Presidency of the Council of Ministers

CONSCIENTIOUS OBJECTION AND BIOETHICS

12 July 2012

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Presentation

The CNB felt the need to address in general the issue of conscientious objection in bioethics, already solicited on several occasions for particular issues, and formed a working group coordinated by Prof. Andrea Nicolussi, in which the Proff. 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 dwells on the legal side, to which the objector ultimately addresses himself by asking him not to comply with legal commands contrary to his conscience.

The new frontiers of bioethics increasingly propose a new challenge to the democratic and pluralist constitutional state. On the one hand, it is a question of avoiding imposing obligations contrary to conscience by instrumentalising those who exercise a profession. Often it is overlooked that the recognition of rights implies the provision of obligations and therefore the claim of behaviour that may not even be compatible with professional ethics. In short, there emerges a broader problem of protection of professional autonomy both from the point of view of the freedom of the community of professionals to self-reflect and determine the specific aims of the profession exercised, and from the point of view of the freedom of the individual professional towards a possible legal heterodetermination with regard to the aims of his own work. The exercise of a profession involves not only technical discretion, but also deontology.

On the other hand, the conscience of the individual is not limited to the deontological dimension, concerning the person as such and not only as a professional. The right to the ODL is therefore presented first and foremost as a right of the person which a constitutionalised state sensitive to freedom of conscience cannot but protect legally. However, precisely because it is a legally protected situation, this right must be integrated into the legal system, as is the case for all rights, and also because the power to evade a legal command must be justified and not mortify the principles of legality and certainty indispensable to the experience of the law. First of all, conscientious objection cannot be exhausted in an arbitrary refusal to obey, but - subject to individual reasons - it must also present an intersubjective relevance which in bioethics can be grasped in references to the inviolable rights of man recognized as the foundation of constitutionalized law. From this point of view, the ODC not only protects individual freedom of conscience, but also represents a democratic institution, because it prevents a majority from "requisitioning" even the problematic nature of very controversial matters inherent in fundamental values by rejecting doubt. However, the recognition of the ODC does not imply a kind of boycott power of the law, the vigour of which must be guaranteed just as the exercise of the rights it provides for must be guaranteed. It is in this perspective that a legally sustainable odc for bioethics can be configured.

For these main reasons the opinion concludes that "conscientious objection in bioethics is a constitutionally well-founded right (with reference to inviolable human rights), constitutes a democratic institution, since it preserves the problematic nature of issues related to the protection of fundamental rights without binding them absolutely to the power of majorities, and must be exercised in a sustainable manner". Therefore, the legal protection of conscientious objection must neither limit nor make more burdensome the exercise of rights recognized by law nor weaken the bonds of solidarity deriving from common membership of the social body.

From these conclusions, some recommendations also derive: in the protection of conscientious objection, which derives from its constitutional basis, adequate measures must

be provided to guarantee the provision of services, with attention to not discriminating neither objectors nor non-objectors, and therefore an organisation of tasks and recruitment that can balance, on the basis of the available data, objectors and non-objectors.

The opinion also deals with the main issues of detail inherent to the issue of ODA in bioethics, such as the need for consistency checks, the distinction between obligations to do and not to do and the difficult question of the criteria for determining the entities that can claim ODA.

The document was drafted by Proff. Andrea Nicolussi and Antonio Da Re, respectively with regard to the legal and moral perspective, making use of extensive written contributions by Prof. Demetrio Neri, as well as Proff. Salvatore Amato, Stefano Canestrari, Lorenzo d "Avack, Marianna Gensabella, Assuntina Morresi and Laura Palazzani.

The opinion was definitively approved in plenary session by those present (Proff. 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 Prof. Carlo Flamigni voting against.

Absent at the plenary session, Proff. Cinzia Caporale, Bruno Dallapiccola, Riccardo Di Segni, Silvio Garattini, Rodolfo Proietti voted in favour.

Prof. Assuntina Morresi, in addition to the approved opinion, sent an apostille; a further apostille was sent by Prof. Carlo Flamigni in disagreement with the approved document.

Il Presidente

Prof. Francesco Paolo Casavola

Reasons for the opinion and definition of the OCD taken into account

The CNB has dealt in some opinions with conscientious objection on particular bioethical and biojuridical issues1. This opinion, on the other hand, aims at addressing the issue from a more general bioethical and biojudicial point of view, taking into consideration conscientious objection (OCD) as an individual "s claim to be exempted from a legal obligation2 , because he considers that such an obligation is contrary to a command from his own conscience and is also detrimental to a fundamental right relevant in the bioethical and biojuridical field.

In this sense, the ODC is to be understood in a more specific sense than a generic 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 contrast with obligations deriving from one's own moral convictions. Moreover, it is distinct both from the right of resistance, understood as a denial of the validity of the law of the State and of the legitimacy of state authority, and from civil disobedience which tends to be a collective phenomenon with the aim of highlighting the injustice of a law in order to induce the legislator to reform it.

The objector does not question the validity of the law as such or of the legal system as a whole, nor the legitimacy of state authority, but he asks to be able not to obey the law in order to act consistently with his moral values. Hence the personal character of the OCD, which is the result of the contrast between legal command and moral obligation, a character that cannot be found in what has been defined as a structural (or institutional) objection (see Resolution 1763/2010 of the Assembly of the Parliament of the Council of Europe), which therefore this opinion does not deal with.

In summary, minimum and fundamental points that characterize the OCD in question are: 1) the refusal to obey a law relevant in the bioethical field; 2) the fact that this refusal is due to the desire not to violate one's moral beliefs or religious principles; 3) the desire to testify with one's behavior the adherence to a certain worldview; 4) the request (addressed to the legal system) to legitimize the conduct of disobedience so as not to be subject to sanctions and therefore the need to anchor the OCD to constitutional values that make it compatible with the obligation of loyalty to the Republic and to comply with the law and the Constitution (art. 54 Const.).

1 The following documents directly or indirectly refer to conscientious objection: Problems of collection and treatment of human seminal fluid for diagnostic purposes (5 May 1991); Ethics committees (27 February 1992); Prenatal diagnostics (18 July 1992); Bioethical issues related to the end of human life (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 Living Health (8 July 1997); Pregnancy and childbirth from a bioethical point of view (17 April 1998); Early Declarations of Treatment (18 December 2003); Note on emergency contraception (28 May 2004); Alternative medicines and the problem of informed consent (18 March 2005); Bioethics in dentistry (24 June 2005); Help for pregnant women and post-partum depression (16 December 2005); Differentiated diet and interculturality (17 March 2006); Conscious rejection and renunciation of health treatment in the patient-doctor relationship (24 October 2008); Alternative methodologies, ethics committees and conscientious objection to animal testing (18 December 2009); Note on pharmacist's conscientious objection to the sale of emergency contraceptive products (25 February 2011).
2 The question of the content of the obligation to which objection may be made, i.e. whether it relates to obligations to do or not to do, will also be examined in Section 6 below.

In this perspective, different from that which places the ODC in a dualistic perspective of opposition between a formal right (for example, the law as such) and a just right from which the objector draws the reasons for his objection, the ODC loses the purely negative connotation of rejection of the law and authority: from "contra legem" it tends to become "secundum legem", because it seeks and finds precisely in law the space to express an individual but not incommunicable moral or religious vision. When the OCD is provided for and regulated by law, it can be seen as a possible option legally attributed to those who, finding themselves in conflict between an obligation provided for by the same law and an obligation of their conscience, prefer to opt for equally legitimate alternative behaviour, according to appropriate limits and modalities so that the space of individual choice is compatible with the orderly development of social life. It remains, however, the symbol of an unhealed conflict with individual legislative provisions, even though it remains within the dictates of the legal system. This will, however, makes it possible to distinguish the OCD from civil disobedience, which has a clear character of generalised revolt. On the other hand, the distinction is less clear-cut from the option (or clause) of conscience which aims to preserve the principles of "science and conscience" of the individual professional in specific and particular situations, as underlined, for example, by art. 22 of the Code of Medical Deontology. Compared to the latter, the OCD recognised by law has a more general and abstract character, as it follows a declaration by the subject to abstain for the future from certain services without waiting to find himself currently in the particular situation of conflict of conscience. On the other hand, as the CNB has already noted in its Opinion on Vaccinations (September 22, 1995) is not conscientious objection that of those who do not claim an obligation of conscience, but a different scientific assessment than that placed at the basis of a legal precept, such as advocating the idea of a uselessness of vaccinations.

Now, the issue of conscientious objection, especially when to assert it is a professional, to which the law imposes duties that may conflict with obligations arising from his conscience to protect fundamental rights, is proposed increasingly because of the problematic and

sensitive issues of bioethics and biojuridical issues involving in a new and often controversial fundamental human rights. Although in itself the OCD can be invoked in many areas of social life, it is especially in the health sector that there are more frequent issues that call for its recognition or at least a debate on it and its implications. At the same time, the spread of the demand for self-determination favours the conflict between different 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 characterized by their own specific aims. Hence the difficult balance between the protection of the freedom of the individual, who turns to someone who is able to provide a specific professional activity due to his/her competence and experience, and the protection of the freedom of the person who performs this activity and decides to follow his/her conscience even when it does not correspond to the requests made to him/her; hence the need to protect the autonomy of the community of professionals to train and preserve their professional status not only when the technical appropriateness of the professional act required3 is at stake, but also when the aims in the axiological sense of the professional activity itself are questioned4. But the need to ensure an area of respect for the conscience of individuals also emerges in function of the pluralist principle that characterises contemporary democracies, as well as the principle of secularity understood as the non-interference of the State with individual morals. There are even those who attribute to conscientious objection "the technical nature of pluralist society", also stressing that "the lack of shared values cannot be replaced by "an ethics of the most", imposed through the legislative instrument, therefore through the most classic of majority procedures". The question of conscientious objection, in other words, challenges the very liberal conception that nourishes the idea of self-determination, calling for this conception to remain faithful to the primacy of the person over the state organization that can also be threatened by the claim of absolute implementation of the will of the majority.

On the other hand, one cannot deny the serious problematic nature of the same conscientious objection accused, not always wrongly, of being able to be bent as an instrument of sabotage in the hands of strongly organized minorities or object of opportunistic abuse by individuals. Moreover, the ODC assumes public relevance to the extent that it presents itself as a possible cause of socially relevant justification, not purely internal, of the non-observance of a command, and implies the inter-subjective communicability of the conscientious reasons that oppose the fulfilment of the command. In short, the ODC also raises the issue of internal and external limits and modes of exercise compatible with the duty of loyalty to the social community to which it belongs.

3 There is a tendency to speak of scientific objection, although the distinction is not always perceptive. One can imagine several borderline cases. For example, the objector to the removal of an organ from a person deemed dead on the basis of the legally applicable assessment criteria could base his or her objection on his or her ethical opposition to the removal itself, or on his or her scientific opposition to those assessment criteria.

4 In bioethical literature, at the opposite poles of the debate are, on the one hand, the so-called "incompatibilists", i.e. those who believe that the doctor's OCD is incompatible with his profession (the doctor must never do OCD) because: a) his professional duty requires him to work at the service of patients; b) the patient has the right to be treated by the doctor; c) OCD produces inefficiency in medicine and inequity in treatment (cf. J. Savulescu, Conscienscious Objection in Medicine, in "British Medical Journal", 2006, 332, pp. 294-297) and, on the other hand, the so-called "compatibilists", i.e. those who believe that the doctor can and should always do odc, because: a) can/hould put his/her own moral values-professional values before what the patient requests; b) the medical profession is not a mere execution of the patient's requests; c) the doctor cannot act against his/her own moral and professional conscience (see M.R. Wicclair, Is Conscientious Objection Incompatible with a Physician's Professional Obligation? in Theoretical Medicine and Bioethics, 2008, 29, 171ff).

The moral perspective

In order to adequately understand the meaning of conscientious objection, it is advisable to first of all dwell on the value and meaning of conscience, which in fact objects to an order or a law in force in the name of a moral or religious reference considered superior and obligatory in the strict sense. The etymology of the term (cum-scientia) can in this sense help to grasp some relevant aspects. First of all, conscience has to do with a knowledge, a knowledge (scientia); the moment of knowledge and even before personal awareness, well exemplified by expressions such as "being aware of" or "being aware of", qualifies the experience of conscience, even when it is expressed, as in the case of the OCD, in a strictly moral sense. The cognitive element is therefore linked to the purely moral dimension. This link is fundamental: the appeal to a further ethical body is not based on a mere subjective opinion or on some extemporary opinion. The moral judgement on the goodness or otherwise of the act and the consequent activation of the volitional component of the subject that then leads to the choice is based on knowledge, which, among other things, should be recognisable and communicable (we are talking about a cum scientia). The original and constitutive relational and interpersonal character of consciousness shows how this cannot be interpreted in terms of closure and self-referentiality. When this sort of self-sufficiency is given,5 the meaning of the ODC, often declined in purely subjective terms, is inevitably affected, if not, in extreme cases, in terms of devaluation and even the rejection of the bond of belonging to the legally regulated community. This aspect, however, does not call into question the primacy of the moral-subjective point of view in relation to the community "s impositions, when these are justified only by the claim of substituting the individual himself in the definition of his interests and values; even if, it should be pointed out, this is not properly the normativity with reference to which the problem of conscientious objection arises, which instead concerns commands justified by a general interest or by the need to protect other people other than the objector.

More generally, a simplistic and at the same time deforming interpretation of the OCD would be that of those who intentionally want to avoid the general respect of the principle of legality and, at the same time, demand that their choice, even if morally justified, was not for any reason attributable to the rule of law; in this case we would be faced with forms of civil disobedience or resistance to power which, as mentioned above, are not dealt with here.

Equally deforming are opportunistic applications that debase the meaning of the OCD. As will be seen, the challenge lies in being able to combine respect for personal freedom, especially when it is appeal to intimate and profound convictions, perceived as inescapable, with respect for the rights of others and the bonds of solidarity deriving from common membership of the social body. In this sense, the refusal to obey, for reasons of conscience, a particular norm requires, at the same time, a fundamental adherence to the juridical order as a whole, and in particular to those principles and values, constitutionally established, which seem to be happily positioned as a possible link between intimate personal convictions, of a moral nature, and positive juridical norms: in other words, the ODC as it is understood in this document manifests a conflict between possible different interpretations of constitutional values.

5 Niklas Luhmann writes in this regard: "Conscience is no longer syn-eidesis, scientia, co-science, common knowledge; it is no longer, absolutely, any knowledge, but a kind of erudition of the originality of the self of which one can only take note with astonishing tolerance and respect it, but which cannot be verified with regard to its content" (La libertà di coscienza e la coscienza, in Id., La differenziazione del diritto, Il Mulino, Bologna 1990, p. 267). It follows that "everyone has the right to his conscience. The content of conscience, then, cannot be referred to and bound by over-positive law" (Ivi, p. 268).

From what has been said, it emerges that the ODC qualifies in a properly moral sense. It refers to a further perspective, compared to the strictly legal one, whose limits and rigidity it highlights. Recalling the fruitfulness of such a moral perspective does not exclude possible legal formalization. On the contrary, the complexity of the many questions pertaining to the ODC derives from the fact that this is an originally moral phenomenon, which nevertheless needs to pass, so to speak, through the examination of law. The safeguarding of an effective space of communication, although presumably often problematic and difficult, between morality and law is the prerequisite for an appropriate recognition of the OCD; and this space of communication is clearly exemplified in the values and principles of the Constitutional Charter.

Conscientious objection and constitutionalized law

On the juridical side, the contemporary question of conscientious objection marks and intercepts a profound revision of the very concept of law with respect to that widespread in the legal culture formed in continental Europe in the 19th century and predominant until before the second half of the 20th century6. Formally, this evolution manifested itself in what could be defined as the post-Auschwitz Constitutions (as in Italy and Germany), which in the second half of the twentieth century reoriented the law by recognising the human person as the centre of gravity of the legal system and therefore as its purpose. In this way a conception of law as the pure result of the power to impose laws is overcome: it is no longer considered as a simple product of the power of statute, but finds its justification more specifically in some fundamental values recognised in the Constitutions (see, for example, articles 2 and 3 of the Italian Constitution)7. In this sense, the law, without losing its autonomy with respect to other points of view (moral, religious, economic, technical, etc.), dismisses the claim of self-referentiality and self-sufficiency by accepting a principle of inclusion and comparison on fundamental values according to reasonableness as the temperament of a legality understood in a rigid, abstract and unlimited way8.

6 In certain aspects, the accreditation of conscientious objection brings continental law closer to the sensitivity of the countries of common law where, in a context of plurality of religions, the recognition of conscientious objection was favoured by the refractoriness towards the legalistic monopoly that was instead the model of the countries of the European continent.

7 The institution of the judgement of the Constitutional Court - the so-called judge of laws - proves that legal norms can no longer be conceived exclusively as the product of the will of the majority, which is not invested with absolute power but meets the limit of the constitutionality of laws.

8 In other words, constitutionalized law, aware of the problematic nature of certain issues, strives to make the principle of legality coexist with the protection of the conscience of those who refuse to fulfill a command that they consider to be at odds with a fundamental constitutional value (in Antigone's words, "with rules not of an hour, not of a day ago..., [but] of mysteriously eternal life").

After all, a right that one wants to secularize cannot accept fundamentalisms of any kind, but must open itself to the balance between values in real (not apparent) collision (opposition) without falling into the paradox of substituting the reference to the absolute with the absoluteness of the majority's point of view.

Hence the idea that the Constitution implies an openness, within certain limits, to conscientious objection as an effect of the balance between the value placed at the foundation of the legal command that is the object of the OCD, 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 military service, which is an extreme hypothesis, since it is functionally inherent to a duty, the defence of the homeland, which, for example, our Constitution qualifies as "sacred duty of the citizen", expressly providing also

for the obligation of military service (art. 52 of the Constitution)9. Therefore, if a legislative provision could be considered necessary for the ODC to perform military service, the ODC appears to be much less problematic in areas, such as health care, where it is not possible to speak purely and simply of a derogatory nature of the ODC to a constitutional principle10. Where, in fact, the ODC invoked in defence of a certain interpretation of these values cannot be said to be a clear exception and its constitutionality is founded a fortiori with respect to cases where it is relevant in the military context11. In these controversial areas the ODC assumes the function of democratic institution by preventing parliamentary majorities or other state bodies from denying in an authoritarian manner the problematic nature of the boundaries of the protection of inviolable rights. Consistently, therefore, Law 194/78 on the voluntary interruption of pregnancy and Law 40/2004 on medically assisted procreation in providing for forms of intervention on prenatal human life have safeguarded the possibility of an OCD by those professionally involved.

And then, on the basis of the recognized need to protect animals, Law 413/1993 also introduced the OCD to animal experimentation, in addition to the protection of human life.

9 In Italy, in deciding on conscientious objection, the Constitutional Court (164/1985) accepted a distinction between the sacred duty of defence (mandatory) and the obligation of military service (derogable from the law). In any case, the recognition of the constitutional compatibility of the legal discipline that in Italy admitted the ODC to military service, resolving a doubt that the German Constitution directly clarifies, implies a very broad opening to the ODC in general.

10 The full legal recognition of the OCD to military service, which also took place in Italy following the spread of the culture of "non-violence", was of considerable importance for the general accreditation of the OCD, since the Constitution already provides that Italy repudiates war as an instrument of offense to the freedom of other peoples and as a means of resolving international disputes (art. 11): in fact, the O.D.O. has given the opportunity to rethink the same sacred duty of defence of the homeland, distinguishing from it military service, whose obligation, provided for by art. 52 itself, has been considered susceptible of fulfillment by the objector also through substitute activities.

11 Otherwise, the thesis that devalues freedom of conscience by degrading it to a purely individual phenomenon over which the principle of legality would always prevail should be accepted. According to this perspective, the ODC would always be derogatory, regardless of the value context in which it is invoked, precisely because of the general irrelevance of the inner convictions of the individual on the profile of the cogency of the law.

Laws in very controversial areas of constitutional and OCD importance for the safeguarding, in addition to freedom of conscience, of a tension towards fundamental values.

It also emerges from this comparison that the discourse on odc cannot be reduced to a simple claim to freedom of conscience. The evaluation of freedom of conscience and freedom of religion as a founding value of a pluralist legal system remains undisputed, but the same need for a balance between constitutional values that underlies the right to the OCD prevents it from being configured as an absolute right and, at the same time, orients it towards a differentiated consideration of the reasons of conscience that can be invoked in support of the objection itself. In fact, a differentiation seems necessary according to the different constitutional weight of the reason invoked in support of the ODA.

In addition, a differentiation is also necessary with respect to the question of whether or not there is a need for a legal discipline of the OCD and how it is exercised, depending on the reasons of conscience invoked by the objector and whether or not they correspond to fundamental constitutional values. Only in this way, moreover, is it possible to avoid the danger of an OCD that is not regulated by law and indiscriminate, as well as, on the other hand, the iniquity of a constitutionally well-founded OCD, but which is exclusively subject to the will of the same majority that placed the legal command against which the OCD could be invoked12 . In this way, the legal system would turn back on itself in an authoritarian sense, reducing the OCD to a concession of the majority even when the objector asserts a reason

that he presents as an extension of protection of a constitutional value of primary rank. It would deny, in other words, the character of its democratic nature as a constant tension towards fundamental values, depriving itself in the course of its life of that critical instance which is asserted with regard to the constitutionality of law itself13. Moreover, the ODC in this way marks a further distance from the idea of the "ethical state" as a claim to impose ex lege only one moral point of view. This democratic connotation of constitutional legal systems is a conquest of civilization, to be regained continuously and laboriously and not easy to preserve, because every majority can be tempted to overcome those same limits that can justify the democratic formation of the majority. This characteristic of the contemporary democratic and pluralist state is also confirmed by the provision of the OECD in numerous international texts ratified by Italy (art. 18, para. 1, Universal Declaration of Human Rights; art. 9, para. 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, para. 1, Charter of Fundamental Rights of the European Union)14.

12 Naturally, even when the ODC is judged to be constitutionally well-founded, it always needs a legal regulation so that it does not become indiscriminate or a judicial evaluation (in the hypothesis of the Constitutional Court) that can accept the request, despite any legislative inertia, without however indiscriminately admitting it.
13 Another cause for exemption from liability for failure to fulfil obligations is, as is well known, the constitutionally recognised right to strike.
14 The resolution of the European Parliament of 7 February 1983 states that the right to freedom of thought, conscience and religion should be included among fundamental rights. For domestic legislation, see Article 1, Law No 230/1998 (New rules on conscientious objection).

In this perspective, the ODC should not be considered as a threat by a majority aware of the democratic foundation of its very existence and eager not to close authoritarianally the discourse on the understanding and scope of protection of fundamental values. On the other hand, most bioethical issues are agitated precisely in very problematic areas (hard cases or casus perplexi) or grey areas, where the need for the right to establish a certainty in one sense or another should not be paid the high price of imposing ex lege the denial of the very problematic nature of the issue. Therefore, at least in the most serious cases, the "tragic" opposition between (constraint of) legality and conscience is the constitution itself (the culture, the constitutionalistic ethos) that wants to avoid it, in the sense that the constitutionalized law accepts a critical space towards the decisions of the majority.

An ODC that is communicable and consistent with autonomous formation of professional ethos

(a principle of non-heterodetermination of the professions).

If in the final analysis the right to the OCD can be constitutionally configured as a fundamental right of the person (articles 2, 3, 10, 19,

However, a purely subjective conception cannot be accepted, i.e. a conception that excludes the possibility of considering the content of the objection and therefore possibly carrying out a comparison between the values to which the objector refers and the values protected by the law against which the objection is made. A subjective approach can only apply when the conflict exclusively concerns the rights or interests of the subject himself; here we remain within the perspective of the individual, whose conscience is certainly inviolable15. If, however, the recognition of legal relevance is also required, then there is a need for an objective externalization, which considers the rights and interests of all parties involved in various ways and makes it possible to evaluate the balance between values in collision. Whatever the most appropriate reconstruction of the OCD, in any case, freedom of

conscience alone is not sufficient to establish the OCD secundum legem but must be supplemented by the value referred to by the objector so as to be able to conduct the balance between the same freedom of conscience and the value referred to by the objector, on the one hand, and the value protected by law, on the other.

15 In these cases, however, more than recourse to the ODC, one could assume the constitutional illegitimacy of the rule that claims to replace the subject in the evaluation of an individual interest when the consequences fall on the subject and the decision does not imply the active collaboration of others, but rather an abstention. The individual "s responsibility towards himself or herself is paramount over the community "s impositions on him or her. If, for example, a rule requires a Jehovah "s Witness, for the protection of his own health, to undergo a blood transfusion that he must refuse according to the precepts of his religion, the reason for the refusal becomes irrelevant for the state, since in the sphere of the individual prevails the individual "s will. Equally irrelevant for the state is the reason why others, even if not motivated by religious reasons, refuse, even through advance declarations, any other type of treatment.

When the law intervenes on the protection of a fundamental good such as life or health (the main hypotheses in which the ODC consists in bioethics and biolaw), the value referred to by the doctor objector represents a different interpretation of the value protected by the Constitution; and the tendency of legislation to provide for the legitimacy of the ODC in such hypotheses testifies, on the one hand, to the fact - already mentioned above - that constitutionalized law accepts a critical space with respect to the decisions of the majority; and, on the other hand, that the recognition of the ODC constitutes the application of a general principle, so that if, outside these directly envisaged cases, a constitutional value of the same rank is still at stake, the right to the ODC would be the result not of a mere analogical extension of these rules, but directly of the general principle of which they are expression.

On the other hand, the ODC is particularly important when it is invoked by a person in the exercise of a professional activity, as can also be seen from the fact that it is generally provided for in the codes of conduct of professional bodies. Very clear in this regard is the Code of Ethics of Italian doctors (2006) in which the general principle is the assumption that "the exercise of medicine is based on the freedom and independence of the profession which are inalienable rights of the doctor" (art. 4)16 and in accordance with art. 22 "the doctor from whom services are requested that conflict with his conscience or clinical conviction, may refuse his work, unless this behaviour is of serious and immediate harm to the health of the person assisted and must provide the citizen with all useful information and clarification". Furthermore, the oath taken in the Code of Ethics states that the doctor undertakes to respect the legal rules only if they "do not conflict with the aims of my profession "17.

In addition to the purely individual dimension of the OCD, there is a professional dimension in which the conscience (cum-scientia) is constituted within a professional ethos defined according to the aims characterizing the individual profession. The possibility of conscientious objection keeps alive the sense of professional identity by preventing the heterodetermination - by law or in any case by imposition from outside - of the professional status of the category of professionals under consideration18 . This does not mean that non-objective doctors do not recognize themselves in the professional ethos or that the objectors are necessarily more consistent with it; only that the possibility of conscientious objection, provided for all doctors, guarantees a margin of appreciation and therefore the safeguard of a professional ethos that, although not necessarily crystallized or monolithic, it does not necessarily have to coincide with the legal heterodermination.

16 The professional autonomy of the doctor is recognised in the case law of the Constitutional Court: see Court cost. 282/2002; 338/2003; 151/2009.

17 Moreover, art. 4 (Professional obligations and rules of conduct) of the Oviedo Convention provides that "Any intervention in the field of health, including research, must be carried out in compliance with professional rules and obligations, as well as in compliance with the rules of conduct applicable in this case".
18 In the medical field, the question of professional aims may also be conditioned by legislative interventions aimed at defining the same concept of health in a different way from how it is understood by health professionals themselves.

A recent example of possible legal interference was recorded at the time of the introduction of the rule concerning the crime of clandestinity, when the hypothesis of providing for the obligation to report the clandestine person by doctors and social workers was debated. In both cases, the professional associations reacted - but found different listening - believing that the acts imposed on them (the reporting of illegal immigrants) deeply questioned the basic reasons of their own profession19 , as well as being detrimental to constitutional values. Thus even a possible law that would oblige the doctor to administer a hemotransfusion despite the refusal of the adult and conscious patient (for example Jehovah's Witness) would impose a heteronomic idea of the profession as an activity of carrying out compulsory services also for those who receive them, instead of services offered to free people. The OCD in this case would allow the doctor to observe, according to the interpretation in conformity with his conscience, the principle of respect for the human person in health care (art. 32, para. 2, Const.) to which the Code of Ethics itself seems to be inspired. Another example of heteronomy could be caught in certain rigid interpretations of the law, more frequent in the past, according to which doctors would be forbidden to administer to severely suffering terminal patients such doses of sedatives as to relieve pain but which could accelerate 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 by relieving his suffering, a duty which the doctor could feel deontologically but also personally as a cogent20.

In the formation of the professional ethos, in short, seem to converge personal self-reflection, of which conscientious objection is a direct expression, and a broader dimension involving the entire professional community, necessary both for the protection of the adherents and to generate an evaluative synthesis between the different points of view of those who exercise the same profession. On the other hand, the idea that a professional choice implies an automatic acceptance of tasks imposed ex lege - perhaps even against the code of ethics - is the result of an authoritarian conception of law that does not admit the autonomy of professional bodies in the definition of their own ends and therefore of their own identity, reducing the profession to a mere depersonalizing technique, pure competence of means, insensitive to the question of ends. Radicalizing this approach, if, for example, the law required doctors to make themselves available to carry out death sentences, even in these cases conscientious objection would not be admitted.

19 On 7.8.2009, the National Council of the Order of Social Workers recommended its Regional Councils "not to initiate disciplinary proceedings against social workers registered in the professional register who are subject to criminal prosecution for failing to comply with the obligation to report the crime of hiding in their capacity as public officials or persons in charge of a public service". The objector, in other words, is considered to be the one who defends the integrity of the profession as the law and order understands it in his or her concrete experience: denouncing the clandestine worker who turns to the social worker for help, perhaps even help to find out what his or her legal status is, distorts the meaning of the profession by bending it to requirements of public order and repression that do not seem to be part of the welfare functions proper to it.
20 The hypothesis, moreover, of the ODC's point of view is problematic because it concerns a possible obligation not to do, but in the text it is referred to as an example of a legal interference in the status of the medical profession which it would be preferable to leave to the professionals themselves and to their common reflection.

A legally sustainable ODC for bioethics: consistency checks, legality principle and ODC relating to obligations not to do

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 the rights due under the law21. In a country such as Italy, the question of respect for legality cannot be underestimated and the OECD must be configured in such a way as to avoid any confusion in this regard. The challenge of the legal recognition of the OCD is precisely to avoid undermining the principle of legality and to make the legitimacy of the objection coexist, especially when it is inherent to fundamental constitutional values, with the protection of those who are holders of rights legally provided for22.

First of all, it is necessary to address the concern that the OCD may be subject to abuse and it is therefore necessary to regulate the manner in which it is exercised in such a way as to reduce this risk, which, however, cannot be completely eliminated. In fact, it is appropriate to remember an intrinsic limit to the law, the impossibility of a complete and definitive ascertainment 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 the manifestations of will of individuals, so that this limit cannot become a pretext to mortify the freedom of conscience of those who invoke it. Rather, the question arises at the level of legal precautions that are functional to exclude odc reasonably (well-foundedly) doubtful.

From this point of view, it is usually stressed the need for a so-called proof of consistency, which can be deduced a posteriori, i.e. after the person has invoked the OCD in general, and such proof concerns the possible incompatibility of subsequent acts with the same conscientious objection (e.g. Article 9 of the Law on the protection of the freedom of conscience).

No. 194/1978 provides that the conscientious objection "shall be deemed to be revoked with immediate effect if the person who raised it takes part in procedures or interventions for the termination of pregnancy provided for by this law, other than the cases referred to in previous paragraph"; these are cases in which "given the particular circumstances their personal intervention is indispensable to save the life of the woman in imminent danger").

21 For example, the OCD cannot be a means to disregard the right to terminate pregnancy in the cases provided for by Law No. 194/1978, nor more generally the right to obtain the administration of appropriately prescribed pharmaceutical products.

22 In a similar order of ideas, the Constitutional Court recognised the constitutionality of the OCD in Judgments No. 467/1991 and No. 43/1997. On the constitutionally necessary nature of conscientious objection there is a significant statement of position in the majority report of the joint Justice and Hygiene and Health Commissions of the House (all rapporteurs). Del Pennino and G. Berlinguer, who, taking into account the possible fears about the frustrating effect of a possible mass conscientious objection, state: "it was not ... permissible to prohibit the recourse to conscientious objection in a matter that involves such delicate questions of principle and in which the imposition by law of a certain behaviour would, yes, constitute a constitutional violation"). G. Galli, V. Italia, F. Realmonte, M. Spina and C.E. Traverso, L'interruzione volontaria della gravidanza, Milan 1978, p. 398.

Secondly, the need to make the OCD compatible with the principle of legality provides the point of view with respect to which the question of the content of the legal obligation against which the OCD may be raised can be coherently addressed in this document. Indeed, reference is usually made to the oC relating to an obligation to do, which implies an abstention on the part of the objector, but there are also those who propose the admissibility of the oC to the obligation not to do, which implies a commissioning behaviour on the part of the objector and therefore the realisation of the fact which may be prohibited by law. While abstention allows others to replace the objector and do what he is not willing to do, active behaviour contra legem does not give room for a substitution that safeguards the application

of the law itself. It follows that if the odc is to be conceived as compatible with the principle of legality, the odc to the obligations not to do must be excluded precisely because the breach of the obligation coincides with the definitive violation of the legal precept without the possibility of organizing a substitute service that safeguards the principle of legality.

The difficult question as to the criteria for determining the persons who may rely on the OCD

A sensitive issue concerns the subjective delimitation of conscientious objection in relation to the more or less direct participation in a given act or activity. On this point there is a stricter position that requires a direct causal concurrence of the person who is legitimated to the OCD and a more open position that admits it even in cases of merely auxiliary participation. The fact remains, however, that morally and legally the criterion of causality is not always precise, as when referring to a purely naturalistic causality, because causality is always coloured by the subjective criterion of imputation of responsibility (intentionality, negligence), so that the intentional facilitation can often be more serious, in terms of ascription of responsibility, than an unintentional direct causation.

In addition, with reference to the health sector, the issue becomes more complicated insofar as surgical treatments are replaced by new treatments made possible by recent developments in pharmacology and therefore the axis of the matter is shifted, because the action of the doctor regresses, from the material act of the surgical treatment, to the prescription of the medicine or, in the case of the pharmacist, to its administration. The issue is not limited to the voluntary interruption of pregnancy, with regard to which, moreover, the CNB has already had the opportunity to deal with the o.c.o. of doctors and pharmacists with regard to abortive drugs or drugs whose potential abortion is not excluded23. The question also arises in other hypotheses: think, for example, of the prescription and administration of lethal drugs, certainly illegal in Italy, but admitted in other countries.

[23] Cfr. Nota sulla contraccezione d'emergenza (28 maggio 2004); Nota in merito all'obiezione di coscienza del farmacista alla vendita di prodotti contraccettivi di emergenza (25 febbraio 2011).

In general, the restrictive argument that treats the legitimacy of the OCD as an exception to be expressly provided for must be examined in the same way as the principle of equality, in order to establish whether the exception is justified with respect to subjects not included by law; the exception could in fact produce unreasonable discrimination against other subjects (objectors, but not secundum legem) who could find themselves in conditions similar to those of subjects exclusively provided for by law (the objectors secundum legem), thus constituting a privilege for the latter.

In any case, the delicacy of the subject and also the limited possibility of identifying a universally applicable abstract legal rule that does not excessively enlarge the number of objectors or reduce it in a discriminatory way may suggest the intervention of the orders or, more generally, of professional associations to define in concrete terms the subjects legitimated to the OCD and the situations in which it may be raised. This suggestion can also be read in the recent opinion of the Spanish Bioethics Committee24 .

On the other hand, the problem of the delimitation of the right to the OCD must be understood in the light of the principle that it is not an instrument of "sabotage" of legitimate legal disciplines, and therefore, when an OCD is admitted, provision must be made for the organization of a service that still allows the exercise of legally recognized rights despite the non-participation of the objector25. Neither sabotage of the law by the Oc, nor sabotage of the Oc by the law, could be summarised.

The aspect of the protection of rights is particularly relevant in cases where the OCD is not legally provided for. In such cases, due to the lack of a legal regulation of the modalities of exercise, an imbalance can be determined to the detriment of the persons holding those rights (e.g. the right to obtain a medicine by submitting the relevant prescription), the exercise of which would in fact be hindered by the objector's decision. Naturally, since the matter is then referred to the judicial authority, the objector runs the risk of how his behaviour will be evaluated, taking into account that the judge cannot fail to consider the consequences. This implies that a regulation by law of the OCD in a general key or for particular hypotheses would be very appropriate and should be accompanied by the indication of the appropriate measures to ensure that the service is not in fact frustrated, for example with the provision of the persons responsible for its implementation and the penalties provided for non-compliance, i.e. the conditions to avoid conflicts of conscience that could be detrimental to the orderly conduct of social life26 .

24 Comité de Bioética de España, Opinión del Comité de Bioética de España sobre la obieció de conciencia en sanidad, p. 15, available at
http://www.comitedebioetica.es/documentacion/docs/es/La%20objecion%20de%20conciencia.
%20en%20sanidad.pdf.
25 In the CNB's Opinion on pharmacists' objection, conscientious objection is accompanied by the provision, voted by a very large majority, that in any case the provision of the service must be ensured. A different degree of protection of the OCD could also be hypothesised depending on the objector's causally direct or facilitating participation in the fact. For example, in the American literature with regard to pharmacists' objection it has been argued that it could not be allowed when in practice the replacement service cannot be provided, for example because it is a pharmacy located in an isolated area where the drug could not be purchased in a nearby pharmacy on time. See E. Fenton and L. Lomasky, Dispensing with Liberty: Conscientious Refusal and the "Morning-After Pill", in "Journal of Medicine and Philosophy", 2005, p. 589.
26 See Opinion of the CNB, Note on conscientious objection of the pharmacist to the sale of emergency contraceptives, 25 February 2011, p. 11.

Ultimately, the OCD must be compatible with ordinary legality and this element also tempers the concern of those who rightly fear a trivialization of it. Heroic OCD is not and cannot be legally recognised: in cases of resistance or civil disobedience the person must fully bear the legal consequences of his or her behaviour. The legal system that has imposed a certain legal duty or obligation in the bio-legal sphere does not intend to contradict itself by admitting the OCD, but is simply not willing to close the space of discussion on fundamental values and not to lose its inclusive and pluralist character. Therefore, as long as the legal system has the strength to admit the OCD, it maintains a certain balance; when, on the other hand, the OCD is not recognised or the objectors do not recognise it, the OCD will not be able to be recognised.

Conclusions and recommendations

The CNB believes that:

1.Conscientious objection in bioethics is constitutionally well-founded (with reference to inviolable human rights) and must be exercised in a sustainable manner; it constitutes a right of the person and a democratic institution necessary to keep alive the sense of the problematic nature of the limits of the protection of inviolable rights; when the ODC is inherent to a professional activity, it contributes to prevent an authoritarian ex lege definition of the aims of the professional activity itself;

2.The protection of the OCD, for its very sustainability in the legal system, must neither limit nor make more burdensome the exercise of rights recognized by law nor weaken the bonds of solidarity deriving from common membership of the social body;

And on this basis it proposes the following recommendations:

3.In recognising the protection of the OCD in cases where it is taken into account in bioethics, the law must provide for appropriate measures to guarantee the provision of services, possibly identifying a person responsible for them.

4.In bioethics, the OECD must be regulated in such a way that it does not discriminate against objectors or non-objectors and therefore does not place a burden on one or the other, on an exclusive basis, particularly burdensome or unqualifying services.

To this end, it is recommended to establish a job and recruitment organisation in the areas of bioethics where the ODA is exercised, which may provide for differentiated forms of staff mobility and recruitment to balance, on the basis of the available data, the number of objectors and non-objectors. Ex-post controls should normally also ensure that the objector does not engage in activities incompatible with the one to which he has objected.

Annotation of Prof. Carlo Flamigni

Supported by the Catholic Church, pro-life movements have been calling for years for the practice of conscientious objection to voluntary abortion to be recognized as an institution of constitutional rank and for it to be recognized as an "inviolable human right". Punctually the National Committee for Bioethics has now satisfied this request by approving by majority an articulate document that aims to achieve two objectives made explicit in the final page, dedicated to "Conclusions and Recommendations":

5. "Conscientious objection in bioethics is constitutionally well-founded (with reference to inviolable human rights) and must be exercised in a sustainable manner; it constitutes a right of the person and a democratic institution necessary to keep alive the sense of the problematic limits of the protection of inviolable rights";

6."Conscientious objection in bioethics must be regulated in such a way that it does not discriminate against either objectors or non-objectors and therefore does not place a burden on one or the other, exclusively, of particularly burdensome or unqualifying services".

Put in simpler words (the language of the CNB's Opinions is not always easy to decipher) conscientious objection to voluntary abortion (and in the future, who knows, to euthanasia) is something so noble and virtuous that the objector must be guaranteed the right to refrain from performing the (public) service required by law without any burden, ignoring the freedoms and fundamental rights of citizens who are entitled to receive that service. The law to which one is asked not to have to obey, in fact, would only be the result of the occasional formation of a parliamentary majority (therefore it could be devoid of an appreciable ethical value) while the right to conscientious objection to that same law would be juridically sustainable because it would have a foundation in human rights (in the specific case not respected by law) and would in any case be useful to keep alive the sense of respect for inviolable rights. Reaffirming the right to conscientious objection in bioethics, the document recognizes that the services provided by the laws in this matter must be regularly provided. This, in short, is the message contained in the proposal of the majority of the CNB.

Before going into the Opinion approved by the majority of the CNB, I would like to highlight some positive aspects. The first, in my opinion, is that, even if implicitly, the majority of the CNB also recognizes the existence of a "right to abortion", since it recognizes that the provisions of Law 194/78 should not be hindered, since it has become an indispensable achievement. In fact, in the "Conclusions and Recommendations" (the only part that - according to a widespread opinion - is read by journalists) the Opinion states that "the protection of conscientious objection, for its very sustainability in the legal system, must not

limit or make more burdensome the exercise of rights recognized by law". Put more clearly, the abortion service provided for by Law 194 must be guaranteed and is not in question. After reaffirming that all possible forms of discrimination for both objectors and non-objectors must be avoided, the document recognizes that it is necessary to arrive at "an organization of tasks and recruitment, in the areas of bioethics where conscientious objection is exercised, which can provide for forms of staff mobility and differentiated recruitment to balance, on the basis of available data, the number of objectors and non-objectors. Post-secondary checks should normally also ensure that the objector does not engage in activities incompatible with the one to which he has objected.

This step includes a new aspect that seems to me of great importance: not only the organization of tasks in the services, but also the "organization of recruitment" can (and perhaps even must) take into account the situation that could arise following the spread of conscientious objection, for example by providing for forms of recruitment in the services reserved to non-Objectors. The fact that the majority of the CNB (always characterized by a strong Catholic density) recognizes this point is certainly a very important step, which is combined with the other great novelty that consists in affirming that "conscientious objection must ultimately be compatible with the legality of the law", which means recognizing that conscientious objection does not intend (in reality it is more likely a dubious "should not intend") to undermine or render inapplicable Law 194/78. In doing so, the majority of the CNB confers an albeit minimal "ethical certification" to the law, as it clearly recognizes the duty to provide the services provided in relation to medically assisted abortion.

This result is certainly not negligible, and it is perhaps for this reason that some lay members have signed the majority opinion. In fact, on the "political" level this conclusion can be shared, but since the National Committee is not the surrogate of the Parliament in which the mediations required for legislative acts are elaborated, but should be a cultural elaboration centre which clarifies and identifies the different ethical solutions so that the citizens and the political forces can then decide which is more appropriate for the common good, the solution indicated seems to me totally insufficient and unacceptable both from the cultural and ethical point of view. Although I know that I do not have much follow up, I disagree with the majority opinion and I am now trying to articulate some of the reasons why I did not approve the document.

A first reason of a very general nature is the choice of a technical language unsuitable to be understood by citizens, not used to the jargon of bioethics. In fact, a more linear discourse, written in a simple and pragmatic way, would have been necessary to present both the real data and the problems that can arise from it, also clarifying the reasons why conscientious objection can "be invoked in many areas of social life", but "it is especially in the health sector that there are more frequent issues that call for ... a debate on it and its implications".

From a National Bioethics Committee we would all have expected an answer to these questions; I personally considered it necessary to make an objective evaluation of the difficulties in which a law of the State can find itself in the face of a surprisingly high percentage of objectors, such as to give rise to hope in a part of them: in the face of a rule that is declared inapplicable, the legislator will have to retrace his steps and acknowledge that he was wrong.

What is the overall credibility of conscientious objection in Italy, at least with regard to the voluntary interruption of pregnancy? No common sense person can believe that 90% of gynaecologists who refuse to carry out pregnancy interruptions in some of our regions have really listened to their conscience and not instead make different and certainly more vulgar appeals. In the impossibility of distinguishing between wheat and ryegrass, taking into

account the consequences of these objections (which often involve entire health facilities, to the point of configuring a real conspiracy against a law of the State), it is natural to wonder why, as a minor of evils, the health units and hospital directorates did not want to at least use the remedies that law 194/78 itself establishes, first of all the mobility of personnel. These are important issues that would have deserved further study and have not even been considered. In this way the document endorsed the hypothesis that conscientious objection would always be required on the basis of sincere moral scruples. In reality, logic and common sense should indicate to everyone that the rapid growth in the number of objectors could be (and in many cases is) the consequence of choices of convenience that have no relation whatsoever with morality. I am personally convinced that a greater attention to empirical data would have brought to light a reality quite different from that which is implied in the document.

The second reason for disagreement is more specific and stems from the choice of the majority opinion not to present in any way the problematic nature of conscientious objection on the theoretical level. For example, the position of those who maintain that conscientious objection should find a way to be made credible by obligations - the more burdensome the more annoying the inconvenience caused by the lack of service - that serve to certify the real and profound opposition has been neglected: Garino27 writes that this provision of a treatment in some way unfavourable for the objector is essential to reaffirm the general validity of the original precept and confirm the sacrificial value, of testimony, of the refusal to carry out the due task foreseen by the norm.

27 Conscientious objection, in appendix to Novissimo Digesto Italiano, Utet, Turin 1984, pp. 338-364.

Even less account is taken of the diversity of the problems that are generated in different historical situations. In fact, the "historical" conscientious objection, the one to military service, was practiced by the young conscript who, because of a precise moral position that induced him to object against violence and war, could not choose not to do military service, an obligation that was imposed on him by law as a citizen. Once the compulsory conscription ceased, the problem of conscientious objection to military service naturally disappeared. Radically different is the condition of a young man who presents himself for university studies and who, instead, can choose the profession to be undertaken: apart from other specific barriers, he can decide to study law, engineering, economics, social communications or medicine, and therefore to accept the obligations deriving from these professions. Just as those who choose to enter the judiciary, or to be a journalist, must then take on all the tasks proper to the chosen office, without any possibility of appealing to "conscientious objection" to the services not shared, so must other professions, including health care. The importance is central because we must ask ourselves why this structural inequality between the different activities can be allowed: some elective professions (the choice to be a judge or to undertake a military career) do not provide for conscientious objection to the duties required by institutional tasks, unlike others (the choice to be a gynaecologist or a gynaecologist in gynaecology). The background noise of a "conscience alarmed" by the possibility of having to carry out unacceptable acts should induce the young man who finds himself having to choose the profession of life, to make some further considerations, before choosing a job that will certainly propose some moral problems that will put him in serious embarrassment: being a gynaecologist means first of all committing himself to protect the health of the woman; interrupting an unwanted pregnancy still means the same thing, protecting the health of the woman. If someone does not think that this is the case, perhaps it is a good idea to read the law 194/78 carefully.

Not only has the majority opinion not taken into account the problems and difficulties that lurk in the institution of conscientious objection, but it has not even considered different theoretical positions and alternatives to those that you will find in the document. For example, there is no mention of the fact that strong reservations about conscientious objection have been put forward by authoritative Catholic jurists such as Capograssi and Piola28 whose theses have been completely ignored. Also as a partial remedy to this limitation, I briefly present the position of a constitutionalist of the University of Modena and Reggio Emilia, Gladio Gemma, who maintains that the objection can become the expression of a right to ideological intolerance, because it is frequent that the objector sees the non-objector as an immoral person, so that the objection translates into an instrument of denial of the principle of secularity, since it allows the holder of a public function to put his personal beliefs before the full respect of his institutional duties, i.e. those deriving from his office29. Conscientious objection therefore inflicts a wound on democratic principles because it can frustrate legislation in the public interest. Gemma disputes the existence of a logical link between the recognition of the rights of conscience and the foreshadowing of the Institute of Consciousness Objection in positive law, an irrational Institute as it constitutes a combination of irreconcilable elements. It is a legally codified right to civil disobedience. In this sense the proposal of a conscientious objection secundum legem entails a legally irrational right, based on the combination of legally irreconcilable elements, since the conscientious objection secundum legem is configured as a right sanctioned by the State not to observe rules of law issued by the State itself. It takes little to understand that this "right" would be guaranteed to certain particular groups of individuals who, due to personal convictions, disagree with the norms approved by a legitimate and democratic Parliament, and - in this case - confirmed by a popular referendum. It is not possible to understand how a right not to observe legally configured duties can take substance, i.e. a legally codified right to disobedience can be upheld.

28 G. Capograssi, Obbedienza e coscienza, "Opere", vol. V, Milan 1959, pp. 198-208; A. Piola, Objection to military service and Italian law after the Council, in Id., Stato e Chiesa dopo il Concilio, Milan 1968, pp. 201-233.
29 I freely take from some of his writings: G. Gemma, Brief critical notes against conscientious objection, in Botta (ed.), L'obiiezione di coscienza tra tutela della libertà e disgregazione dello Stato democratico, Milan 1991, pp. 319-338; and Objiezione di coscienza ed osservanza dei doveri, in Mattarelli (ed.), Doveri, Franco Angeli, Milan, pp. 55-74.

According to Gemma this proposal may give rise to several developments, all affected by logical-legal inconsistencies:

1.There is a danger that an indiscriminate prevalence of individual consciousness over any legal precept that collides with it will be recognized. In this case any duty of citizens would find an absolute limit in their own conscience. Since the possible objections of man's conscience to obligations established by law are practically infinite, and since it is practically impossible to recognise the cases in which the request for the possibility of disobeying the law is made in the name of one's own personal interest and not in the name of one's own conscience, no rule would be guaranteed to be observed and the laws would no longer have the present meaning, that of indicating obligatory patterns of behaviour, but would only have the value of a counsel, to which one can, but must not, obey. This could represent the beginning of an individualistic anarchy that could also prove capable of supplanting the democratic order.

2.The other possible implication could be that of attributing a not indiscriminate but limited recognition to the individual conscience towards the legislative precepts that with this

conscience contrast. This could happen, for example, when we want to protect certain human rights, incurring in other legal and institutional inconsistencies.

Allowing the refusal of services necessary to achieve public interest objectives may therefore lead to the frustration of legislative guidelines in the public interest. This would lead to a paradoxical situation, that of a state which, on behalf of its citizens, indicates binding behaviour and which, at the same time, allows minorities, more or less restricted, to refuse to provide certain services, thus opposing the will of the people, in total contrast with the logic of democracy. In this case, the will of the majority, which called for the legalization of abortion, would be annulled by a majority of medical objectors, a clear defeat of logic as well as of democracy.

For a more precise presentation of this thesis, I asked Gemma to summarize her position, which he kindly agreed to do by sending me this memory:

"On the conscientious objection we can support two theses, to use the language of jurists (especially lawyers): a main one, a subordinate one (in case of non-acceptance of the first one). The first one is the radical objection of conscientious objection and its recognition at a legislative or jurisprudential level. The subordinate thesis is represented by the delimitation of the legal scope of conscientious objection. (This second thesis has a mediatory character and I did not consider it essential to include it in the text).

As regards the radical objection of the figure in question, various reasons can be put forward.

1.The configuration of a right to disobedience (of rules considered immoral by the objectors) appears incongruous. The right understood, in an objective sense, as a set of norms has the function of (contributing to) ensuring the coexistence of individuals, therefore their availability of goods and resources useful to their existence (first of all, public security, a minimum of social solidarity, etc.). It can ideally be conceived as the fruit of a social contract (certainly historically never happened), by virtue of which the members of a political community undertake, regardless of their philosophical, political, moral, etc. convictions, to observe the rules which are set for the common good. Are such rules sacred and inviolable as divine precepts? Absolutely not, of course. However, when faced with the ethical-political contestation of legal norms, two solutions are rational and legitimate.

Within the framework of a legal system, accepted as a whole also by the objectors, it must be acknowledged that the latter have the right to propose the repeal or revision of the rules considered unacceptable on the basis of the (also) moral ideas of those who contest them. Therefore, the power to propose, and to act for the success of the proposal, a legislative amendment, without any non-compliance with existing laws. In contrast to this there is the second solution: the right to rebellion. That there is a right to rebellion can be admitted, but only on an ethical-political level, before a system rejected for its values. For example, the rebellion, even with weapons, of the anti-fascists against the fascist regime was morally lawful (indeed worthy). But it is sustainable only on an ethical-political level. After all, nobody has ever thought of criticizing the fascist regime for having legally denied the right of the anti-fascists to take up arms against fascism!

The legal recognition of conscientious objection presents this inconsistency: it translates into the legalization of a claim to non-observance of the law, which can find, if ever, only ethical-political, and therefore extra-legal justification.

1.What has been said above about the duty to respect legal norms, except for revolutionary rejection, is reinforced by the observation that in democracies there are constitutions that transpose moral demands far more than authoritarian regimes and prefigure instruments of protection. Our Constitution has also made many ethical principles inherent to the human person - think of dignity, freedom, solidarity, etc. - a fundamental

principle of the human person. - This can be confirmed if we read the speeches of the members of the Constituent Assembly, first of all the Catholic deputies, who were among the most active in the drafting of our Fundamental Charter. Certainly, the Constitution, in its letter and even more so in its evolution, recognizes and protects shared moral values and leaves the field open to different ethical orientations and consequent legislative guidelines. Nevertheless, it can be affirmed that, in principle, the juridical norms introduced under the force of constitutions such as ours either have a minimum of ethical lawfulness (even though they are, of course, contestable on the basis of specific moral convictions) or they can be eliminated by means of guarantee devices (making conscientious objection superfluous).

2.Conscientious objection is configured as a right to freedom, as a moment of self-determination of the individual, but with this configuration there is a mixture of very different legal figures. In other words, one thing is an individual freedom, which mainly concerns a field, a range of action, of the holder of the right; quite another is a claim that operates within the scope of functions or services. To give an example, one thing is the freedom to be treated or not to be treated, another is the claim of the doctor not to treat the person who has the right to be treated; or one thing is the right to appeal to the judge to obtain a (favourable) judgment, another is the claim of the judge not to judge and not to issue a judgment. From the recognition of rights of conscience, such as religious freedom, the right to the non-observance of duties due to a conflict of conscience does not derive at all.

3.Conscience, that is, the good on which the right to object is based, is a very broad and indefinite fact and is not suitable to circumscribe a legal claim. Conscience has many possible manifestations: a religious fundamentalist might feel the duty not to care for, or not to assist, an infidel; an an anarchist might consider the payment of taxes, etc., to be in conflict with his conscience. The conscience of an individual can be translated into the most disparate moral and political imperatives that are in conflict with public or professional duties, and if one wants to recognize a right to the non-observance of laws in the name of conscience, a chasm opens in the democratic order (for authoritarian or totalitarian systems the problem does not exist by definition).

4.Finally, it is bizarre that the State recognizes the right to non-compliance with its laws because they are considered immoral. That the parliamentary majority is not a moral authority and that laws can be criticized (as well as the subject of proposed amendments) for reasons of an ethical nature is out of the question. But from this to the acknowledgement of a repugnance towards the laws of the State and the protection of this repugnance runs to us. Moral rejection, the criminalization of a legal regulation can be tolerated if they do not translate into illicit behaviour, but which must find a legal consecration does not seem very rational".

I will try to draw some simple conclusions from these considerations. In the case of the law on the voluntary interruption of pregnancy, a series of values are at stake, which concern the respect and protection of the existence and 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 to them - would make the rule constitutionally illegal. If this were proved, the hypothesis of resolving the problem by authorising conscientious objection would be at least as inadequate as the decision to grant freedom of speech to a small number of citizens in order to resolve the manifest lack of legitimacy of a non-democratic government which has made the prohibition of freedom of speech its guiding principle. The correct response would of course be to use the legitimate instruments, always present in a civilised country, specifically created to defend legality in similar cases. If, on the contrary, a law that concerns protected values such as that of existence and that of freedom is recognised as constitutionally legitimate, then it

must be considered functional to the defence of the values in question. This does not mean, of course, that it is an objective and indisputable functionality, but much more simply that the laws passed by Parliament and the people on values and freedom constitute, by presumption of the system, a protection of the rights in question. It would then become an incomprehensible contradiction that the same system which has legitimately considered that a certain rule protects existence and freedom allows conscientious objection to its decision.

To these wise considerations of Gladio Gemma I add a last personal one. The request to conscientiously object cannot rely on the irrationality and fantasies of the applicants or of a (more or less organised) group of applicants, but must have, certainly within the limits of solid common sense, a precise scientific credibility. This means that it must be established - and on this point the majority of the CNB should have given its precise opinion - who has the right to give definitions and to specify what is true and what is false according to current scientific knowledge. To avoid misunderstandings, I will give a concrete example: all reasonable people who know about science know the most recent data on the mechanisms of action of progestins used for emergency contraception and know that the only direct experiences carried out with human embryos and human endometrial tissue certify that no mechanism of inhibition of implantation exists in that case. This means that, until proven otherwise (which at the moment is not even possible) anyone who asks to be exempted from prescribing these progestins for a supposed embryonicidal effect (the possibility that it was an abortive action has been excluded for some time now) can only be in bad faith (in these cases justifications such as ignorance or incompetence cannot be admitted).

I spread myself in presenting theoretical perspectives different from the one taken 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 up, and to underline that the primary task of the Committee should have been to inform correctly and objectively about the different positions on the matter, presenting also those contrary to those preferred by its majority. A possible proposal could perhaps have been made only after an objective presentation of the various positions, while leaving the regulatory choice to other fora. Instead, none of this: the majority of the CNB simply ignores and neglects the positions that are different from its own, standing as a normative source of "Italian morality", almost as if it had the chrism and the ability to grasp and make explicit the authentic "Italian values" - almost with a claim of "infallibility" deriving perhaps from the fact that a Committee in which 90% of the members are Catholic cannot fail. As I have already reiterated on other occasions this position taken by the majority of the CNB is mystifying and is far from interpreting the task that should be carried out by a National Committee in a secular, democratic and pluralist State.

The third and final reason for my disagreement with the majority opinion concerns the justification of the thesis that conscientious objection should be seen as an exemption clause secundum legem which, in some ways, would strengthen the legal system. According to Gemma's thesis, this proposal should be considered for

In order to grasp the core of the majority opinion's proposal, it is appropriate to consider the definition of "conscientious objection" that has been chosen: "an individual's claim to be exempted from a legal obligation, because he believes that such an obligation is contrary to a command from his own conscience and is also detrimental to a fundamental right relevant to bioethics and biojurisprudence".

There are therefore two conditions that for the majority of the CNB are based on the institution of conscientious objection:

1. the "subjective" perception of a strong and profound contrast between the legal obligation to obey the law and the moral obligation to follow the dictates of one's conscience; and

2. the "objective" finding that the legal obligation infringes a fundamental human right.

The qualifying point of this definition is that the "subjective" aspect is not in itself sufficient to justify conscientious objection, because otherwise the principle of legality that binds to the observance of legal obligations would fail. If the subjective perception of a moral contrast were sufficient, the conscientious objection of all liberalists to the payment of taxes, or that of all lovers of risk at the limits of speed, and so on, should also be accepted: in short, it would be the end of the social function of law. On the contrary, what the institution of conscientious objection in bioethics is based on is that the moral obligation perceived by conscience is closely connected with the protection of some fundamental human right that in this case is denied: for this reason conscientious objection would have nothing to do with Protestant individualism, it would be "communicable", and should be clearly distinguished from civil disobedience or "scientific objection "30 .

The reference to human rights is the keystone that, according to the majority of the CNB, would provide a solid legal basis for conscientious objection. In fact, "the refusal to obey, for reasons of conscience, a particular rule requires at the same time a fundamental adherence to the legal system as a whole, and in particular to those principles and values, constitutionally established, which seem to be happily positioned as a possible link between intimate personal beliefs, of a moral nature, and positive legal norms". This overall fidelity to the legal system as a whole, on the other hand, is in turn morally supported by the fact that the Italian Constitution of 1948 abandoned the nineteenth-century conception "of law as the pure result of the power to impose laws: it is no longer considered as a simple product of the power of statute, but finds its most proper justification in some fundamental values recognized in the Constitutions" which are precisely human rights. Thanks to this change, the law "dismisses the claim of self-referentiality and self-sufficiency by accepting a principle of inclusion and comparison on fundamental values according to reasonableness, as the temperament of a legality understood in a creonteo, that is, rigid, abstract and without limits".

By virtue of this happy situation in which state power (the imperium) is by constitution subject to human rights, it is possible to establish that "trait d'union" or that relationship between the "intimate personal connections" and the "positive legal norms" which, according to the majority opinion, would not only provide a solid legal basis for conscientious objection, but would also assign it "the function of democratic institution by preventing parliamentary majorities or other state bodies from denying in an authoritarian manner the problematic nature of the boundaries of the protection of inviolable rights".

Since the areas concerning human life are those in which some "fundamental human rights" seem to be threatened, this explains why conscientious objection today concerns the most controversial issues of bioethics such as abortion, embryo protection and euthanasia. This also clarifies the reasons why for the majority of the CNB the institution of conscientious objection applies not only to the individual citizen, but also to the entire category or class of healthcare workers: "the idea that a professional choice implies an automatic acceptance of tasks imposed ex lege - perhaps even against the code of ethics - is the result of an authoritarian conception of law that does not allow the autonomy of professional bodies in the definition of their own aims and therefore of their own identity, reducing the profession to a mere depersonalizing technique, pure competence of means, insensitive to the question of aims". Health workers, in fact, would be directly involved as a class in the protection of

"human rights" regarding human life, a fundamental reason why conscientious objection is limited to this elective profession and not to others (magistrates, journalists, military, etc.).

30 As noted in the majority opinion, it would be "a simplistic and at the same time deforming interpretation" that sees conscientious objection as the claim "of those who intentionally want to avoid general respect for the principle of legality and, at the same time, demand that their choice, even if morally justified, was not for any reason attributable to the rule of law; in this case we would be faced with forms of civil disobedience or resistance to power which, as mentioned above, are not dealt with here".

This close link between conscientious objection of health workers and "inviolable human rights" also explains the different position of conscientious objection to animal experimentation. The majority opinion recognizes that, "on the basis of the recognized need to protect animals, Law 413/1993 has also introduced conscientious objection to animal experimentation, in addition to the protection of human life". It is therefore clear that in the case of animal experimentation, conscientious objection is allowed under the specific law approved by the Parliament "on the basis of the recognized need to protect animals" and not as a consequence of the recognition of their "inviolable right", which would be the basis of conscientious objection in the field of human medicine. It is not by chance that the majority opinion immediately specifies that a "differentiation seems necessary ... according to the different constitutional weight of the reason put forward in support of conscientious objection", a differentiation that "is also necessary with respect to the question of whether or not a legal discipline of conscientious objection and its modalities of exercise is required, depending on the conscientious reasons invoked by the objector and whether or not they correspond to the fundamental constitutional values. Only in this way, moreover, is it possible to avert the danger of a conscientious objection ... which has been remitted exclusively to the will of that same majority which has placed the legal command against which the conscientious objection could be invoked".

Thus we come to the crucial point of the discourse, the one that intends to demonstrate that, if conscientious objection were recognized as "a concession of the majority even when the objector asserts a reason that he presents as an extension of the protection of a constitutional value of primary rank", this solution would show a retreat in an authoritarian sense of the order on itself. In other words, the legal system "would deny the character of its democratic nature as a constant tension towards fundamental values, depriving itself in the course of its life of that critical instance which is asserted with regard to the very constitutionality of law". In fact, "conscientious objection should not be considered as a threat" to the principle of legality and to the laws approved by the majority, but should be viewed favourably, by the majority itself, as the democratic institution that allows "not to authoritarianally close the discourse on the understanding and breadth of protection of fundamental values" or the ring announcing those values and those rights.

This is why, according to the majority of the CNB, "in the final analysis, the right to conscientious objection can be configured constitutionally as a fundamental right of the person" and as such should be favoured and protected by that same State which, at the same time, enacts a law imposing opposing duties. The challenge of the legal recognition of conscientious objection [which] consists precisely in avoiding to undermine the principle of legality and in making the legitimacy of objection coexist, especially when it is inherent to fundamental constitutional values, with the protection of those who have rights legally provided for. The final conclusion is that "the system which has placed a certain duty or a certain legal obligation in the bio-legal sphere does not intend to contradict itself by admitting conscientious objection, but is simply not prepared to close the space for discussion on fundamental values and not to lose its inclusive and pluralist character. Therefore, as long as

the legal system has the strength to admit conscientious objection, it is able to maintain a certain balance; when, on the other hand, conscientious objection is not recognized or the objectors are discriminated against, legality once again takes on the creonteo (authoritarian) character - only auctoritas facit legem - and conscientious objection is forced to summarize the tragic features of Antigone's sacrifice. The challenge of the democratic state is to maintain the tension towards its fundamental values in the respect of the principle of legality".

The words quoted make it clear that the position defended by the majority opinion is divided into three different theses:

1.Conscientious objection must be considered "as compatible with the principle of legality" since admitting its legitimacy does not undermine or contradict the principle of the duty to respect the law;

2.Conscientious objection in the health field is not a mere "granting of a majority" to a group of citizens who request exemption from obedience to a law (as is the case with animal experimentation), but must be configured "constitutionally as a fundamental right of the person";

3.Conscientious objection takes on "the function of a democratic institution, preventing parliamentary majorities or other state bodies from authoritarianally denying the problematic nature of the boundaries of the protection of inviolable rights", showing in a concrete way that the system "is not willing to close the space of discussion on fundamental values".

As can be seen, the three theses are different and each makes increasing demands. The thesis (A) opposes the general criticism of conscientious objection that presents it as a real contradiction inserted in the system: as Gladio Gemma points out again, admitting the objection means legalizing the right to disobey a binding rule introduced for good and socially beneficial purposes.

Gemma's position could be contested, or it could find a precise limit while remaining generally valid, noting that in certain circumstances it may be appropriate to grant conscientious objection in order to avoid more serious social difficulties than those that the legal obligation would like to avoid: sometimes it may be useful to override and circumvent the obstacle with an ad hoc concession, which decides in favour of all the positions expressed. In this sense, an "exemption clause" could be introduced to avoid or mitigate lively social conflicts.

The thesis (B) opposes this solution stating that conscientious objection is a real right of the person, which has an immediate practical consequence: the exercise of conscientious objection cannot require any "heroic" commitment and cannot involve additional service burdens or other burdens of any kind. If conscientious objection was a grant of the majority allowed to avoid worse trouble, one could also think of additional burdens or penalties (to be established separately depending on the circumstances), but if it is a right it cannot entail any kind of burden. This also clarifies why the majority opinion recognises without difficulty "that conscientious objection may be abused" and that it is therefore necessary "to regulate the way it is exercised in such a way as to reduce this risk, which is, however, completely unavoidable". Precisely because it is a right of the person, the right must be protected even if it gives rise to abuse, so that one must willingly accept to live with a large number of "convenient objectors". This would also explain why the risk of abuse should be tolerated in this specific case, whereas in other areas (e.g. the possibility of conception), even the slightest risk is unacceptable and must be absolutely excluded.

The thesis (B), however, is in turn only sustainable on the basis of the thesis (C) which provides the theoretical justification and which constitutes the "archimedean point" of the whole proposal of the majority opinion, 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 open "the space for discussion on fundamental values" that would otherwise be affirmed in an authoritarian way by state power.

Underlying this thesis (C) is the idea about the change brought about by the Republican Constitution thanks to which the law would have abandoned "the claim of self-referentiality and self-sufficiency by accepting a principle of inclusion and comparison on fundamental values according to reasonableness, as the temperament of a legality understood in a creonteo way, that is rigid, abstract and without limits". This means that the legal system provides for two different levels that are at the basis of the distinction between the "creontean legality" consisting in the respect due to the law as the fruit of state power (creonteo: sola auctoritas facit legem), and the "constitutional legality" consisting in the respect due to the system as a whole, which recognizes itself subject to the highest values expressed in human rights recognized by the Constitution. It is thanks to this distinction that the majority opinion is able to support the thesis (A), that is, that conscientious objection is compatible with the principle of legality. In fact, on the one hand, the law must be observed as an expression of the imperium (creonteum) which deserves due respect as part of the system and derived from the (legitimate and democratic) majority of citizens, but, on the other hand, conscientious objection is legitimate when the law (creontea) is not respectful of the fundamental human rights recognised by the Constitution which is the basis of the system itself.

Furthermore, this distinction legitimises conscientious objection as a fundamental right of the person (thesis (B)), which would be constitutionally guaranteed since (constitutional) legality provides that state power (the creontea law) is respectful of human rights. Therefore, in the absence of the latter condition (i.e. where human rights are violated), (constitutional) legality provides a legal basis for the right to conscientious objection.

Finally, thanks to the distinction between the two levels of the system (Creon law and constitutional law), conscientious objection becomes a democratic and positive institution (thesis (C)), because it prevents the parliamentary majorities from denying "in an authoritarian way the problematic nature of the boundaries of the protection of inviolable rights", allowing to keep open "the space of discussion on fundamental values". It thus becomes clear why the majority opinion intends to "avoid undermining the principle of legality" and at the same time seeks to "reconcile the legitimacy of the objection, especially when it is inherent to fundamental constitutional values, with the protection of those who have legally established rights". Hence the "compatible" solution according to which both the right to conscientious objection of the health care worker and the right of women to use the services provided by law 194/78 must be guaranteed.

At first sight the solution may seem "Solomonic" in that it assigns to each applicant a little bit of what he asks for, but a closer reflection reveals that the price to pay is unacceptable, because it involves theoretical inconsistencies that are combined with a certain "cultural provincialism" that prevents us from properly grasping the situation.

The first of these inconsistencies is generated by the fact that the majority opinion takes it for granted that Law 194/78 is the result of mere creonteo (authoritarian) power generated by the parliamentary majority that approved it and, if ever, by the popular referendum that confirmed it, but that it is substantially a law (morally) unjust and contrary to "human rights". It almost seems to be assumed that this law was approved by a despotic power (creonteo) aimed only at finding a tragic remedy to the spread of clandestine abortion generated by the sexual intemperance of women, even to the detriment of the "human right" to life in the prenatal phase. After 34 years of law 194/78 the widespread mentality is so accustomed to the legality of abortion that the majority of the CNB is convinced to recognize that at this time

it is not possible to question the provision of services for medically assisted abortion, but it intends to affirm that at least the discussion on fundamental values, and in particular on the "right to life" of the embryo also endangered by other practices introduced in recent years, must be kept open. Thanks to this continuous criticism of the creone-a permissive legislation on abortion, it will perhaps be possible to avoid a further widening of the attacks on prenatal life as is the case with the RU486 and others with similar expedients.

One is astonished to say the least 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 obvious premise that Law 194/78 is a Creon law against the "human right" to life in the pre-natal phase, so that conscientious objection to abortion would become the democratic institution which, in a society accustomed to the lawfulness of abortion, keeps the debate on fundamental rights open and testifies in favour of that "right".

This judgement is so harsh and surprising that it casts doubt on the real objectivity of the Committee and provides the extremes to note once again how the overwhelming influence of Catholic culture conditions its judgements. This evaluation of Law 194/78 is so unjust and offensive that it alone justifies my clear dissent from the majority opinion, because never as a citizen of a democratic and secular state could I be touched by the idea that 194/78 is the result of mere creone-like (authoritarian) power asserted in violation of a "human right".

Not only the sense of respect for the democratic State and for the laws enacted by it, but also other theoretical considerations lead me to give the problem under examination a completely different approach from that underlying the majority opinion. If we succeed in overcoming this sort of "cultural myopia" that usually characterizes the CNB's perspective, which is too careful to keep within the banks of its own ideological matrix to look beyond our borders, we must take note that the protection of prenatal life does not fall within "human rights". In this regard, it is enough to recall that in 1948 the UN Assembly did not include among human rights either the specific paragraph proposed by Chile on the protection of prenatal life ("Unborn children and incurables, mentally defectives and lunatics, shall have the right to life") or the alternative text supported by Lebanon which 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.

31 See M.A. Glendon, Towards a new world. Eleonor Roosvelt and the Universal Declaration of Human Rights, Liberilibri, Macerata 2008, p. 430. Also the Vatican scholar and diplomat

If we look beyond the Italian province, we must recognize that after the UN Conferences in Cairo (1994) and Beijing (1995) there is a strong tendency to include "sexual rights" and "reproductive rights" among human rights. Their affirmation is not yet certain, but at least the CNB should have given an account of the current debate, instead of subjecting it to preventive censorship without even mentioning them.

If there is no "human right" to protect prenatal life, then the presumed legal and constitutional basis of the right to conscientious objection in bioethics is dissolved and with it the entire proposal put forward by the majority opinion falls. Moreover, a new perspective opens up: it can be observed that - beyond the historical problems regarding its genesis - Law 194/8 was by no means the mere fruit of mere creontean and authoritarian power (exercised by a "tyrannical" majority), but it turns out to be the concrete way in which, at the end of the 1970's, the precise "human right" which is the right to women's health was protected - almost preempting the notion of "reproductive health" which underlies "sexual" and "reproductive rights". Far from being at odds with the non-existent "right to life in the prenatal phase",

194/78 was a forerunner in the concrete protection of women's human rights: first of all the right to health, understood according to the principles and limits accepted by modern states. For this reason, the slogan "The good doctor does not object" launched by a recent campaign promoted by "easy objection objectors" seems to be particularly successful. In fact, it is difficult to justify that health workers conscientiously object to interventions aimed at protecting the reproductive health of women32.

At a time when interventions to protect reproductive health are on the rise, one would expect that a National Committee of a modern, secular and pluralist state would be ready to value practices that increase people's freedom and criticise cultural survival and other prejudices that are invoked to resist the protection of human rights, including health. On the contrary, the majority opinion insists on re-proposing the Catholic thesis according to which abortion violates an allegedly non-existent "human right" to life in the prenatal phase, a premise that is certainly not valid, but nevertheless useful to promote conscientious objection as a real right of the person, with the ultimate aim of keeping open the debate on fundamental values and inviolable rights that would be conculcated by Law 194/78. This way of seeing tends to overturn the picture of the situation, presenting the voluntary interruption of pregnancy as a highly immoral practice, entrusted to people with no ethical sense; in this sordid picture the enlightened behaviour of conscientious objectors, new champions of the protection of human rights, would stand out as noble exceptions. Personally, however, I feel able to declare, with a certain pride, that, despite all the limitations due to historical events, Law 194 was passed to protect the "human right" to health (also, but not only, reproductive): it follows that 194 does not violate human rights, and conscientious objection to abortion is not a right of the person.

Ettore Balestrero acknowledges that human rights do not include the protection of prenatal life. Cf. (E. Balestrero, The right to prenatal life in the international order. L'apporto della Santa Sede, Edizioni Studio Domenicano, Bologna 1997, p. 88.

32 It will be up to the health care professions to realize that the primary task is the service of women's health, including reproductive health: just as reticence and delays in the administration of analgesics must be overcome, so too must reproductive health. This is, however, a broader issue that needs to be addressed separately.

It is decisive to reiterate this perspective both because it allows us to look favourably at the new proposals of reproductive medicine (which may require changes to the 194 aimed at extending women's freedom) and because the awareness that the 194 is in line with human rights is liberating for all. Also for this reason I disagree with the majority opinion that it is on the same line of criminalization and culpability that has always characterized the Catholic world

However, there is at least one other serious inconsistency in the majority opinion that deserves to be reported. Let "s try to suppose, of course absurdly enough, that the opinion is acceptable and that we all agree that conscientious objection in bioethics is not a protest against the 194/78 law, but only a secundum legem clause capable of strengthening the legitimacy of the system as a whole since 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 that were the case, then we'd be faced with at least two problems. First, we should ask ourselves whether a state that blatantly violates human rights so cynically is structured in such a way that it is then also willing to recognise conscientious objection in bioethics. The second question that we should propose to ourselves (and here I refer to some of the considerations made above) concerns the behavior of the CNB: is it morally acceptable for a

committee such as ours to recognize that a certain legal practice is manifestly contrary to human rights and to limit itself to proposing as a solution the right to conscientious objection as a useful institution (?!) to keep the discourse on fundamental values open, explicitly stating that it wants to "avoid undermining the principle of legality" that allows the provision of abortion services? Such a declaration, however, is equivalent to an "ethical certification", timid as long as one wants, but unequivocal, of Law 194/78. But then, in what sense would this law be in blatant violation of human rights? On the other hand, if a law was really in clear conflict with human rights, would it be correct to avoid criticism and denunciation? In the face of an inhumane practice, would it be sufficient to limit oneself to asking for the right to conscientious objection for some operators? If the majority of the National Committee really believes that 194/78 involves a blatant violation of human rights, then it is not clear why they want to "avoid to undermine the principle of legality" and limit themselves to trying to "make the legitimacy of the objection coexist ... with the protection of those who have legally foreseen rights". It seems to me that this solution reveals an unacceptable moral inconsistency, which is another reason for my disagreement with the majority opinion.

The final conclusion is that if one abandons - as I believe it is necessary to do - the idea that conscientious objection should be considered as the banner raised in defence of human rights and in particular of the "right to life" in the prenatal phase against a law enacted by a Creonese [autocratic] power, then conscientious objection in the field of health is no longer a "fundamental right", but it may be permitted provided that the objector is obliged to accept an appropriate charge (to provide a supplementary service that integrates the lack of service due or to adopt the criterion of staff mobility cannot be adequate compensation) that testifies to the solely and exquisitely moral reasons for his request. Continuing to defend the current situation, which is limited to exempting from the service anyone who requests it, means defending the privilege of too many "convenient objectors", i.e. continuing to feed the widespread immorality.

Annotation of Prof.ssa Assuntina Morresi

The opinion "Conscientious objection and bioethics" deals with the issue of conscientious objection (henceforth OTO) from an overall point of view, without referring to specific situations provided for by Italian law: the contents of the document have a general value and referable to any case in which OTO can be invoked.

The validity of the considerations developed is in any case verifiable in what is the best known model in our country, i.e. the ODC as provided for by law 194/78 on the voluntary interruption of pregnancy (from now on ivg).

This apostille is intended to supplement the document approved (also by the undersigned) with considerations and data relating to the OCD as understood and implemented since 194/78, supporting and confirming the conclusions and recommendations made in the opinion itself.

The data on the application of Law 194/78 are public and accessible thanks to the reports that the Ministry of Health presents annually to Parliament. The data collection involves ISTAT, the regions, the Istituto Superiore di Sanità and the Ministry itself, in the manner described in the reports, which are also available on the website of the Ministry of Health.

From an examination of the available data, to date, it is clear that there is no correlation between the number of conscientious objectors and the waiting times of women accessing the IVG, but that the methods of access to the IVG depend on the organisation of the individual regions.

As shown below in an example, on the basis of the available data, it can be seen that in some regions, as the number of conscientious objectors increases, the waiting time for women decreases, and vice versa, in other regions, as the number of objectors decreases, the waiting time increases, contrary to what one might imagine.

In other words, it is not the number of objectors per se that determines the access to the IVG, but the way in which the health care structures organise themselves in the application of Law 194/78.

Already today, in fact, it is possible for the regional health organisation to implement both forms of staff mobility33 and forms of differentiated recruitment, as suggested in conclusion n.3 of the CNB opinion.

Recruitment limited to contractual forms of fixed-term contracts (also called "token-based"): any "ad hoc" competitions for permanent positions, intended only for non objectors (even without considering the problems of compatibility with the regulations on non-discrimination of workers) would in any case not be resolutive for the healthcare organisation.

It is not possible, in fact, that a person hired for an indefinite period as a non-objective employee is denied the possibility, later on, to change his or her mind and become an objector. It already happens, in fact, that doctors who at the beginning of their career declare themselves to be non-objective become objectors and vice versa. Possible forms of indefinite recruitment reserved to non-objectors, therefore - provided that the law allows it - could not guarantee the service, as they could not oblige a doctor or a health professional, hired as non-objective, to remain as such forever.

However, on the other hand, some of the organisations that contest the implementation of the OECD in 194 confirm that the problem is primarily an organisational one; in a recent press conference on the situation in Lazio, in fact, the LAIGA (Free Italian Association of Gynaecologists for the application of Law 194/78) stated, among other things: "With the use of external contracted doctors and token-operated doctors, the objection drops to 84%, which is in any case a figure that is not an objection.

33 L. 194/78, art. 9 "Authorised hospitals and nursing homes are in any case required to ensure the completion of the procedures set out in article 7 and the performance of the pregnancy termination interventions required in accordance with the procedures set out in articles 5, 7 and 8. The region shall monitor and ensure their implementation also through the mobility of staff (mio neretto mio).

The Region monitors and ensures its implementation also through the mobility of staff, neretto mio). 80.2% more serious than the 80.2% reported by the Minister of Health, who does not consider in his report the fact that a part of the non-objectors does not actually carry out the voluntary interruption of pregnancy "34.

In other words, the current legislation allows for a differentiated, specific recruitment of non-objectors, some of whom, however, for unknown reasons, do not carry out ivg: a fact certainly not ascribable to the percentage of conscientious objectors (and it would be interesting to investigate why).

The recommendations of the CNB opinion, therefore, are consistent with what is currently happening in Italy under Law 194/78 which, if correctly applied, allows both the right to OCD and, at the same time, access to IVG for those who request it under the terms of the same law.

Conscientious objection and application of 194 - example (see attached table)

Table legend:

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

N. Ab.: number of abortions in absolute value, useful to evaluate the number of interventions.

Obiet: Objectors, understood as a percentage among gynaecologists.

T. At. % < 14 days: waiting time, intended as the time between the issue of certification and intervention. In this case it indicates the percentage of women who wait less than 14 days, including the 7 days of reflection provided for by art.5. It is an indicator of the efficiency of law enforcement.

T. A. 22 - 28: the percentage of women who wait between 22 and 28 days from the issue of the certificate and the intervention, including the 7 days of reflection provided for by art. 5.

Urg.: indicates the percentage of abortions in which the doctor has issued a certificate stating conditions of urgency, so the intervention is performed as soon as possible (without the seven days of reflection).

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

So in three years in Italy the number of objectors has increased and the waiting time has decreased, i.e. improved.

The table then shows the same data, region by region, and we see that the situations are the most different.

For example, in Lazio, the number of objectors in three years has increased from 77.7% to 80.2% and waiting times have decreased (from 47.8% to 54% the number of women who wait "little", and from 17.2% to 13.3% those who wait "a lot"). A similar trend occurs in Piedmont, for example.

34 http://www.associazionelucacoscioni.it/rassegnastampa/aborto-consulta-decide-su-legge- 194-in-lazio-over-90-medium-object.

In Lombardy, on the other hand, the number of objectors has decreased and waiting times have increased, i.e. they have worsened (the number of women who wait "little" decreases). In Umbria the situation is the same as in Lombardy, but more accentuated in the figures: the number of objectors fell from 70.2% to 63.3% and the number of women who wait "a little" fell from 51.0% to 40.0%, and those who wait "a lot" increased from 13.3% to 19.0%.

In Emilia Romagna something even different happens: the number of objectors decreases and also the waiting time, which has therefore improved.

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

In summary: the way the law is applied depends substantially on the regional organization, which is the overall result of many contributions that, of course, vary from region to region (and probably also within the same region).

I would also like to point out the data on urgency: the regions where the most urgent certificates are issued are always Emilia Romagna and Tuscany.

That for a correct interpretation the data should be contextualized, and examined together with even complex considerations on the health organization, is demonstrated by this simple example: If these data - i.e. that Tuscany and Emilia Romagna have always been the regions with the highest number of abortions in emergency conditions - were considered in themselves, it should be deduced that women in these regions are not adequately informed, that the advisory network is not very efficient, that the so-called "active offer" is not very effective, given that a very high number of women arrive too late to request abortion compared to the national average, and therefore for many of them the emergency procedure must be used.

Only by contextualizing this data can we interpret it as a political and health orientation of the two regions, which in applying the law evidently tend to bypass the week of reflection.

	2009						2006					
REGIONE	TAS.	N.AB.	OBIE T.	**T.AT. %< 14gg**	T.A T 22-28	UR G	TAS.	N. AB.	OBIE T.	**T.AT. %< 14gg**	T.AT 22-28	URG
ITALIA	**8.5**	**118579**	**70.7**	**59.3**	**11.1**	**9.2**	**9.4**	**131018**	**69.2**	**56.7**	**12.4**	**9.4**
ITALIA SETTENTRIONALE	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
ITALIA CENTRALE	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
ITALIA MERIDIONALE	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
ITALIA INSULARE	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
ITALIA	**8.5**	**118579**	**70.7**	**59.3**	**11.1**	**9.2**	**9.4**	**131018**	**69.2**	**56.7**	**12.4**	**9.4**