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Conscientious Objection for Specific Professional Categories (Pharmacists, Judges, Administrators, Consultants, etc.)

Conscientious objection directly derives from the inviolable dignity of the person and the inherent freedom of religion and conscience. It is based upon the principle of the fundamental importance of the sovereignty of the human spirit and the inviolable right to live according to truth of one's conscience and to allow oneself to be guided by the force of that which, according to judgement of one's conscience, is right. Thus nobody must be forced to act against their conscience. The Polish king, Sigismund Augustus, when upholding freedom of conscience and religion, declared clearly and forthrightly: 'I am not the master of human consciences'. Man would like his actions, for which he is responsible, to be in conformity with his ideal of good and his moral judgement.¹ Conscientious objection has its roots in the basis of the conflict between the duty to behave according to positive law and the moral obligation of conscience. This conflict can be resolved or the human conscience can be violated by obeying juridical norms (thereby wounding in the end the person's inherent dignity) or positive law can be violated by following one's conscience. To invoke conscientious objection means to have the choice to act according to one's conscience in conformity with moral norms, i.e. preferring one's conscience to juridical norms. Conscientious objection in a situation of conflict between a juridical norm and a moral norm of one's conscience becomes an individual right as long as both norms have the same field of application and concern the same situation, which emerges in a different way from both norms.² From conscientious objection there follows at a juridical level the abrogation, in the individual situation, of the duty to respect the norm of behaviour derived from the law given that it is in conflict with human conscience. A law that envisages conscientious objection contains permission to transgress a juridical norm which is generally obligatory if this is motivated by the conscience of the individual. When conscientious objection is clearly regulated by the law or legally admissible in a supposed way, the person who invokes it and

¹ J.J. WRIGHT, *Coscienza e autorità. Tensione e armonia* (Citta Nuova Editrice, Rome, 1970), p. 15.

² G. DANESI, *L'obiezione di coscienza: spunti per un'analisi giuridica e metagiuridica*, http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_1998/Danesi1.rtf :90

does not obey the relevant juridical norms does not have a juridical-penal, civil, administrative, disciplinary, workplace responsibility or other juridical consequences. It should be admitted that such behaviour is the circumstance that excludes penal illegitimacy, as well as civil, administrative or disciplinary illegitimacy. John Paul II wrote that ‘those who have recourse to conscientious objection must be defended not only against penal sanctions but also against any injury at a legal, disciplinary, economic or professional level’.³

In the literature in the field we find that ‘the conflict between human law and conscience is as old as the history of man’.⁴ However, this question should be approached as a sign of the contemporary times because specifically in our times the question of conscientious objection has become of great contemporary relevance. It should be seen as a new interdisciplinary juridical institution present in all liberal juridical systems.⁵ One may see the legitimacy of conscientious objection as a characteristic of contemporary pluralistic societies and liberal democratic states and of the process of separating it from moral values.⁶ This fact above all finds its justification, which is, indeed, the source of conflicts of conscience, in the contents of positive law which imposes duties that are opposed to the universal system of high moral values. As a consequence, the situations in which conflict of conscience can exist are becoming increasingly numerous. From this comes the problem of juridical regulations involving, on the one hand, not forcing the person into a legal path to behave against his conscience, and, on the other, through disobedience to the law, of not creating a situation of anarchy in the state in which each person could violate every juridical norm as they wished by invoking conscientious objection. One may observe the tendency to confer on conscientious objection the dimension of a human right and to attribute to it the form of a juridical norm in force at a universal level. John Paul II observes of this kind of solution: ‘To refuse to take part in committing an injustice is not only a moral duty; it is also a basic human right...which, precisely as such, should be acknowledged and protected by civil law’.⁷

At times the opinion is expressed that the acceptance of conscientious objection always involves the consequences due to disobedience to law but are such as to render their authors immune. At times, to compensate these costs, the obligation is introduced to obtain from the

³ JOHN PAUL II, *Evangelium Vitae*, n.74.

⁴ J.T.M. DE AGAR, ‘Problemi giuridici dell’obiezione di coscienza, versione italiana dell’ art. Problemas juridicos de la objecion de conciencia’, *Scripta Theologica*, 1995, 2: 519-543. <http://www.geociteies.com/martinagar.geo/obiezione.html> .

⁵ G. DANESI , *L’obiezione di coscienza: spunti per un’analisi giuridica e matagiuridica*, p. 90.

⁶ Cf. e.g. G. DALLA TORRE, ‘Ruolo della Chiesa nella societa civile:pastori e laici nella prospettiva ecclesiologico-canonica’, in *I cattolici e la societa pluralista. Il caso delle “leggi imperfette”* (Edizioni Studio Domenicano, Bologna, 1996), p. 218, ss.

⁷ JOHN PAUL II, *Evangelium vitae*, n 74.

objector such activities that reduce the injury of disobedience.⁸

Questions are raised about the justification in a democratic state for this institution which is said to violate the principle of equality and justice.⁹ For that matter, the reason for this institution is unusually fundamental for the dignity of the person. To act justly according to one's own conscience is a part of the identity of a person. The institution of conscientious objection must be understood as a technique to solve axiological controversies. Thanks to the institution of conscientious objection the conflict can be resolved so as to attribute this right to individual behaviour that is in conformity with conscience but in opposition to the duties of the law. It is evident that conscientious objection creates problems, not only juridical problems, but also problems in the sphere of the philosophy of law, legal medicine and, above all, ethics.¹⁰

2. The state can regulate in various ways the problem of allowing conscientious objection. The general regulation of this institution directly in a country's constitution is the best solution.¹¹ Conscientious objection thus obtains the status of a universal right. This can be referred to in every situation determined by the constitution without the need for specific legislative provisions. Thus consistent doubts often arise in attributing to conscientious objection the dimension of a universal human right that is guaranteed constitutionally. This could limit the possibilities of using a human right, for example the conscientious objection that medical doctors who do not want to carry out an abortion could raise, thereby creating difficulties in the upholding of the so-called 'right of a woman to abortion'.

The constitutional approach to conscientious objection is the highest juridical guarantee there is of allowing a violating of a specific juridical duty if a person is motivated by conscience. Leaving aside the question of the constitutional regulation of conscientious objection in relation to military service, which is to be found in nearly all the constitutions of democratic countries and is supported by international regulations, one may observe that shared regulations relating to conscientious objection in normative documents at a constitutional level are few in number. One example is the Portuguese Constitution of 1976 which with its up-dating of 1982, in article 41.6, upheld the right to conscientious objection but in conditions envisaged by the law. This means that it must be specified in the context of

⁸ J.T.M. DE AGAR, 'Problemi giuridici dell'obiezione di coscienza', p. 17.

⁹ *Ibidem*.

¹⁰ Cf. A. FIORI and E. SGRECCIA (eds.), *Obiezione di coscienza e aborto* (Milan, 1978), p. 90.

¹¹ Cf. F. PEREIRA COUTINHO, *Sentido e limites do direito fundamental a objecção de consciencia*, Faculdade de Direito da Universidade Nova de Lisboa, Working Papers 2001, p. 6.

ordinary law as well.¹² In reality, after a certain fashion, the constitutional right to conscientious objection works in dependence on the law in force by which it is applicable. It is held that the Constitution of Holland of 1983 intentionally did not introduce a general norm guaranteeing the right to conscientious objection because it was believed that ‘a Constitutional country cannot authorise everyone to have scruples of conscience – this would lead to anarchy’.¹³ However, even when a specific law is absent the person who applies conscientious objection could directly invoke the right to freedom of conscience imposed by the Constitution in relation to human rights, applicable in an indirect way, independently of the intervention of the legislator that determines it.

In a situation where the Constitution does not directly cover conscientious objection as a human right, it happens that constitutional courts uphold this right during analysis of individual cases by extrapolating it from the right to freedom of conscience and religion. In this context, the sentence of the Constitutional Court of Spain decreed that ‘conscientious objection is a part of the contents of the fundamental right to ideological and religious freedom recognised by article 16.1 of the Constitution’.¹⁴ The Constitutional Court emphasised on this occasion that the Spanish Constitution is applicable in a direct way, in particular in the field of fundamental rights. The other sentences of the same court have not confirmed to the full this opinion.¹⁵

In the field of the right of freedom of thought, conscience and religion of article 9 of the European Convention for the Defence of Human Rights and Fundamental Freedoms, the European Court of Human Rights in Strasbourg allows the reality of conscientious objection but argues or denies that this right depends on the object of the case under examination. In international human rights conscientious objection is very often connected with freedom of religion and freedom of conscience. As the literature in the field demonstrates, it is necessary to broaden the motivations at the base of conscientious objection as well as the motivations of an ethical, philosophical, ideological and political character.¹⁶ However, it is significant that in the European Convention on Bioethics and Gene Therapy of 4 April 1997 a clause on

¹² Constitution de la République Portugaise, <http://www.parlamento.pt/frances/const-leg/crp-franc/crp-97.1.html>

¹³ M. BEN VERMEULEN, ‘Rapport sur „Portée et limites de l’objection de conscience’, in *Liberté de conscience. Actes de Séminaire organisé par le Secrétariat Général du Conseil de l’Europe en collaboration avec le Centre d’études des droit de l’homme. “F. M. von Asbeck” de Université de Leiden, 12-14 novembre 1992* (Les éditions du Conseil de l’Europe, Strasbourg, 1993), p. 85. In Holland it is recognised that the best level for the regulation of conscientious objection is specific laws: *ibidem*, p. 90.

¹⁴ STC 53/85 dell’ 11.IV. 1985.

¹⁵ Cf. J.T.M. DE AGAR, ‘Problemi giuridici dell’ obiezione’, p.17 .

¹⁶ F.P. COUTINHO, *Sentido e limites do direito fundamental a objecção de consciencia* (EDUNL, 2001), p. 6.

conscientious objection was not inserted.¹⁷ Although during the parliamentary assembly of the Council of Europe an amendment that envisaged its introduction was proposed,¹⁸ this was rejected. The speaker contested the meaning of inserting it into this document given that it was already present in other conventions.¹⁹

3. In the analysis of the juridical regulations on respect for freedom of thought and conscience in relation to the various professional categories, numerous solutions to the question can be observed. In this case, laws envisage regulations that indicate in an evident way the right to express conscientious objection both in the form of exercising actions determined at a juridical level that form a part of the profession and through a conscience clause which envisages that the profession is exercised by people according to their conscience – the conscience option. In the case of a conscience clause, the law allows non-obedience to the obligations derived from the law when a specific profession is practiced.

The regulation of conscientious objection by numerous laws creates models for juridical norms in relation to conscientious objection that are different in a subjective and objective sense.²⁰ Reference is also made, applying the plural form, to ‘institutions of conscience’. One should also note the special dynamic of this field of law, which R. Navarro-Valls calls a ‘juridical big-bang’.²¹

At the present time, two contrasting trends as regards the position of conscientious objection may be identified: on the one hand, there is the trend of extending the field of the legal formula of conscientious objection; on the other, there is a moderation of this trend with the denial to certain professional categories of the right to conscientious objection or the limitation of its contents, that is to say, after a certain fashion, a taking into consideration of the nature itself of this institution. One can observe that conscientious objection prior to becoming a form of fundamental human right is already limited. Legislative concessions in favour of conscientious objection are progressively engaged in for well specified reasons.²²

A new overall way of regulating conscientious objection at a juridical level was applied in the Republic of Slovakia with a clear connection with freedom of religion in

¹⁷ E. SGRECCIA, ‘La Convenzione sui diritti dell’uomo e la biomedicina’, *Medicina e Morale*, 1997, 1, p. 10.

¹⁸ CONSEIL DE L’EUROPE, ASSEMBLEE PARLEMENTAIRE, SESSION de 1995. *Compte rendu officiel de la sixième séance*, 2 II 1995, AS(1995)CR6.

¹⁹ Cf. *L’emendamento e l’intervenzione di A. Grześkowiak*, Conseil de l’Europe, Assemblée parlementaire, Session de 1995. *Compte rendu officiel de la sixième séance*, 2 II 1995, AS(1995) CR6.

²⁰ J.T.M. DE AGAR, ‘Problemi giuridici dell’obiezione di coscienza, versione italiana dell’art. Problemas juridicos de la objeccion de conciencia’, *Scripta Theologica*, 1995, 2, 519-543.

²¹ R. NAVARRO-VALLS and J. MARTINEZ-TORRON, *Las objeciones de conciencia en el derecho español y comparado* (Madrid, 1997), pp. 1-2.

²² G. QUINN, ‘Objection de conscience dans le domaine professionnel (fonction publique et professions liberales)’, in *Liberté de conscience*, p. 114.

relation to Catholics. In agreement with the Holy See, a project was drawn up for an agreement regulating the question of conscientious objection²³ which referred to the concordat of 24 November 2000. By this project Slovakia would have recognised the right of the faithful to act according to conscience and there was an undertaking to approve a law on a conscience clause. Taking the form of an appendix it would have guaranteed Catholics the right to refuse to engage in certain professional activities that were in opposition to their religious beliefs. Conscientious objection would have applied to professions and to forms of conduct that were laid down in the project. It would have applied to health-care personnel who would have been guaranteed the right to refuse to procure abortions, engage in assisted procreation, and to participate in experiments, euthanasia, cloning, sterilisation, contraception and trading in the human body, human embryos, and organ banks. Teachers could have refused to hold courses that were against their beliefs, and in particular courses on sexual education, and lawyers could have refused to accept cases and provide juridical aid, but above all it would have allowed people to refuse to work on Sundays and feast days. This juridical solution, which is without precedent, which hitherto is not applicable and thus does not constitute law in this field, contained an overall regulation of conscientious objection, even though it was limited to Catholics. The approach of this Slovak project meant, first of all, a direct recognition of conscientious objection as a human right. Unfortunately, the project was not approved and the result of all the initiatives to achieve its approval was the fall of the government and early elections. This, perhaps, indicates the political aspects of the question.

4. Recently, the recognition of conscientious objection has often been requested by people obliged to perform military service but because in this case the same right offers the alternative possibility of choosing other forms of service, reference is made more to the option of conscience.²⁴ Thus for some time the question of refusing to carry out activities that are decreed by law has become of particular contemporary relevance in relation to certain professional categories and to activities of theirs which raise conscientious objection. There is a juridical specification of the category of these professions and a legalisation of the right to refuse activities that are defined as being opposed to the judgement of conscience. In many contexts it is stated that professions exist where the refusal to perform certain activities envisaged by the law for reasons linked to conscientious objection is inadmissible.²⁵ One is dealing here first and foremost with carrying out duties to the state that require the application

²³ *Nvrah. Zmluva medzi Slovenskou republikou a Svatou stolicou o uplatnovani vyhrady svedomia.*

²⁴ Cf. G. DELLA TORRE, 'Ruolo della Chiesa', p. 220.

²⁵ M. BEN VERMEULEN, 'Rapport', p. 90.

of a legal obligation for the defence of its security and public order – for example police and prison guards. It is to be noted that conscientious objection is not allowed for civil servants.²⁶ The questions and issues connected with conscientious objection, examined with reference to labour relations, no longer depend on the kind of work that is done but on the category of public-private employer and the way in which the work relationship is formed. It is supposed that the basis of the way in which the work relationship is formed constitutes the contract between the employer and the employee, that is to say that the voluntary contract of work that explicitly determines the kind of work engaged in, does not recognise, *ex post*, that the worker has the right to invoke conscientious objection. He can choose or broaden the duties of his work that are in conformity with his conscience or he can reject the post. For that matter, if the contract of work does not include this clear explanation of his professional duties or at the moment of beginning the job these professional duties are not set out, and the conscience of the employee rebels against them, it is necessary to give the worker the possibility of invoking conscientious objection and to obtain another kind of job for him. In no case can the worker who invokes conscientious objection be subjected to disciplinary measures or be dismissed. However, it is emphasised that this cannot involve privileges because this would injure the principle of legality and justice. Such cases are examined by courts in a different way. The case examined by the European Commission for Human Rights is well known. This concerned the dismissal of a Protestant priest who had protested against the broadening of his activities because of the law on abortion, which is accepted in Norway, as a result of his contract of work. The Commission decided that his work had no relationship with direct or indirect participation in an act of abortion. Basing itself on the contents of the work contract, it argued that ‘within the context of the official Church, the pastor is not only attributed religious duties, he must also accept duties towards the state’. It added that if the requirements of law were in contrast with the man’s conscience then he could always withdraw from the work contract with the state.²⁷

In the analysis of questions connected with conscientious objection in various professions it is to be observed that the deontological codes of certain professions include the right to conscientious objection or an indication that a person who practices a profession is recognised as having the right to act according to conscience. Article 62 of the deontological code of the Province of Turin of 1948 clearly laid down that a medical doctor, who because of

²⁶ Z. CICHONŃ, ‘Klauzula sumienia w różnych zawodach’, in *Prawnik katolicki a wartości prawa* (Kraków, 1999), p. 50.

²⁷ *Affaire Knudsen c/ Norvege- Decision de la Commission europeenne des Droit de l’Homme du 8 mars 1985.* DR 42:247.

his convictions believes that he should not procure within a specific legal period so-called therapeutic abortion, could refuse to carry it out, but this norm was repealed in 1954. Conscientious objections is fully inserted into the deontological code for medical doctors of 1978 and is firmly established in the deontological code of 1998, but on the condition that a refusal to carry out activities contested by the conscience of the medical doctor does not directly imperil the health of the patient.²⁸ Article 19 of the same code contains the common right of a medical doctor to refuse to carry out activities in contrast with his conscience or his clinical knowledge. The ethical code for medical doctors of Poland argues that a medical doctor should work in conformity with his conscience and contemporary medical knowledge; indeed, in particularly justified cases he can refuse to treat a patient.²⁹ However, ethical codes do not have the power of state law and there thus emerges the question of the relationship of their norms with the legal norms that regulate the practice of certain professions which do not have a conscientious objection clause or go beyond the clauses of the deontological codes. In Poland the Constitutional Court has dealt with the relationship between deontological norms and the norms established by law and amongst other things has referred to the opposition between the very restrictive medical ethical norms in relation to abortion that involve the prohibition of taking part in the act of killing and the norms of the law that legalise abortion. In its sentence of 7 October 1992, the Constitutional Court of Poland argued that ‘medical ethical norms have the character of deontological norms and not the character of norms that apply in the field of state administration...The statement that an ethical norm must conform to a legal norm³⁰ is illegitimate. This statement presupposes the primacy of the law over ethical norms’.³¹The Constitutional Court argued that law must have ethical legitimation and that ethics do not require legal legitimation. It emphasised that a medical doctor can refuse to grant authorisation attesting the acceptability of abortion and refuse to carry it out. This right derives from the fundamental freedom to act in conformity with one’s own conscience as defined by the Constitution of the country. The observation of the Constitutional Court of Poland is very important because from comparison with ethical codes of specific professions there often explicitly derives the right to perform professional activities, a right which is not confirmed or upheld in the broader field of the precepts of law. In particular, this situation

²⁸ M.I. DI PIETRO, C. CASINI, M. CASINI, A.G. SPAGNOLO, *Obiezione di coscienza in sanita. Nuove problematiche oer l’etica e per il diritto* (Edizioni Cantagalli, Sienna, 2005) pp. 8, 28, 39, 138.

²⁹ *Kodeks etyki lekarskiej* del 2 I. 2004, Warsaw, 2004.

³⁰ U.1/192

³¹ E. Sgreccia has written ‘*Ce n’est donc pas la loi qui constitue l’ethique ni qui impose sa propre moralite*’: E. SGRECCIA. *Manuel de bioethique. Les fondamentes et l’ethique biomedicale* (Mame-Edifa, Paris, 2004), p. 497.

occurs with the conscientious objection of pharmacists which has been upheld by ethical commissions but rejected by the courts because they held that it was without legal bases.

5. *Conscientious Objection in the Health-Care Professions*

Conscientious objection is defined in juridical terms in relation to health-care workers above all in the context of laws that recognise abortion as a medical intervention and because of which medical doctors are obliged to carry out abortions although this involves the death of the conceived child. The right to refuse to collaborate in abortion is also extended to other professions that form a part of the health-care professions. The juridical institution of conscientious objection has been expanded by the development of bioethics³² and by the legalisation of attacks on human life – euthanasia, assisted suicide, artificial fertilisation,³³ and voluntary sterilisation. It also covers other activities of the health-care professions, for example organ transplants, but it is also included in the professions of scientists, in particular in the field of sciences that can generate problems of conscience in relation to scientific experiments (on animals as well), biotechnology and genetic engineering.³⁴ Laws on science are introduced or proposed that establish the right of scientists to claim conscientious objection in the field of research in the scientific domains that are indicated, and these are also extended to students.³⁵

John Paul II clearly characterised the question of conscientious objection in the case of the health-care professions when he wrote that ‘the opportunity to refuse to take part in the phases of consultation, preparation and execution of these acts against life should be guaranteed to physicians, health-care personnel, and directors of hospitals, clinics and convalescent facilities’.³⁶

It is necessary to establish conscientious objection in the health-care field so that, amongst other things, people who exercise such professions (medical doctors, pharmacists, nurses or biologists) take decisions of an ethical character in relation to the beginning and the end of human life, as well as in relation to its dignity and to private life.³⁷ Many conflicts

³² Cf. G. RIPERT, *Bioethique et objection de conscience, il discorso al Colloquio Pampelona*, 2/3 X 1999, (typescript).

³³ M. GAŁĄZKA, *Prawo karne wobec prokreacji pozaustrojowej* (Wydawnictwo KUL, Lublin, 2005) p. 384

³⁴ R. NAVARRO-VALLS, ‘La objecion de conciencia’, *Bioetica y Justicia*, pp. 311- 314.

³⁵ *Ibidem*, p. 314.

³⁶ JOHN PAUL II, *Evangelium vitae*, n. 74.

³⁷ J. GUZMAN LOPEZ, *Objecion de conciencia farmaceutica*: <http://www.andoc-biosanitario.org/Juridico/Lopezguz:1>; R.DRESSER, *Professionals, Conformity, and Conscience Hastings Center Report*, 2005, XI/XII, p. 9.

between conscience and the law arise at the level of the professional activities that they engage in.³⁸ By the health-care professions is meant above all medical doctors but also obstetricians, nurses and other health-care personnel who provide assistance. E. Sgreccia describes the following as the subjects of conscientious objection: medical doctors, paramedical staff, the heads of hospital institutions, clinics and health centres, and pharmacists.³⁹ The above-mentioned professions are attributed the right to invoke conscientious objection in relation to activities connected with abortion, assisted procreation or medical experiments that are connected with the need to eliminate human embryos. The legalisation of abortion-inducing instruments such as the RU486 pill and the ‘day after’ pill and the increasing phenomenon of pharmacists who refuse to sell them, raises the question of whether pharmacists, too, are health-care personnel who can invoke conscientious objection in relation to abortion-inducing acts and procedures and thus whether this group belongs to the health-care professions. It is pointed out that the professional integration of health-care personnel must lead to a recognition of conscientious objection as a shared right of the health-care professions, to which they have a right in any case.⁴⁰ In legislative practice, conscience clauses are atomised around various activities and dispersed in various laws. Furthermore, they are very different in their contents and it would be difficult to construct from them a model for a single clause common to all the health-care professions. An attempt is made to limit to the minimum some substantial model through juridical resolutions on the question. R. Dresser has presented this evidence.⁴¹ In his opinion, the first model is based upon the contract between the medical doctor and his patient. The medical doctor, at the beginning of the contract, indicates the limits of his conduct, although modifications dictated by urgent medical help are inserted. The second model authorises the medical doctor who is the conscientious objector to be obliged to send the patient to another doctor. This model is false because it relativises the right in question. A pharmacist expressed the point in a precise way when he said that ‘I do not kill but I point out a man who would do it who is somewhat further away’.⁴² The third model rejects the possibility of invoking conscientious objection because a person who enters the profession accepts that he will conform to its standards, although the author emphasises that not all the duties of health-care personnel are known at

³⁸ J. GUZMAN LOPEZ, ‘Objecion de conciencia’, p. 1.

³⁹ E. SGRECCIA, *Manuel*, p. 499.

⁴⁰ G. HERRANZ, ‘La objecion de conciencia de las profesiones sanitarias’, *Scripta Theologica*, 1995, 2, p. 546.

⁴¹ R. DRESSER, ‘Professionals, Conformity, and Conscience’, *Hastings Center Report*, 2005, XI/XII, pp. 9-10.

⁴² *Ibidem*, p. 9.

the outset. For that matter, the development of biomedicine and the legalisation of attacks on human life, which are legally connected with the health-care professions, demonstrate that the framework of professional activities is not fully predictable. In the fourth model R. Dresser describes the schema of conscientious objection in relation to military service, that is to say the legal indications of the possible options for the conduct of the health-care personnel from which they can choose suitable conduct in conformity with their consciences. Lastly, the fifth model constitutes a compromise solution which establishes a balance between the interests of the patient and the freedom of conscience of the health-care personnel.

The Italian legislature introduced a juridical unification of a solution to the problem of a conscience clause with reference to experiments on animals. A special law was passed on conscientious objection in relation to experiments on animals.⁴³ As a criterion for such regulation the objective factor was adopted, namely the kind of experiment involved in the domain of the various professional categories. This allowed a shared right to conscientious objection in relation to every act committed in experiments on animals. According to this law, medical doctors, researchers, health-care personnel with jobs of professionals with degrees, technicians and nurses, as well as university students, can invoke the conscience clause. It is a pity that this regulation (which is overall and unitary) of conscientious objection has not been inserted into laws that legitimate attacks on human life. However, as regards the expansion of the field of conscientious objection in the health-care professions at times reference is made to the need for legislative additions in this field so that in protecting the individual conscience respect 'is saved' for the precepts of law that attribute to the personnel of this category the duty to engage in the activities that belong to the profession.⁴⁴ In addition, it is observed that the condition of invoking conscientious objection in all the health-care professions, including pharmacists, should assure that sick people have access to medical care.⁴⁵

a. *Medical doctors*

Medical doctors are the professional category in the sphere of health-care personnel in which for the first time was expressed with full acuteness the question of refusing to engage in activities imposed by the law but opposed by their consciences. Many activities have been included in the profession of being a medical doctor that have nothing to do with treating man

⁴³ Legge 12 X 1993, n. 413, *Norme sull'obiezione di coscienza alla sperimentazione animale*, GU n. 244.

⁴⁴ In the view of P. DUCA: 'La difficile conciliazione di precetto morale, dettato della legge e diritto della paziente, *Ochio Clinico*, 2004, 8, p. 23.

⁴⁵ J.R.H.R. MANASSE, 'Conscientious Objection and the Pharmacist', *Science* 2005, 308, 9728, p. 1559.

and the Hippocratic oath, for example: abortion, euthanasia, contraception, prenatal diagnosis, the selection of embryos, artificial fertilisation etc.

The rejection advanced by medical doctors concerned first and foremost activities that lead to the murder of a person, that is to say abortion, which had been legally recognised as a medical intervention, and also, much later, euthanasia and capital punishment by injection. Medical doctors refused to engage in abortion despite the fact that the law had not, as yet, established a conscience clause.

The juridical regulation of conscientious objection in the context of the professional of medical doctors, which came into being with laws that legalised abortion, was also extended at the outset to the right to refuse to kill a conceived child by voluntary abortion.⁴⁶ The sphere of application of the conscience clause for medical doctors was extended with the legalisation of abortion and the acceptability of abortion for criminal and eugenic reasons, but above all social and personal ones, or the acceptance of the model of abortion on demand.⁴⁷ However, the first pro-abortion laws, which were approved in Communist countries, did not include precepts that authorised medical doctors to refuse the interruption of a pregnancy. Medical doctors who refused to engage in an abortion were the subjects of oppression, deprived of the right to practice their profession, and in the best of cases dismissed from their jobs. And medical students who did not want to participate in the carrying out of an abortion were expelled. This was the case in Poland, where the law on abortion of 27 April 1956 did not envisage the legal possibility of refusing to carry out an abortion. Only in the laws passed by Western countries from the 1970s onwards, in parallel with the permission granted to a medical doctor to kill a conceived child without being liable to legal action, was there also permission, rooted in the conscience of the medical doctor, to reject such activity without being liable to sanctions, although in a certain sense this was dependent on the conditions that were indicated.⁴⁸ This authorisation applied not only to medical doctors but was also extended subjectively to all people and thus to health-care personnel who in a direct or indirect way participated in the practice of legal abortion.⁴⁹ This clause is to be found in the first law allowing abortion, that of Great Britain of 1967.⁵⁰ Conscientious objection, independently of the legal status of the workers, related to a refusal to engage in abortion-inducing activities

⁴⁶ E. SGRECCIA, *Manuel*, p. 501.

⁴⁷ K. WIAK, *Ochrona dziecka poczętego w polskim prawie karnym* (Redakcja Wydawnictwa KUL, Lublin, 2001), pp. 49-50.

⁴⁸ Cf. F. STELLA, 'La situazione legislativa in merito alla obiezione sanitaria in Europa', *Medicina e Morale*, 1985, 2, pp. 281-301.

⁴⁹ Cf., for example, C.M.R. CASABONA *Los delitos contra la vida y la integridad personal y los relativos a la manipulación genética* (Canares, Granada, 2004), p.143.

⁵⁰ *The Abortion Act of 1967*.

within the area of the profession, but with the exclusion of actions necessary to save the life or defend the health of, or to prevent grave physical or mental damage to, the pregnant woman. However, in invoking conscientious objection it was necessary to guarantee the implementation of the decision of the woman to be referred to another medical doctor who would procure the abortion for her.⁵¹ It may be seen that the clause already included grave objective limitations. The medical doctor had to establish the person who was to carry out the abortion. Given that the legislature used the phrase ‘every person who treats’, it was supposed that this applied not only to medical doctors but also to all the people who in some way or another co-operated in the abortion. This was the subject of a famous case.⁵² Conscience clauses were also included in the laws on abortion that were subsequently approved by European countries. Without doubt, on the basis of these laws, a medical doctor could employ the conscience clause and refuse to carry out an abortion and thus the clause formed a part of the juridical practice of his profession. In an explicit way, this was confirmed by article 9 of the law of 1978 which legalised abortion in Italy⁵³ with reference to the activities of people who co-operated in abortions, above all medical doctors.

The law of 1985 that legalised abortion in Spain did not include a conscience clause and thus it has been necessary to refer to the decisions of the Constitutional Court. The medical deontological code, however, does envisage such a clause⁵⁴ but it remains without relevance to the legal status of the right to conscientious objection. The Polish law on abortion of 1993 did not include a conscience clause. At the beginning such a clause was inserted into the regulation of the Ministry of Health⁵⁵ of 30 April 1990, that is to say in a directive of a lower level. But the Constitutional Court, when examining the legitimacy of this provision, argued that the right of medical doctors to conscientious objection derived directly from the constitutional right to freedom of conscience. In 1996 the conscience clause was established in the law on the medical profession.⁵⁶ It was given a general framework and was treated as the right of medical doctor to abstain from engaging in health-care activities that were against his conscience. The use of the clause is conditional and the medical doctor is prohibited from

⁵¹ M. DAVIES, *Medical Law* (Blekstone Press Limited, London, 1998), p. 279.

⁵² *Janaway v Salford Area Health Authority* (1989) AC537, HL.

⁵³ Law of 22 May 1978, n. 194, Norms for the social defence of maternity and the voluntary interruption of pregnancy, GU n. 140, of 22 May 1978, with modifications.

⁵⁴ D. SERRAT MORE and L. BERNAD PEREZ, *Las profesiones sanitarias ante la objecion de conciencia*, <http://www.andoc-biosanitario.org/Juridico/Serrat.htm> :3.

⁵⁵ ROZPORZĄDZENIE MINISTRA ZDROWIA z 30 kwietnia 1990 w sprawie kwalifikacji zawodowych, jakie powinny posiadać lekarze dokonujący zabiegu przerywania ciąży oraz trybu wydawania orzeczeń lekarskich o dopuszczalności dokonania takiego zabiegu Dz.U. 2000. nr 29, 179.

⁵⁶ Attached text Dz. U. 2001, nr. 126, 1382.

refusing to provide help to someone who runs the risk of dying or a grave injury to their health. The medical doctor is obliged to indicate the real possibilities of obtaining this service from another medical doctor or in a local health-care structure able to justify and register this fact in the medical records. A medical doctor who practices his profession on the basis of his work relationship or during service is also obliged to inform his superior in written form. With respect to the interruption of pregnancy, according to Polish legislation the medical doctor who refuses to engage in such an interruption has to indicate another medical doctor who does practice it. This approach is clearly wrong because it relativises conscientious objection. And obviously it violates the conscience of the medical doctor involved.⁵⁷ In Poland, the question was raised of the possibility of invoking the conscience clause of a medical doctor with reference to a refusal to issue a prescription for contraceptives (in Poland abortion-inducing pharmaceuticals have not been legalised), to a refusal to provide a certificate on state of health to a pregnant woman that authorises the interruption of the pregnancy for reasons of health, to a refusal to issue a certificate on the state of health of a foetus, and a refusal to find whether prenatal tests indicate a major likelihood of the foetus having a grave and permanent disability or an incurable illness that will lead to death.⁵⁸ On the basis of this case the medical doctor was accused of not performing his duties as a public official and of causing injury to the pregnant woman.

Analyses of the juridical formulas of the conscience clause in relation to the practice of abortion, above all in relation to medical doctors, demonstrate a tendency towards a 'secularisation' of their contents. This is connected with the trend towards the 'secularisation' of conscience, that is to say its detachment from religion and its connection solely with the individual decision of a person.⁵⁹ One can also find proposals, in relation to conscientious objection, that refer solely to the concept of secular morality for which the diversification of ethical values is justified and which does not accept the high truth of the character of juridical-natural norms.⁶⁰ Subsequently, some legislatures tried to break the relationship between the refusal to practice an abortion and the conscience of the medical doctor by providing an ethically 'neutral' formula. This was something the French legislature did in article L2212-6 of the Code of Public Health. This lays down that if a medical doctor does not engage in an interruption of pregnancy he should direct the request of the woman to another

⁵⁷ Cf. A. ZOLL, 'Prawo lekarza do odmowy udzielenia świadczeń zdrowotnych i jego granice', *Medycyna i Prawo*, 2003, 13, p. 20.

⁵⁸ Cf. E. ZIELIŃSKA, 'Klauzula sumienia', *Medycyna i Prawo*, 2003, 13, pp. 26-30.

⁵⁹ M. BEN VERMEULEN, 'Rapport sur "Portée et limites de l'objection de conscience"', in *Liberté de conscience* (Strasbourg, 1993), p. 81.

⁶⁰ P. DUCA, 'La difficile conciliazione', p. 23.

doctor.⁶¹ The clause does not refer to the fact that the abortion is in contradiction with the conscience or beliefs of the medical doctor. This broadens the objective range of the refusal to practice an abortion.

The conscientious objection of the medical doctor can also be extended not only to the physical carrying out of an abortion but also to all the activities and all the procedures that are needed to bring about an abortion – the provision of information, the issuing of certificates, the prescription of tests on which an abortion depends, and the decision to engage in an abortion. Thus conscientious objection for medical doctors has two dimensions of an objective character: firstly the stage of the test and the procedures leading up to an abortion and secondly the carrying out of the abortion.⁶² We should point out that in recent years there has been a third dimension as well, namely the prescription of abortion-inducing pharmaceuticals. The legalisation in a large number of countries on the use of post-coital abortion-inducing products that prevent the implantation of the blastocysts and destroy the conceived baby has created a new area as regards the right to conscientious objection of medical doctors. The question concerns the acceptance above all of the RU486 pill and the ‘day after’ pill, that is to say so-called ‘emergency contraception’. The National Committee of Bioethics in Italy clearly argued that ‘medical doctors should have the faculty to have recourse to conscientious objection in the case of prescribing the day after pill’. Without doubt a medical doctor can for reasons of conscience invoke the conscience clause and refuse to prescribe means such as these that lead to abortion.⁶³ However, the question has been presented as being controversial⁶⁴ and in certain countries it has become the subject of pronouncements by courts or constitutional courts. Unfortunately, as regards the definition of pregnancy which holds that it begins not with conception but with implantation, a view which has often been approved by laws, at times the right of the medical doctor to refuse to prescribe abortion-inducing pharmaceuticals is contested. It is argued that such activity has nothing to do with abortion and as a result is not covered by the conscience clause. This approach follows the policy of the juridical solution to the question of conscientious objection included in the Bill on aware Fatherhood and Motherhood of 2004,⁶⁵ which was rejected by the Polish parliament. It was indicated explicitly that the right of a medical doctor to abstain from health-care duties that are in opposition to his conscience do not apply to the refusal to engage

⁶¹ Loi n.2001-588 du 4 juillet 2001 art. 1 Journal Officiel du 7 juillet 2001.

⁶² Cf. E. SGRECCIA, *Manuel*, p. 500.

⁶³ Cf. M. L. DI PIETRO, C. CASINI, M. CASINI, and A.G. SPAGNOLO, *Obiezione*, p. 73ss.

⁶⁴ *Ibidem*, p. 127.

⁶⁵ *Projekt ustawy o świadomym rodzicielstwie*, Warsaw 30 II 2004, Sejm RP, Druk nr 3214.

in activities that prevent pregnancy in the sense of also preventing the implantation of an embryo in the uterus with the aim of making the growth of the embryo or foetus impossible.

With the development of biomedicine and the legalisation of techniques of *in vitro* artificial fertilisation, which are connected with the elimination of human embryos and biomedical research on human embryos, the selection of embryos for eugenic purposes, the manipulation and the worsening of the genetic inheritance of an embryo, cloning, the formation of hybrids or chimeras and the practice of contraceptive sterilisation,⁶⁶ the conscientious objection raised by the medical doctor is broadened by the refusal to engage in such activities. The Declaration of the World Association of Doctors on *in vitro* Fertilisation and the Transfer of Embryos, which was accepted by the thirty-ninth assembly of the doctors of the world within the context of the activities that a medical doctor can engage in, laid down that legal provisions cannot transgress the moral principles of a medical doctor and at the same time must respect the moral principles of patients. In article 16 of the law of 19 February 2004, n. 40, on norms relating to the field of medically assisted procreation, which is concerned with conscientious objection, it emerges that health-care personnel, and without doubt a medical doctor, cannot be obliged to take part in procedures involving the application of techniques of assisted procreation when he invokes conscientious objection with a preventive declaration. This does not apply to medical care before and after the intervention. In the conscience clause emphasised in article 38 of the Human Fertilisation and Embryology Act of 1990 of Great Britain, it is generally indicated that no individual, and by this is meant a medical doctor who has invoked conscientious objection in relation to any of the activities envisaged by this law, can be forced to engage in such activities.⁶⁷

For some years, in connection with the legalisation of euthanasia and assisted suicide, the question has been raised of the extension of the conscience clause to members of the medical profession.⁶⁸ The Dutch law on ending life on request and assisted suicide⁶⁹ does not include a conscience clause. It is to be found, however, in article 14 of the Belgian law on euthanasia.⁷⁰ In the legislation of the State of Oregon, where assisted suicide and the role of

⁶⁶ Cf. A. CAFARO and G. COTTINI, *Etica medica* (Edizioni Ares, Milan, p. 113).

⁶⁷ *Human Fertilisation and Embryology Act* 1990, c. 37, 'The Public General Acts and General Synod Measures' 1990, part IV: 1471-1509; cf. also §10 *Gesetz zum Schutz von Embryonen* (Embrionenschutzgesetz-EschG) vom 13. Dezember 1990, BGBl Nr 69, Teil I : 2746-2748, with modifications, cf. GAŁAŻKA, *op.cit.*, p. 324.

⁶⁸ Cf. F. MENDOZA, *La objecion de conciencia en derecho penal* (Comares, Granada, 2001), pp. 409, 423; C.M.R. CASABONA, *Los delitos*, p. 142.

⁶⁹ *Reform of the procedures for putting an end to life on request and assisted suicide and amendments to the penal code* (Wetboek van Strafrecht) and *the law on cremation and burial*, High Chamber of the States General, parliamentary year 2000-2001- 26691 n. 137.

⁷⁰ *Loi relative à l'euthanasie*, (28 V 2002), Moniteur Belge 2002, 22:VI.

the medical doctor in such an act have been legalised, permission is envisaged for the medical doctor to abstain from prescribing the pharmaceuticals necessary to suicide.⁷¹ It should be observed that in the laws on euthanasia, in which the murder of a person who is gravely ill by a medical doctor is legal, substantially the problem of a conscience clause does not exist because the law does not give the medical doctor the task of killing a man through euthanasia or assisted suicide. The situation seems to be inverted: medical doctors who want to kill a sick person present their readiness to engage in such activity. They know that they will not be liable to penal responsibility for the murder if they are rigorous in their conduct, that is to say if they engage in the interruption of life or assisted suicide with all the medical rigour requested in conformity with article 2 of the Dutch law. The legalisation of euthanasia and assistance in suicide is clearly contrary to the ethics of the medical profession and medical deontological norms. The numerous deontological codes indicate, indeed, that a medical doctor cannot take part in ending life. This abstention includes the common norm of the deontology of this profession derived from the moral norm 'do not kill'.

At the level of the conscientious objection of medical doctors, the trend is emerging which, if implemented, could lead to the loss or the limitation of the right of the medical doctor to conscientious objection. Here I am referring to the concept of so-called neutral medical ethical values⁷² in relation to such activities imposed on the medical doctor as abortion, euthanasia or assisting in suicide. It presumes that the values that are inscribed in the conscience of the medical doctor cannot influence his decisions as regards his approach to his patients. The medical doctor must not present any system of values to the patient or assess interventions in a moral sense or the procedures he engages in or sets in motion. He must not transfer his individual religious, ideological or political values to the relationship between the patient and the medical doctor.⁷³ This concept is based upon the principle that no value is more right than another and thus the values of the medical doctor should not prevail over the values of the patient. The medical doctor must be neutral in relation to values, or to put it differently, he has to accept 'neutral values'. The presentation of his own values in the form of conscientious objection is said to be politically incorrect. The acceptance of this concept, as a consequence, would deprive the medical doctor of the right to conscientious objection.

Another dimension relates to the question of conscientious objection in connection

⁷¹ R. DRESSER, Professionals, Conformity, and Conscience', *Hastings Center Report*, 2005, n. XI/XII, p. 9.

⁷² J.F. PEPPIN, 'The Christian Physician in the Non Christian Institution: Objection of Conscience and Physician Value Neutrality', *Christian Bioethics*, 1997 1, 39-49.

⁷³ Cf. S.G. GAY, "'Conscience Clauses" for Doctors Are a Risk to Public Health', *Science & Theology News*, 2004, VI.

with the death penalty. The problem emerged with the approval by the United States of America of the death penalty by lethal injection. On receiving news of the first execution of this kind that was to take place in the state of Oklahoma in the United States of America, the First Secretary of the World Association of Doctors, during the thirty-fourth world congress of the World Association of Doctors, spoke on the resolution which condemned the participation of medical doctors in the carrying out of the death penalty. For him, the destiny of medical doctors, of medicine and of its instruments was the protection of life and not acting as a killer. A medical doctor should not carry out the death penalty but merely ascertain death after the execution.⁷⁴ Unfortunately, voluntary excesses in wanting to carry out the death penalty in this form have occurred. It should be emphasised that in the case of the carrying out of the death penalty by the endovenous injection of a lethal chemical dosage, medical knowledge is required, and the typical situation for conscientious objection does not arise, that is to say conflict between two obligations, the legal and the moral, because the law does not force the medical doctor to engage in active participation in the execution. Requests to entrust prison doctors with such a task in certain states of the United States of America has led to the protests of some medical doctors who stressed that they were physicians and not killers.⁷⁵ However, in the United States of America cases are well known of doctors who have come forward voluntarily to carry out a death penalty by lethal injection.

b) *Nurses and other health-care personnel*

The question of a conscience clause for nurses and obstetricians does not raise doubts. The need to introduce such a clause was recognised by the International Labour Organisation which in article 18 of its Recommendation n. 157 of 1977 laid down that members of the nursing profession should be able to exclude themselves from activities engaged in by them that are in conflict with their religious, moral or ethical beliefs on the condition that they inform their health-care superiors in good time so as to ensure suitable measures to prevent patients from being damaged. The right to the conscientious objection of nurses and other health-care staff has been introduced in the formula of the conscience clause in numerous abortion laws or laws relating to such professions. Laws that allow abortion and envisage the right to conscientious objection expand its realm of application and thus, without doubt, it is extended to nurses, obstetricians and other people who belong to the professional categories

⁷⁴ A. GRZEŚKOWIAK, 'Współczesne problemy kary śmierci', *Przegląd Powszechny*, 1988, 1, p. 28.

⁷⁵ Cf. R. NAVARRO-VALLS, 'La objecion de conciencia', *Bioetica y Justicia*, p. 321.

of health-care personnel. It should also be pointed out that in the laws on the professions of nurses and obstetricians at times the right to conscientious objection is sanctioned, with a description of its sphere in general terms, so that conscientious objection can be invoked in relation to every activity that generates it and not only in relation to abortion. In article 23 of the Polish law on the professions of nurses and obstetricians it is explicitly laid down that nurses and obstetricians can abstain, with a prior written declaration sent to their health-care chief, from engaging in health-care services that are in contrast with their consciences on the condition that they act when there is an imminent threat to life and a decline in the health of a patient.⁷⁶ The question is solved differently in countries where there is no juridical regulation of conscientious objection in relation to the professions of nurses and obstetricians and no general clause such as exists in Poland or a specific clause relating to auxiliary health-care activities and the carrying out of abortion. After the above-mentioned sentence of the Constitutional Court, which stated that conscientious objection is a human right, in substantial terms there has been no doubt that in the professions of nurses and obstetricians the conscience clause is allowed. However of relevance in this area is the sentence of the National Court of Spain of 20 January 1987 (RJA 18/87) on the case of eight nurses of a gynaecology department who presented a request for conscientious objection in relation to activities connected with abortion and assured that all activities, apart from those connected with abortion, would have been carried out. The governing authorities of the hospital, in replying to their request, indicated that they should change their jobs. Four of these appealed against this and invoked articles 14 and 16 of the Spanish Constitution. The National Court of Spain upheld their right to conscientious objection but argued that the fact that they did not carry out duties as nurses disturbed the normal work of the department.⁷⁷

Conscience clauses or a clear indication that nurses should act in conformity with wisdom and their conscience are to be found in the deontological codes of nurses and obstetricians.

The objective domain of conscientious objection goes beyond abortion, for which nurses prepare the patient, both when they take part in the actual interruption of pregnancy and when they engage in subsequent related activities. The field of legalisation of attacks on human life carried out 'for medicine' has been enlarged to activities that require the presence of nurses as well. I mean here, for example, actions involving artificial fertilisation or euthanasia. Also in the case of a decision by a court to separate a patient from a ventilator or to suspend artificial

⁷⁶ *Law of 5 July 1996 on the nursing and obstetric professions* G. U. Nr 57, pos. 602, with modifications.

⁷⁷ R. NAVARRO-VALLS, 'La objecion de conciencia', *Bioetica y Justicia*, p. 323.

alimentation, which leads to the death of the patient, such activities are entrusted to nurses. One should not be surprised that these require the extension of the conscience clause so that it covers not only abortion but also other interventions or activities in contrast with their conscience. This question has not been matched by an overall regulation and in reality the declaration of conscientious objection by nurses constitutes the basis for the application of disciplinary sanctions to them to the point of being dismissed or, in general, for professional discrimination by employers.

c. Pharmacists

The question of conscientious objection is at the present time the most topical there is for the profession of a pharmacist who works in a laboratory or a pharmacy.

Its intensity has followed the insertion of the legal sale of contraceptives and above all of pre-implant pharmaceuticals that cause the death of the conceived child during the first moments of his life, primarily the RU 486 pill and the 'day after' pill, but also instruments for assisted suicide, euthanasia or the production or sale of medicines and drugs made from human foetuses. This problem has become particularly acute in the United States of America where, in various states, diametrically opposed approaches have been approved. Frequently the refusal to allow pharmacists the right to conscientious objection, above all in relation to emergency methods (especially the 'day after' pill), has been a pretext to present these questions to the courts. However, in certain states of the United States of America state law has allowed the right to refuse sell such instruments on the basis of conscientious objection.⁷⁸ The third solution approved in certain states of the United States of America has been that of recognising that pharmacists have the right to conscientious objection but on certain conditions and in order to defend the interests of patients.⁷⁹

The question of the conscientious objection of pharmacists emerged somewhat before this in the approach of French pharmacists who refused to sell syringes to drug-addicts and refused to dispense prescriptions that had been issued by medical doctors.⁸⁰ Although the granting of the right to conscientious objection to medical doctors, obstetricians and nurses

⁷⁸ It may be observed that in twenty-three states of the United States of America, legislators have passed a law that in an explicit way recognises the right to conscientious objection of pharmacists: cf. *The New York Times*, 19.IV.2005; cf. J.R.H.R. MANASSE, 'Conscientious Objection and the Pharmacist', *Science* 2005, v. 308, 9728, p. 1559.

⁷⁹ J. CANTOR and K. BAUM, 'The Limits of Conscientious Objection - May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception', *The New Journal of Medicine*, 2004, 2, p. 2010.

⁸⁰ S. RODOTA, 'Objection de conscience au service militaire', in *Liberté de conscience*, p. 100.

does not raise objections, in relation to pharmacists it generates controversy. Pharmacists make up a professional category to whom the right to conscientious objection is refused, especially in the context of the legalisation of the sale of abortion-inducing pharmaceuticals.⁸¹ J. Lopez Guzman is right when he points out that in substance a pharmacist can invoke conscientious objection like every other citizen because it is a human right⁸² based on the right to freedom of conscience and religion guaranteed by the Constitution. As a result of strong protests and famous judicial cases involving pharmacists who had invoked conscientious objection, evident changes were made in the approach to the right to conscientious objection of this professional category. Of importance here is the decision of 2 October 2001 of the European Court of Human Rights in Strasbourg which declared the illegitimacy of the plea of French pharmacists, who had refused to dispense prescriptions for ‘day after’ pills, in the sentence called ‘contraceptive means’. The pharmacists had referred to the right to freedom of conscience and religion as laid down in article 9§1 of the European Convention on Human Rights. At first they were punished with a fine on the basis of a definitive decision because they had not fulfilled their obligation to sell a pharmaceutical prescribed by a medical doctor. The European Court of Human Rights argued that the reference to the human right to freedom of conscience to justify conscientious objection was baseless because article 9 of the Convention does not always guarantee the right to conduct in the public domain that is dictated by a person’s belief. It pointed out that if the sale of a product is legal, pharmacists should not impose on others their beliefs so as to justify their refusal to sell the product that is prescribed, and added that they have many ways of expressing their beliefs outside the professional domain.⁸³

The most debatable problems of the question of the recognition of the right to conscientious objection of pharmacists are as follows. Does the profession of pharmacists belong or not to the category of health-care professions? In their practice of their profession does the law guarantee their right to refuse to carry out legal obligations for reasons of conscientious objection? Should the production and the distribution of abortion-inducing methods by pharmacists to be placed in the activities indicated by conscience clauses as explicit or implicit co-operation in abortion-inducing procedures or activities? Can a pharmacist who is in conformity with the law on his profession, and is called upon to

⁸¹ R. NAVARRO-VALLS and J. MARTIN TORRON, ‘Le obiezione di coscienza. Profili di diritto comparato’, p. 106.

⁸² J. GUZMAN LOPEZ, *Objecion de conciencia farmaceutica*, op. cit, p. 2.

⁸³ Cf. COUR EUROPEENNE DES DROIT DE L’HOMME, *Décision sur la recevabilité de la requete n.49853/99 contre France du 2.X. 2001.*

distribute the pharmaceuticals of the prescriptions of a medical doctor, refuse to issue them by invoking conscientious objection? Although the first question in general does not raise many doubts, it becoming evident that the profession of the pharmacist is one of the health-care professions. In the second case an attempt has been made to deny the right to insert the activities of a pharmacist amongst those indicated by conscience clauses in relation to the procedures of abortion, and in such activities and procedures that attack human life or the dignity of the person as: euthanasia, assisting suicide, artificial fertilisation or contraceptive sterilisation carried out by health-care personnel. It has been denied that the production or the dispensing of prescriptions for abortion-inducing pharmaceuticals can be seen as activities imposed by abortion laws which provide a qualification to invoke conscientious objection.⁸⁴ It has been demonstrated that this is not co-operation in procedures to carry out an abortion. This point of view should obviously be rejected because the production or distribution of an abortion-inducing or euthanasia-effecting means is to be found, according to the principle of '*sine qua non*', within the frameworks of co-operation in abortion or euthanasia.

It has also been denied that post-coital or mechanical means have an abortion-inducing effect. If they do, their distribution cannot be included in the conscience clause. The principal field of conflict concerns above all, since they were allowed onto the market, the RU486 pill (which goes under various medical names) and the 'day after' pill which has been legalised in many countries.⁸⁵ Some of these have been distributed even without a prescription and for free. It has been pointed out, first and foremost, that the interruption of a pregnancy can only occur after implantation, whereas the impeding of nidation does not constitute abortion, and that this excludes the substantial qualification for the invocation of conscientious objection. An even more complex question has been the justification of the right to conscientious objection in relation to the distribution of the post-coital 'day after' pill. This question was examined by courts that assessed the cases of pharmacists who had refused to dispense prescriptions where a medical doctor had prescribed the 'day after' pill. In general they did not accept the right of the pharmacist to conscientious objection. The question of the conscientious objection of pharmacists, above all with reference to the 'day after' pill, is of particular contemporary relevance in the United States of America, where in 1988 the Food and Drug Administration approved the use of the 'emergency contraception pill' as an instrument for the control of births. It is argued that its application allows the prevention of

⁸⁴ J. GUZMAN LOPEZ, *El farmacéutico en la elaboración, promoción y dispensación de abortivos*, <http://www.bioeticaweb.com/content/view/150/42>.

⁸⁵ P.es. in Italy, France, Spain, Belgium, the USA, Mexico, the Honduras, Colombia, and Chile, cf. 'Obiezione di coscienza e pillola del giorno dopo': <http://italiasalute.leonardo.it/news2pag.asp?ID=6072>.

1.5 million ‘unwanted’ pregnancies and 700,000 abortions every year.⁸⁶ One may also add, generalising, that at the level of the application of these pills a new front of national battle for reproduction rights is being opened up.⁸⁷ A few state legislations have introduced legal guarantees for the conscientious objection of pharmacists in relation to the ‘day after’ pill and the RU486 pill and other abortion-inducing methods, whereas others have obviously excluded this possibility, often after an intense debate.⁸⁸ A large number of Italian pharmacists have also invoked conscientious objection, pointing out that it is included in the formula of law n. 194 of 1978 which approves the possibility of invoking conscientious objection in relation to the interruption of pregnancy because they form a part of ‘health-care personnel and engage in health-care activities’.⁸⁹ The same has happened with French pharmacists, especially since 2002 when the law obliged pharmacists to distribute the ‘day after’ pill anonymously to minors. In Belgium it is obligatory to distribute this pharmaceutical which induces abortion for free to minors.⁹⁰

In relation to the conscientious objection of pharmacists to the ‘day after’ pill, national bioethical committees have contributed to the debate and within the context of the associations of pharmacists have tried to insert the question of conscientious objection into the deontological codes of this professional category. One example of this is the National Bioethical Committee of Italy which, accepting the claim of medical doctors to conscientious objection to the prescription of the day after pill, clearly approved that pharmacists could invoke conscientious objection in dispensing prescriptions for emergency contraception, including the ‘day after’ pill.

The same question has been approached differently in countries such as France or some states of the United States of America where the obligation to write out prescriptions for these methods was abolished and they can be obtained ‘over the counter’. In Spain, in the absence of a legal conscience clause for health-care professions, including pharmacists, a conscience

⁸⁶ SCOTT S. GREENBERGER, “‘Morning-after pill’ issue poses dilemma for Romney”, *The Boston Globe*, 12.VI.2005.

⁸⁷ R. STEIN, ‘Pharmacists’ Rights at Front of New Debate’, *Washington post. Com*, 28.III.2005 s. A01.

⁸⁸ Cf. for example S. ERTELT ‘Arizona House Committee Approves Pharmacists’ Abortion Conscience Clause’, *LifeNews. Com*, 3.II.2005, *idem*, ‘Minnesota Bill would Allow Pharmacists to Opt out on Morning After Pills’, *ibidem*, 3. III, 2005, Nevada Pharmacy Board Will, Consider Pharmacists Conscience Clause’, *ibidem* 24.X. 2005, *ibidem*, ‘Georgia Haus Rejects Pharmacist’s Conscience Clause on Abortion Drugs’, 14.III. 2006, ‘Arizona Governor Votes Pharmacist Abortion Conscience Clause Bill’, *ibidem*, 13.IV .2005, *ibidem*, ‘Illinois Gov. Sued Over Discrimination Against Pro-Life Pharmacists’, *LifeNews.com Editor* 13.IV.2005.

⁸⁹ Cf. for example. ‘Obiezione di coscienza dei farmacisti sulla pillola del giorno dopo’, http://www.mpv-cav.veneto.it/a_93_IT_659_1.html; P. MORANDINI, ‘Obiezione di coscienza dei farmacisti sulla pillola del giorno dopo’: http://www.pinomorandini.it/a_14_51_1.html, 2.XII.2000.

⁹⁰ ‘Des pharmaciens sommes de distribuer la pilule du lendemain, Alliance pour les droit de la vie’, *Revue de presse confidentielle* n. 185 of 15.III.2006.

clause was introduced into articles 28 and 33 of the ethical and deontological code of the year 2000. This code was approved by the Ministry of Health and although it does not have the force of law its significance is emphasised for the practice of the profession of pharmacists and for possible judicial cases examined by courts that involve the refusal to distribute such methods.⁹¹ On the other hand, the Italian deontological code for pharmacists of 2000 clearly established that a pharmacist works according to his wisdom and his conscience and with respect for the law.

However, in general this normative obligation with disciplinary sanctions is completed by a clause which lays down that a pharmacist cannot refuse to distribute pharmaceuticals and medicines without a justified reason.⁹² It has been stressed that in conformity with the law on the profession a pharmacist is obliged to distribute those pharmaceuticals and medicines which have been legally approved for sale. There can be no doubt that conscientious objection is a justified reason. John Paul II strongly emphasised that ‘the pharmacist, who has always been an intermediary between the medical doctor and the patient, has seen an expansion of his function of mediation. Awareness of ...duties....leads him to reflect increasingly on the human, cultural, ethical and spiritual dimensions of...his mission. Indeed, the relationship between the pharmacist and the person who asks for remedies goes far beyond the commercial aspects because it requires a profound perception of the personal problems of the individual involved, in addition to the fundamental ethical aspects of services provided to life and the dignity of the human person...in the distribution of medicines the pharmacist cannot forgo the requirements of his conscience in the name of the laws of the market or in the name of accommodating legislation’.⁹³ Pharmacists are not ‘mere neutral traders in, or distributors of, what is asked for: the dignity of their professional service requires them to live their role of mediation between the medical doctor and the patient responsibly and pro life...The sale of products, if they are intended exclusively for a purpose contrary to life, must be the subject of objection’.⁹⁴

It should be stressed that pharmacists are a special professional category which has its own deontological codes. Pharmacists have to engage in studies, obtain authorisation to practice their profession, and in general they have their own ethical code. They cannot

⁹¹ P. TALAVERA FERNANDEZ and V. BELLEVER CAPELLA, ‘La objecion de conciencia farmaceutica’, *Medicina e Morale*, 2003, 1, p. 111.

⁹² P. TALAVERA FERNANDEZ and V. BELLEVER CAPELLA, ‘La objecion’, p. 121.

⁹³ JOHN PAUL II, ‘Address to the International Federation of Catholic Pharmacists’, 13. XI. 1990, nn. 3, 4.

⁹⁴ Cf. L. MELINA, ‘La cooperazione con azioni moralmente cattive contro la vita umana’, in *Commento interdisciplinare alla “Evangelium Vitae”* ed. by E. Sgreccia and R. Lucas Lucas (Vatican City, 1997), p. 488.

distribute pharmaceuticals and medicines in a mechanical way and they cannot dispense prescriptions automatically. They have to analyse them because they practice one of the health-care professions. They thus have the right to engage in a personal judgement when they dispense specific prescriptions. They cannot reject the morality of their profession.⁹⁵ Thus the law should not impose on pharmacists the obligation to sell products that are intended to destroy or end human life. This decision should be included in the formula of legal conscientious objection.⁹⁶

The right to conscientious objection is so strongly contested that proposal has been made to install automatic machines in pharmacies for the dispensing of prescriptions for contraceptive and abortion-inducing products, including the ‘day after’ pill. It is said that the distributors do not invoke conscientious objection and that the interests of the patient are respected.⁹⁷

A grave problem is: can the autonomy of the profession of a pharmacist be absolute and should it possess in the interests of the patient certain specific limits? Here one may record opinions which hold that it is not necessary to introduce a general conscience clause for pharmacists into law and that it is necessary to link it to the results of the action of the pharmaceuticals and methods that are distributed. It is observed that pharmacists should not transfer their moral judgements on pharmaceuticals onto patients so as not to interfere with the existing state of the law.⁹⁸

Conscientious objection in the domain of the profession of pharmacists should only include those cases, where the pharmacist believes that in selling a pharmaceutical he is taking part in the committing of an immoral act, in which an insoluble conflict arises. This means that in certain cases the pharmacist should not look for alternative means by which to refuse to distribute specific medical methods with professional arguments. Much depends on the type of pharmaceutical and the way that the personnel is employed. The reference to conscientious objection, when reasons of professional wisdom are sufficient, are in Guzman’s view an error,⁹⁹ and this applies not only to the dispensing of prescriptions issued by medical doctors for abortion-inducing medical methods but also their work within hospital structures

⁹⁵ J. CANTOR and K. BAUM, *op.cit.*, 2009.

⁹⁶ Cf. L. MELINA, ‘La cooperazione con azioni moralmente cattive contro la vita umana’ in *Commento interdisciplinare alla “Evangelium vitae”*, ed. by E. Sgreccia and R. Lucas Lucas (Vatican City, 1997), p. 488.

⁹⁷ K.A. BRAMSTEDT, ‘When pharmacists refuse to dispense prescriptions’: www.thelancet.com, vol 365, 15V 2006 , 9518, p. 1220.

⁹⁸ J. CANTOR and K. BAUM, *op.cit.*, p. 2010.

⁹⁹ J. GUZMAN LOPEZ, ‘Objecion’, p. 2. The author argues that the refusal to sell condoms in a pharmacy does not require invocation of conscientious objection.

and research on pharmaceuticals in laboratories.¹⁰⁰

d) *Consultants*

The institution of consultants in the field of human life and the family is very differentiated and involves a public or private institution to which is entrusted the task of offering consultancy – that is to say advice, opinions and help in relation to questions connected with conjugal and family personal life.¹⁰¹ It is envisaged by numerous laws, above all by laws on abortion, but Dutch law also envisages it for euthanasia. Thus subject is also regulated by special laws. Consultants do not constitute, in substance, a separate professional category but rather they represent a specific specialisation in the domain of more general professions which, however, require suitable qualifications. One of their duties is consultancy prior to an abortion. The role of consultants in the interruption of a pregnancy is specific because they should present the truth about the development of the unborn child, the nature and procedure of abortion, the results and dangers of this act, the needs of the mother, and the kinds of social or medical assistance that are envisaged for babies and mothers both before and after birth. In some cases consultancy before an abortion is obligatory and is a formal condition envisaged by the law that is necessary in the case of an interruption of a pregnancy. In these cases a certificate that requires that the pregnant woman has engaged in consultancy is required. Unfortunately, it has no material influence on the carrying out of the abortion because this depends solely on the wishes of the pregnant woman, but it is a required document that must be presented to the medical doctor who procures the abortion.

Consultancy before an abortion is envisaged as being obligatory or facultative in many laws on abortion. This is the case, for example, in France, Germany, Italy, the Czech Republic, Slovakia, and Switzerland. Special laws have been passed on consultants, for example in Switzerland a Federal law is in force on abortion consultants which was passed on 9 October 1981.¹⁰² This created or recognised consultancy centres, as a result of which all cantons are obliged to create such centres to provide consultancy to all the people involved. This consultancy should be a detailed conversation about the personal situation and the

¹⁰⁰ A.R. LUNO, 'L'obiezione di coscienza sanitaria' (2006): http://www.eticaepolitica.net/corsodi_morale/giudizia20.pdf:4.

¹⁰¹ L. PATTI, 'Consultori Familiari' in *LEXICON*, edited by the Pontificio Consiglio per la Famiglia (Edizioni Dehoniane Bologna, Bologna, 2003); L. PATTI, 'Consultori Familiari' *LEXICON*, edited by the Pontificio Consiglio per la Famiglia (Edizioni Dehoniane Bologna, Bologna, 2003): p. 113.

¹⁰² RS 857.5

mental and social circumstances of the pregnant woman and about help to remove the causes that led to the interruption of pregnancy. The legislature supposes that it is sufficient for the woman to take a decision to accept abortion freely and voluntarily.¹⁰³ Especially well known is the case of Catholic consultants for pregnant women in Germany,¹⁰⁴ where consultancy is a condition for legal abortion. In conformity with §218 of the German penal code, with modifications of 26 January 1992, the life of the conceived child is defended not by the prohibition of abortion with the threat of sanctions but by obligatory consultancy for the woman. This consultancy has recently been carried out by Catholic centres and this requires the authorisation of the state and is subject to state control.¹⁰⁵ The question of the certificates issued by Catholic consultants for the interruption of pregnancy was the subject of grave controversies and an intervention by John Paul II. The Permanent Council of the German Bishops' Conference decided to leave the state system of consultants and create its own consultants who, obviously enough, do not issue certificates that are required for the carrying out of legal abortion but, instead, have other duties. Because of a directive of the German Bishops' Conference of 26 September 2000 on the work of consultants for pregnant women, it was accepted that 'no Catholic consultancy office is allowed to maintain or support at the level of ideas or funds organisations which issue consultancy certificates which are one of the pre-conditions for the decriminalised carrying out of abortions. This certificate cannot be used for the decriminalised carrying out of abortions'.¹⁰⁶

In Italy, family consultants worked *de facto* in Milan since 1948 and were formally created by law n. 405 of 29 July 1975.¹⁰⁷ The area of their responsibilities was expanded by the law of 22 May 1978 n. 194 on assistance for pregnant women.¹⁰⁸ The numerous duties of the consultants include, for example, education, responsible fatherhood and motherhood, family education, questions and issues connected with marriage and minors, contraception, assistance for pregnant women, information on the rights of such women, on social services, and on health-care services, and help in removing the causes that are said to have led the woman to the interruption of the pregnancy. Every woman that wants to interrupt her pregnancy is obliged to consult the consultant, who issues a suitable certificate which is then

¹⁰³ J.H. POZO, *Droit penal. Partie special I. Infractions contre la vie, l'integrite corporelle et le patrimoine* (Schulthess Polygraphischer Verlag, Zurich, 1997), pp. 69-70.

¹⁰⁴ H. REIS, 'Consulenza per le donne incinte in Germania', *Lexicon*, pp. 105-111.

¹⁰⁵ *Ibidem*, p. 109.

¹⁰⁶ *Ibidem*, pp. 110, 111.

¹⁰⁷ Cf. L. PATTI, 'Consultori Familiari', p. 113,ss.

¹⁰⁸ Art 2, L. 22 V. 1978, n.194 *Norme per la tutela sociale della maternità e sull'interuzione volontaria della gravidanza*.

given to the medical doctor who procures the abortion.

Consultants are employed on the basis of specific provisions in force and on work contracts and thus they know the subject matter of the field in which they provide consultancy. It appears that there is no doubt about the fact that they provided with the faculty of conscientious objection on the basis of article 9 of law 194 of 1978 which lists *espressis verbis* health-care personnel and those who engage in auxiliary activity. This is based upon the fact that their work is not confined to issuing a certificate to a pregnant woman who wants to interrupt a pregnancy. As family consultants they can invoke the conscience clause in relation to the issuing of a document that authorises the interruption of a pregnancy or consultancies on contraceptive methods.

However, as L. Melina rightly observes in relation to the consultants envisaged by laws on abortion, they are subjected to the false logic of a law which forgoes defence of the conceived baby and emphasises respect for the decision of the conscience of the woman.¹⁰⁹ The people who decide to work in consultancy centres are aware that their certificates can be used as a formal ‘sanctioning’ of the individual woman to interrupt the pregnancy.

The situation of the consultants established by the Dutch law on euthanasia is completely different. According to article 1 of the same law, ‘by consultant is meant the medical doctor who has been consulted with reference to the intention by a medical doctor to end life on request or provide assistance to an act of suicide’. A medical doctor who takes away life or assists a suicide is obliged to provide consultancy with another independent medical doctor who has examined the patient and has provided a written opinion on the requirements of the treatment that is due, expressing the belief ‘that the request of the patient is voluntary, well thought through, and he has the full belief that the sufferings of the patient are resistant to therapy and insuperable’, and that ‘he has informed the patient about the clinical situation and his prospects, that the medical doctor and the patient believe that there is no other reasonable solution to his situation’. In the light of this law it does not appear that the person who is entrusted with the role of a consultant is attributed the possibility of conscientious objection because he is fully aware of his duties in relation to euthanasia or assisted suicide which are specified by the law, and he has voluntarily undertaken to perform these duties. In the case of the Dutch law the consultant knows at the outset the sphere of activities for which he is responsible within the context of consultancy, and thus it would be hypocritical to attribute to him the right to conscientious objection so that he can reject work

¹⁰⁹ MELINA L., *La cooperazione...*:483.

that is contrary to his conscience. To assign the right to conscientious objection to him would be as absurd as giving this right to a killer because the murder of a man is the essence of his profession.

e) *The administrative personnel of health services*

With respect to the legalisation of the conscience clause, in certain legislation the medical doctor is obliged to indicate another medical doctor or another health-care structure where abortion is carried out. The other juridical solutions transfer this obligation directly to the directors of hospitals, clinics or other health-care structures. The medical doctor who invokes the conscience clause in relation to abortion informs the provincial doctor or the health-care director who have to guarantee the possibility of the abortion being carried out by another doctor. The exponents of abortion emphasise that a public health-care structure as such cannot invoke conscientious objection because a conscience has an individual dimension and not a collective one. Thus it is connected with physical persons and not with entities that have a juridical status. This opinion is criticised to such an extent that some laws envisage such a possibility.¹¹⁰ The person who performs the functions of a director is obliged to indicate members of the personnel who procure abortions or where all the medical doctors of that structure are conscientious objectors he must indicate another health-care structure. It is certainly the case that such activity can be in opposition to the conscience of the provincial doctor or the health-care director. But this is no longer a question of the profession but of the function performed in the administrative structure and it should be examined within the context of the right to conscientious objection of the workers employed on the basis of a work contract or appointment. It is thus beyond the scope of this paper.

6. *The Juridical Profession*

a) Many controversies are raised by the fact that judges can invoke the right to conscientious objection. This question emerges not only with regard to the need to deal with cases where the subject is an attack on life, in general in the form of abortion, but also divorce cases or couples of the same sex. In these last cases the Catholic Church has encouraged invocation of conscientious objection. In conformity with the precepts of law on the judicial

¹¹⁰ Cf. G. RIPERT, 'Bioethique et objection de conscience', Colloque Pampelona, typescript, p. 6.

system, judges decide according to their own conscience. This allows them to examine a specific case in conformity with the norms of conscience but always within the limits laid down by the law.¹¹¹

It should be emphasised that in this formula one is dealing with the independence of judges and sovereign decisions without forms of pressure. However, if the judge does not consent to cases decided by the majority of his collegial judges he can declare a *votum separatum* and express his different opinion. He then acts within the domain of the so-called option of conscience. He can also exclude himself from deciding a specific case.

The gravest problem is the question of binding a judge with the precepts of law whose 'axiology he does not accept'.¹¹² In general, it is accepted that a judge is bound by the law and thus that he cannot refuse to enforce it.¹¹³ At times, above all in reference to the situation of 'political changes', the possibility is indicated of applying to the judge the so-called Radbruch clause, according to which 'the conflict between justice and juridical safety should be solved so that positive law, which is upheld by legislation and state power, has precedence even though its contents are unfair and useless, although the contradiction between positive law and justice reaches such a level that the law as unfair law should give way to justice. One could, however, with all clarity, indicate...the boundary: where there is never a move in the direction of justice, where equality, as the essence of justice, is knowingly rejected at the moment the positive law is made, it is difficult to say that the law is only 'unfair law' because it loses, overall, the nature of law'.¹¹⁴ Radbruch explains that 'juridical principles exist that prevail over every legal provision and in consequence law that is opposed to them is without force. These principles are defined as natural law or the law of reason'.¹¹⁵ In this explanation, which is at the basis of the exceptional possibility of withdrawing from respect for legal norms, is reflected the principle of unfair law which was pointed out much earlier by St. Thomas Aquinas. A judge who in his conscience sees the unworthiness of a juridical norm, and its contradiction with universal moral values, and refuses to implement this provision of juridical norms, accepting the consequences thereby or even forgoing to practice the

¹¹¹ Cr. R. DE ASIS ROIG, 'Juez y objecion de conciencia', *Sistema* 1993, 113, p. 72; J. GUZMAN LOPEZ, 'Objecion de conciencia farmaceutica', p. 2.

¹¹² A. ZOLL, 'Związanie sędziego ustawą', in *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej* (Warsaw, 1996) p. 245.

¹¹³ A. ZOLL, *op.cit.*, p. 251.

¹¹⁴ G. RADBRUCH, 'Ustawowe bezprawie i ponadustawowe prawo', in M. Szyszkowska, *Zarys filozofii prawa* (Białystok, 2000), p. 262.

¹¹⁵ G. RADBRUCH, 'Pięć minut filozofii prawa', in *Colloquia Communia* 1988/89, 41-42, p. 62.

profession of a judge, should not take on juridical responsibility.¹¹⁶ In the Polish literature on the subject one can find the reasonable view that ‘an ethically sensitive judge cannot obey every law...A threshold of the legal system or juridical order exists beneath which we are dealing with the negation of the fundamental idea itself of law because of the violation of fundamental principles and values. This law cannot be implemented by any honest judge’.¹¹⁷ Although the substantial contradiction between Stalinist law and human laws was the background to this opinion, one should extend the ethical norms of the conduct of a judge to his activities connected with the right to life or family law. A judge, like everyone else, has the right to act in the practice of his profession in conformity with the judgement of his own conscience. Indeed, he should be recognised as having the right to conscientious objection. One must accept that in the case of an irremediable conflict between the contents of provisions and the conscience of the judge at the level of universal human rights, for example the right to life, a judge should have the opportunity to refuse to decide on their bases. In the same field there has emerged the problem of the refusal of a judge to defend the issuing of the authorisation of abortion to a minor; acting in accordance with his conscience he can refuse to issue such authorisation. E. Sgreccia has expressed the same opinion. He has emphasised that the judge responsible must have the right to conscientious objection in the case of minors or handicapped people.¹¹⁸ Reference should be made to the sentences of the Constitutional Court in Italy, for example: 196/1987, 445/1987, 1993, 2002, in which a judge was refused in the above-mentioned cases the right to conscientious objection because he would have been in sharp contract with the substantial obligation to implement the juridical order imposed on people who perform public functions.¹¹⁹ It appears that the question of a judge invoking the conscience clause can arise in the sphere of other laws and not only in relation to abortion laws. Some authorities, however, in rigorously binding the judge to the obligation to apply the law, indicate that where he is convinced that a specific provision of the law violates constitutional norms he can begin ‘procedures to examine the legitimacy of the contested norm in relation to the constitution at the Constitutional Court’,¹²⁰ and this evidently excludes the possibility that he can invoke conscientious objection.

¹¹⁶ W. ŁĄCZKOWSKI, ‘Wymiar sprawiedliwości a stosowanie prawa’, in *Ius et lex. Księga jubileuszowa ku czci Profesora Adama Strzembosza*, edited by A. Dębiński, A. Grześkowiak, and K. Wiak, Lublin, 2002, p. 236.

¹¹⁷ M. SAFJAN, ‘Etyka zawodu sędziowskiego’, in *Ius et lex, op.cit.*, p. 272.

¹¹⁸ E. SGRECCIA, *Manuel*, p. 504.

¹¹⁹ M.J. DI PIETRO, C. CASINI, M. CASINI, and A.G. SPAGNOLO, ‘Obiezione di coscienza in sanità’, pp. 135-136.

¹²⁰ A. ZOLL, ‘Związanie’, p. 247.

The question of the right of a judge to conscientious objection is also raised with reference to decisions on divorce cases and it is a very topical question in the sphere of the legalisation of homosexual couples at the level of the duties of a judge who keeps a civil register of people who want to contract a marriage. It should be remembered that the Congregation for the Doctrine of the Faith has clearly indicated that one must abstain from any type of collaboration in the sanctioning and application of laws that legalise such couples because they are gravely unjust. In this case ‘everyone can claim the right to conscientious objection’.¹²¹

Within the context of Spanish law, reference may be made to the same question by examining the contents of the sentence of the Constitutional Court of 11 April 1985. In truth, this applied to abortion but it recognised conscientious objection as a fundamental right and one that was directly applicable. According to this sentence, there are no juridical reasons why a judge cannot invoke this sentence as a juridical basis for refusing to apply the law on the civil unions of couples of the same sex with reference to conscientious objection. In this context it may be observed that as a result of an overall law a judge, if he believes that the civil union of people of the same sex is illegitimate, can present a case to the Constitutional Court.¹²²

In Italy, after the address of John Paul II to the Rota Romana given on 28 January 2002,¹²³ on the occasion of the inauguration of the judicial year, discussion intensified about the right to conscientious objection of people who practice the juridical professions, and in particular judges and lawyers. The Holy Father, who defined divorce as a curse for civil society and emphasised the indissolubility of marriage, invited people to abstain from co-operating in divorces. The President of the National Forensic Council, in opposing the right to conscientious objection, declared that were jurists to engage in it they would betray the law. Similarly, the Italian Minister of Justice declared against the right to conscientious objection for judges.¹²⁴ At the time of this discussion on the conscientious objection of Catholic jurists in relation to divorce, it was argued that the juridical order should recognise the right to conscientious objection as an individual right that is inviolable and innate and observed that

¹²¹ Congregazione per la Dottrina della Fede, ‘Considerazioni circa i progetti di riconoscimento legale delle unioni tra persone omosessuali’, 31 July 2003; cf. also Card. LOPEZ TRUJILLO A., ‘Reflexiones sobre la objecion de conciencia en la Enciclica Evangelium vitae’, *Famiglia e Vita* 2005, 2, p. 72.

¹²² J. FORNES, ‘Il giurista: L’obiezione de coscienza? Scelta legittima’, *Avvenire*, 27 IV 2005.

¹²³ JOHN PAUL II, ‘Il discorso alla Rota Romana’.

¹²⁴ R. RICCIOTTI, ‘Il giudice non puo obbiettare contro la legge’: [http://www.giustiziacarita .it/professioni/rom.htm](http://www.giustiziacarita.it/professioni/rom.htm).

the application of this right should not lead to juridical sanctions.¹²⁵

b) *The right to conscientious objection of lawyers and other people who practice a legal profession.*

It is assumed that a lawyer does not have the faculty to have recourse to conscientious objection because he is in a situation in which an insoluble conflict between his conscience and the contents of the legal provision does not exist. Put more simply, he will refuse to handle a case that would lead to a violation of the norms of conscience. There remains, however, the question of the defence of the professional role which is requested in some situations by the judicial organs because in this case two duties can clash; the possibility of invoking the conscience clause would be a just solution, all the more because in deontological codes for lawyers there is often the rule that a lawyer should act in conformity with his own conscience. In the French law on lawyers of 31 December 1990 it is indicated that a lawyer should not provide services of defence if he finds that this is in opposition to his own conscience.¹²⁶

One must therefore accept that a lawyer also has the right to conscientious objection which, indeed, constitutes a universal human right.

The Bill on the concordat in Slovakia clearly guaranteed the right to conscientious objection for all jurists whose activities concerned the subject of that Bill, for example divorces. In the appendix to this measure reference was made to judges, lawyers, and judicial officials.¹²⁷

c) The law that legalised homosexual marriage in Spain provoked the problem of the right to conscientious objection not only of civil judges or mayors who preside over the civil marriages of such couples but also of auxiliary administrative personnel. The secretary of a court raised conscientious objections in relation to activities imposed during the process of the marriage of a couple of the same sex. It should be supposed, above all in the light of the general observation of the Constitutional Court of Spain which recognised conscientious objection as a human right, that the secretary of a court has the right to invoke conscientious

¹²⁵ M. ALTOBELLO, 'Relazione deontologica': <http://www.giustiziacarita.it/professioni/relazione-deontologica.htm>.

¹²⁶ La Croix.com, 10 VI 2005, L'Eglise et les lois

¹²⁷ Cf. art 4 Nvrah Zmluva, *op.cit.*

objection and that this should not involve disciplinary sanctions.¹²⁸ Thus administrative and judicial personnel, the sphere of their co-operation, and the carrying out of legal obligations in opposition to the obligations inscribed in their consciences, should thus be added to the professions where the question of conscientious objection is present.

The same applies to administrative personnel in health-care structures because one cannot always see administrative personnel as health-care personnel, although according to article 9 of the Italian law n. 194 of 1978 they are carriers out 'of auxiliary activity'. The specific case of the secretary of a medical doctor who refused to write a document that included indications of the doctor in relation to the procedures of an abortion for a woman who wanted to interrupt her pregnancy was the basis for raising the question of the right to conscientious objection. I am referring here to the well-known case of

Janaway v. Salford Area Health Authority where the first-level court accepted her plea and argued that the activities carried out by her were covered by article 4(1) of the Abortion Act of 1967. However, in the final decision the House of Lords refused the secretary conscientious objection and argued that the activity of writing a letter that referred to abortion was not covered by the provisions of the law on abortion of 1967 because it did not constitute participation in the process of abortion.¹²⁹ In cases in which the question of conscientious objection is not regulated *expressis verbis*, the basis for invoking it constitutes the precept to be found in all constitutional charters of democratic countries that guarantee the right to freedom of belief and conscience.

7. The Teaching Profession

The question of conscientious objection for teachers arises on the basis of the obligation to transmit opinions that are in opposition to values recognised by their conscience. In particular, one is dealing here with the subject of sexual education. The question of conscientious objection is not regulated by the law but encounters problems of various kinds. A teacher works according to a contract of work. In this way, the teacher of sexual education accepts the programme that is proposed with which he will teach his subject in various state schools. In

¹²⁸ The case described by R. NAVARRO-VALLS, 'La objecion de conciencia religiosa', *Famiglia et Vita* 2005, 3, p. 105.

¹²⁹ [1988] AC537 HL, cf. M. DAVIES, *Medical Law*, p. 280; G. QUINN, 'Objection de conscience dans le domaine professionnel (fuction publique et professions liberales)', in *Liberté de conscience, op.cit.*, p. 124.

some countries the teaching of sexual education is entrusted to specialised teachers, so-termed 'educators'. In addition, it is necessary to distinguish the teachers in private schools, and especially confessional private schools, from teachers in state schools. In private schools this subject can be taught according to the system of values chosen by the school. It should be remembered that parents are the first and fundamental educators of their own children. In conformity with international standards, in the education of children a school should respect the religious and moral beliefs of parents.

Teachers cannot be refused the right to conscientious objection. In the proposed agreement between the Republic of Slovakia and the Holy See this kind of solution was proposed. In the clause concerning conscientious objection educational activities were also placed, and these were subjected amongst other things to the laws on public education that justify sexual education.¹³⁰ As has already been observed in this paper, this project was not approved.

8. As regards laws whose contents bear upon fundamental values and injure the fundamental rights of man, there is the question of whether people who perform public functions in high organs of the state can invoke a conscientious objection clause. In the above-mentioned cases, however, one is not dealing with the real practice of a profession, even though one talks of a parliamentary professional because that person performs a public function. The legal foundation for the revocation of the obligation to perform certain actions contemplated by the law is to be found in the right to freedom of conscience. One example of this is without doubt the gesture of King Baldovin of Belgium who refused to sign the law on abortion because it was in opposition to his conscience. Members of Parliament have the right to draw up a law, to present amendments and to vote according to conscience. Unfortunately, however, this rule is rarely applied.¹³¹

Naturally, one could list other professions where the guarantee of right to conscientious objection has a more important role. This would be a subject for a longer monograph.

9. It is to be observed that in our epoch there are strong tensions between the conscience of individuals and the authority of democratic countries which tend to exercise absolute power over the conscience, given that positive law creates serious problems for those who

¹³⁰ Nvrah. Zmluva ..., art.4 lit. c), Predkladacia sprava, II.

¹³¹ On the question of the votes of members of parliament cf. JOHN PAUL II, *Evangelium Vitae*, N. 73; and E. SGRECCIA, *Manuel*, pp. 499-500.

accept the existence of a supernatural normative order.¹³² The situation is such that in the name of the pluralism of beliefs laws are passed that violate fundamental values and when they are applied reference is made to their names, thereby justifying the individual decisions of individuals that are of determining importance. This practice frees the legislator from making sure that acts do not violate moral rules and do not bear upon fundamental human rights. The institution of conscientious objection acutely brings out the question of unjust law and objection to its contents.¹³³ Laws that injure fundamental values, and especially values relating to man and his intangible rights, are increasingly numerous, and this is true in particular of laws on life, the family, and natural rights.

In introducing a conscientious objection clause, legislators appear to justify their ethical choices in relation to the contents of the law and justify moral relativism, delegating matters exclusively to the individual conscience. The juridical acceptance of conscientious objection is seen as the ultimate requirement of a coherent order based on human rights.¹³⁴

A person who invokes conscientious objection has immunity against the juridical consequences of his behaviour in accordance with the principle of individual concession. One can thus speak about the privatisation of morality and of a fragmentariness dependent on the ethical behaviour of a specific person. In this way, ethics becomes the ethics of personal conscience clauses.¹³⁵ The conscience, however, is not a private criterion but an objective one.¹³⁶

The frequent practice of invocation of conscientious objection by representatives of the various professions creates conflicts in those who tend towards the total separation of the law from the fundamental moral values connected with man and the family. Thus a campaign is gaining ground against this institution, based on the assumption that it can represent an abuse of rights and personal freedom. This mass attack was illustrated in particular by the work on the Concordat project on the right to acceptance of conscientious objection in the Republic of Slovakia. In the report of 15 December 2005 of the European Union's Network of Independent Experts on Fundamental Rights, which was drawn up first and foremost by pro-abortion organisations, it was argued that such a regulation would have had a negative

¹³² J. J. WRIGHT, *Coscienza e autorità*, p. 7.

¹³³ J.T.M. DE AGAR MARTIN, *Problemi*, *op.cit.* p. 2

¹³⁴ J.T.M. DE AGAR MARTIN, *Problemi*, *op. cit.*, p. 8.

¹³⁵ M. SCHOONYANS M., *L'objection de conscience en politique*, *Communication à la Conférence Internationale pour les Parlementaires d'Europe Centrale sur le thème Contemporary Family, Bioethics, and Responsibility of the Members of Legislative Bodies*, Bratislava, 3 octobre 2003.

¹³⁶ E. Sgreccia, 'Foundations of the Ethics of Life: Ethical Personalism', *Bioethics Notes & News*, Manila, 2006, 1, p.6.

influence on certain so-called fundamental rights, such as the right to abortion, euthanasia or homosexual marriages, and the right to have access to contraceptives as well.¹³⁷ Although I cannot enter here into discussion of the admission of such rights as fundamental human rights, the experience of Slovakia indicates that the rule of the concession of conscientious objection to the various professions is not a stable law and can be seen by contemporary pluralist states as being too 'pluralist'. When reflecting on the question of conscientious objection, one should observe that in situations where laws are not based upon the fundamental norms of moral law in relation to human rights, human life, and the family, and where they cannot be changed at the level of legislation, one should at least assure the right to conscientious objection.¹³⁸

¹³⁷ Cf. UNIFER, 'Commissione dell'Unione Europea di esperti indipendenti sui Diritti Fondamentali': http://europa.eu.int/com/justice_home/cfr_cdf/index_en.htm.

¹³⁸ CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Instruction on Respect for Unborn Human Life and the Dignity of Procreation, Donum Vitae*, III.