9	**67.1**	6.4	11.1	8.2	12049	83.0	**62.1**	10.3	7.4
Puglia	9.7	9682	79.4	**77.3**	5.1	9.7	11.2	11333	79.9	**60.9**	11.5	10.2
Basilicata	5.0	700	85.2	**82.6**	3.6	6.6	4.9	701	44.0	**78.0**	3.5	8.1
Calabria	6.3	3090	73.3	**65.5**	10.1	2.2	6.6	3304	73.5	**64.9**	10.0	2.3
INSULAR ITALY	6.3	10295	74.1	**59.8**	11.8	4.9	7.0	11585	76.3	**66.0**	8.9	4.8
Sicilia	6.5	7979	81.7	**55.2**	13.7	3.6	7.5	9303	84.2	**62.0**	10.5	3.7
Sardegna	5.7	2316	54.3	**75.7**	5.3	9.4	5.5	2282	57.3	**77.8**	4.1	8.0
ITALY	**8.5**	**1185**	**70.7**	**59.3**	**11.1**	**9.2**	**9.4**	**1310**	**69.2**	**56.7**	**12.4**	**9.4**

		79						**18**				