

## **Some problems of conscientious objection**

## **Algunos problemas de la objeción de conciencia**

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### **Abstract**

Seven problems are raised about conscientious objection (CO): 1) How to manage the diversity of ethical convictions, with laws that require acts against personal moral convictions. 2) How to accommodate the right to disobedience to a law by the CO, with the obligation to obey the law. 3) What is the better way to consider CO, as a fundamental right or an exception tolerated by the legal system. 4) Some consider that the massive use of the CO is a collective strategy to oppose controversial laws, producing a boycott of the law and the State. 5) There is a possibility of fraud when appealing the CO, having to determine if it has a true substrate. 6) How to reconcile the freedom of conscience of health professionals with the rights of patients. 7) It is necessary to determine when and how the CO should be manifested. To facilitate its discussion, a brief historical evolution of the CO, its definition, its characteristics, and the foundations that support it, will be previously described.

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## 1. Introduction

When hearing the term conscientious objection (CO), the first thing that comes to mind is Jehovah's Witnesses' refusal of blood transfusions or refusal of compulsory military service. But in recent years, CO cases have multiplied, to the point that some authors speak of a «big bang» of conscientious objections (1). The conflict between authority and conscience is as old as man, and CO has been around for centuries in human history. In the Bible appears the case of the Maccabean brothers (2), and there is also that of the first Christians who refused to offer sacrifices and worship Caesar (3). Then, in the Middle Ages, society became more homogeneous, as there were the same ethical and religious values, so CO was generally reduced to disobedience to authority in the face of laws or mandates that were considered unfair. As of the 16th century, ethical pluralism of thought, conscience and religion began to increase, with which conflicts of conscience increased, especially with cases of objection to compulsory military service. Thus, Napoleon dispensed the Mennonites who objected to the service of arms in the conquered countries, assigning them to auxiliary services of the army (4).

In the 20th century, the term CO began to be used properly, closely linked to human rights. The first CO legal ordinances also appeared in several countries, initially in relation to the refusal of compulsory military service, based on religious beliefs or for pacifist, humanist, ethical or philosophical reasons, even in non-believers (5). The CO to military service is approved linked to a substitute civilian or unarmed military service (health, quartermaster, administrative) in Sweden (1902), Australia (1903), South Africa (1912),

Great Britain (1916), Canada, New Zealand and the United States (1917), Soviet Russia (1919), Norway and the Netherlands (1922), Denmark (1933), Luxembourg (1953), France (1953), Austria (1955), Finland (1959), Belgium (1964), Federal Republic of Germany (1968), Italy (1970), Portugal (1976), Spain (1978), Argentina (1985), and Paraguay (1992) (4, 6, 7). Today, society has diversified; it is becoming increasingly complex and pluralistic with a greater diversity of opinions, cultural identities, conceptions of thought, ethical and philosophical ideas, and religious beliefs, so that CO assumptions have multiplied. Therefore, it is necessary to legislate the possibility of CO, since it is a relevant issue in the 21st century in view of the ethical diversity of people, and because human rights require respect for individual autonomy, moral integrity and dignity of people, taking into account their ethical and religious convictions (8).

CO can only occur in societies that value individual autonomy, convictions and pluralism, which allows people with different ethical and religious conceptions to coexist. This is typical of liberal, democratic and secular countries, which is why the right to CO is relatively recent in the history of humanity. On the other hand, it is difficult for it to exist in totalitarian countries or countries that do not recognize individual rights, autonomy and pluralism. However, in democratic societies where laws emerge from majority legislative votes, it is not always guaranteed that the laws are fair or respect the ethical or religious convictions of minorities, which may affect the deep convictions of citizens and their own identity (9).

It is necessary to distinguish between the legality and legitimacy of a law. Legality is the fulfillment of the necessary requirements for a legislative proposal to have the character of a law. It affects the form, the external aspect. Legitimacy, on the other hand, is the justice, goodness, reasonableness of a law, which must be in accordance with the nature of things. A law that contradicts the nature of persons, even if it is legal when approved with all the formalities by a legislative majority, will be an unjust law. If that law goes

against the conscience of the people, there will be no obligation to obey it. This is the case of the Athenian Socrates (400 B.C.), who preferred to die rather than obey an unjust mandate (10). It was also raised in 441 B.C. in the tragedy *Antigone*, by Sophocles (11), when the tyrant Creon of Thebes, after a fight between Eteocles and Polynices in which both die, makes a law so that the body of Eteocles is buried with honors, while that of Polynices remains unburied, to be eaten by birds. But when her sister Antigone decides to bury him, and is imprisoned for disobeying the law, she answers the tyrant that this law is contrary to the nature of things, and is only a capricious commandment that no one is obliged to obey. In our societies, majority ideological groups have imposed some laws that are legal, but not just. This was the case of the Nazi laws for the extermination of the Jews, or of Germans with hereditary or mental defects (Aktion T4 program, of 1939), or those of *apartheid* in South Africa for racial discrimination, or those of decriminalization of drug trafficking and consumption, or those of certain procedures that go against the right to life of human beings.

Therefore, a democracy must have mechanisms that guarantee CO, since a well-ordered society needs the possibility of recognizing the right to conscientious objection, as long as it comes from conscious and specific attitudes (12). It is only in secular States, which are committed to neutrality towards different religious and ethical convictions, without favoring any that CO can occur. Part of the respect for religious and ethical plurality is to allow freedom of thought, conscience and religion, and CO is a concrete expression of these freedoms (9). As Blancarte (13) says: *Only in a secular state does religious freedom and freedom of conscience really exist, whether for religious or philosophical reasons. In confessional States what exists, in the best of cases, is tolerance towards minority creeds, but no real freedom to believe, convert or proselytize, besides the fact that there is neither equity in the treatment of the State towards religions, nor autonomy in the political sphere towards the religious. Neither in officially atheist or anti-religious States do*

*such freedoms exist, since atheism becomes an officially established belief (that of non-belief), and this generates not only inequity in the treatment, but also religious persecution. Thus, only the secular state guarantees freedom of conscience, and with it the possibility of conscientious objection.*

## **2. Definition and characteristics of conscientious objection (CO)**

It is difficult to include precisely the various aspects of CO, so there are many definitions. As a starting point, I propose the following: *It is the personal attitude based on the principles of his ethical conscience, by which he feels obliged to disregard a certain legal provision or a hierarchical superior, which forces him to act against his conscience or prevents him from acting in accordance with it.*

There are other simpler definitions, such as *the refusal, for reasons of conscience, to perform an act or conduct that in principle would be legally required (14), or personal resistance to a legal prescription because it is contrary to a moral prescription that is considered to prevail (15).* Others define it as *a refusal of a person to comply with a specific judicial order, considering it incompatible with his fundamental ethical convictions (8), or as a realization of the freedom of conscience that, within the right limits, leads an individual to fail to comply with a certain legal provision that obliges him –under penalty or deprivation of a benefit– to act against his conscience or prevents him from acting in accordance with it (5).*

CO can occur in any professional who is forced to perform an act that goes against his or her conscience. Some common examples are journalists, with the conscience clause in the face of impositions from the journalistic company; public servants who refuse to perform certain administrative acts; students and researchers who refuse to practice or experiment with animals; the refusal of parents to allow their teenage children to attend certain extracurricular subjects; the opposition of pharmacists to supply certain drugs in their establishment; the refusal of Jehovah's Witness students and

teachers in schools to salute the flag and sing the national anthem, which in some countries is obligatory. It also occurs in patients in hospitals who request a type of food according to their religious prescriptions; or refuse to receive biological products derived from animals, such as insulin, pig heart valves; or in women who, out of modesty, refuse to be examined by male doctors who do not belong to their religious group; or the refusal of Jehovah's Witnesses to receive blood transfusions, even in life-threatening situations.

Of course, it also occurs in doctors and nurses, but also in midwives, orderlies and even hospital administrative staff, who may refuse to intervene in certain techniques permitted by law, as long as the patient is not in a life-threatening emergency situation. This is the case of some sexual and reproductive health procedures; of anticipating the end of life, with suspension of treatments or life support, and in countries where it is legal, of assisted suicide or euthanasia; of refusal to participate in research that destroys human embryos, or in adults with certain drugs, or other types of experiments permitted by law, such as genetic ones; of refusal to declare death, despite the presence of encephalic death; refusal to prescribe, at the patient's request, drugs that are not indicated or contraindicated, or to perform futile procedures, such as excessive aesthetic or other surgeries on the same patient, without waiting for a positive evolution, or when they are in a terminal state; some psychosurgical interventions; forced feeding of hunger strikers; cooperation with the police in obtaining information; participation in the execution of capital punishment in countries where it exists; refusal of Jehovah's Witnesses to perform blood transfusions.

Once CO has been defined, four essential characteristics will be described:

a) *It is fundamental to the conscientious integrity of the objector*, because it is based on reasons of conscience that affect his ethical, philosophical or religious convictions, which are of great importance to him (8). Conscience is understood as the critical evaluative capacity of one's own acts, in relation to the moral law that human nature

has within it. It can be considered as the subjective experience of ethics. The CO entails the defense of his personal convictions, which make it impossible for him to comply with a legal mandate (4).

The moral integrity of a person is at stake when, in accordance with his conscience, he cannot perform an action that he is obliged to do by law or authority. CO would be an attempt to maintain that integrity of conscience (9). But this implies that the person has certain values, which are an integral part of his identity or of the conception he has of himself (16).

*b) It is a private and apolitical action;* that is to say, an individual behavior, since the judgment of conscience is personal, whose objective is to avoid the transgression of a moral duty and to maintain the integrity of conscience in the face of a norm that contradicts its fundamental convictions. Its purpose is not to have a law eliminated or changed, or to seek a change of policy on an issue, but only to be exempted from compliance for reasons of conscience and without suffering legal consequences (8).

This differentiates CO from similar figures, such as civil disobedience or passive resistance to a legal norm, which cannot be confused. However, in both there is a refusal to comply with a law, but in civil disobedience the justification is different. While the latter is a public political act, *an attempt on the part of the agent to change policies, conscientious objection is a private act done to protect the agent from interference on the part of the public authority* (17). Civil disobedience can be individual or collective, seeking to assert one's right to participate in collective decisions or to object to laws that seem unjust, so that the individual feels exempted from complying with them (9). The purpose is usually to press for the modification or repeal of a law or a State policy that is considered unfair, or, that a class action lawsuit is agreed. Sometimes, however, peaceful insubordination to a law has nothing to do with the norm that is being disobeyed, which in itself is not objected to, but its disobedience is used as a means of pressure to get their demands acceded to. Here the purpose is fundamentally political, and conscience is not primarily

involved (15). This is the case of Gandhi in India or Martin Luther King with civil rights in the United States of America, who sought social and political change.

On the other hand, the purpose of the CO is not the modification of laws, but only the exemption from complying with it and the protection of the private sphere, in the face of an imposition that the person considers contrary to his conscience and ethical principles (9).

*c) The reason for the CO is the existence of a legal obligation* that opposes the ethical or moral convictions of a person's conscience, whether or not based on religious beliefs (14). As a consequence, the person feels a moral duty to obey his or her conscientious convictions, over and above the legal provision or the mandate of an authority. However, the motives cannot be ideological or political, since those would not be of conscience. Nor is it sufficient that it is a law considered unjust, but which does not impose an ethically reprehensible conduct for that person.

In short, it is based on the possible negativity of a civil law, and refers to the priority value of the person with respect to the State (15). There is CO whenever the authority intends to impose a mandate that goes against the ethical and moral convictions of a person. Authorities must respect basic freedoms, which are part of the human rights of individuals.

But human conscience can be informed by very varied codes (religious, philosophical, cultural), which the law cannot determine precisely. It is the most difficult element to prove, being subjective (4). Often the only direct proof of the objector's moral convictions is his word, which must generally be taken as good, unless there is reason to believe otherwise (9). The methods used in the countries to verify the sincerity of the alleged objectors are very varied. One example is the substitute social benefit of equal magnitude or more burdensome than the general obligation, which is used in many countries in connection with CO to military service. However,



the fact that the substitute social benefit is greater, rather than equal in magnitude, has been questioned as a violation of freedom of conscience and equality before the law (5).

CO is more frequent in the face of positive legal precepts, which oblige certain conduct, with prejudice in the case of refusal. But it can also occur in the face of negative precepts, which prohibit an action. Moreover, CO is more feasible when it is a positive precept, since non-compliance is usually less serious and causes less disruption to the social order than when there is a violation of a prohibitive mandate, due to the principle of freedom that exists in democratic states (18).

*d) The CO must respect fair limits*, such as not seriously affecting the rights of third parties, or harming public order or the common good. There are laws that are not objectionable because they protect inescapable duties of justice. For example, the objection against the payment of taxes, or the legal duty to provide food and education to minor children, or the duty of the physician to attend a patient in an emergency situation, with risk to his life. On the other hand, there are other legal duties that, although they seek the common good, like any law, resolve circumstantial situations or situations of convenience in a situation, but their breach entails minor consequences with respect to the unavoidable duties of justice (5).

### 3. Grounds for conscientious objection (CO)

Human rights are inherent to the human being, and CO is based on human rights, as a concretization of the right to freedom of thought, conscience and religion, as well as on the prohibition of discrimination on religious grounds. These freedoms are recognized in almost all constitutions and in various international legal documents, which we will see in this section.

Today, anyone can object when an authority asks him to do something that his conscience judges to be wrong, counterproductive or

unethical. No authority can eliminate freedom of conscience, and force us to do something that goes against our ethical and moral convictions. The authorities have the obligation to respect the basic freedoms that are part of human rights. If a state does not respect or does not allow CO, then it is against human rights and freedom. CO can never be considered unlawful conduct in a democratic system, where there is real protection of human rights. CO is currently understood as an immunity from coercion by authority or a legal norm, so that, within just limits, no one is forced to act against his conscience or prevented from acting in accordance with it. The CO is a reflection of the current concern to establish limits to the increasingly invasive States, being a means of resistance to an abusive intrusion of the authority in the interiority of the people, who can manifest their open opposition to obey a legal mandate (5).

What is proper to the human being is freedom and will, which implies freedom of conscience to think and choose a type of action. If the will is annulled, that human being is no longer free. By freedom of thought, people can have their ideas in any field, and choose in conscience with their will a type of decision. Another different thing is the freedom of action, since one can choose something, but, sometimes, one does not manage to act. No one can restrict my freedom of choice; freedom of action, on the other hand, is in the context of other human actions. It is always said that «my freedom ends where someone else's freedom begins,» and that affects freedom of action. The legal system limits freedom of action, which can be regulated between two extremes, the obligatory and the prohibited. But in between, there is ample room for freedom of action. Another aspect that limits the freedom of action is the moral conscience, which can raise the rejection of an action and, consequently, one should not perform something that the authority wants to impose. What do we do then? There are different rights, obligations, values, and there is a great variety among people. Some options we can share, but others we cannot, because of free-

dom of thought or because they are against our conscience, and so we must exercise CO.

The right to CO is also justified on the basis of the protection of autonomy and moral integrity, which are part of the dignity of the person (16). Individual autonomy includes the moral autonomy to give oneself values and ethical principles, with which we decide to guide our lives and actions. A State that would force its citizens to an action by means of punishment and against their will, instead of out of a sense of duty, would not be respecting autonomy, nor would it be recognizing their dignity as human beings. Respecting individual autonomy implies a pluralistic vision, which accepts that citizens have the right to act according to their ethical convictions, as long as there is a sufficiently strong justification for not requiring them to comply with a mandatory rule. However, some object to individual autonomy, saying that by itself it is not a reason to conclude that judgment and action are correct. For example, when one decides to act autonomously according to neo-Nazi principles or racial discrimination. Certainly, to be acceptable, personal judgments and actions must be based on reasonable ethical or religious principles for the community, and not for personal convenience or for reasons that seriously infringe on the rights of others (9).

Regarding justification based on the integrity of conscience, as stated in the first essential characteristic of CO, a person cannot perform an action to which he is obliged if it goes against the integrity of his conscience, which is part of his identity. To perform such an action would imply that he dissociates himself by acting against his own moral identity (9).

The right to CO is legally recognized in almost all countries, as can be seen in the global map of conscientious objection norms (19), being in most countries a recognition with limitations, but in others it is unlimited (Angola, Cuba, Estonia, Moldova, Namibia, Zimbabwe), and is only prohibited in Bulgaria, Ethiopia, Finland, Lithuania, Sweden and Venezuela. There are other countries that have no laws either for or against it, both in Europe (Macedonia,

Switzerland, Turkey, Ukraine), and in America (Bahamas, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Dominican Republic), and in quite a few nations in the Middle East, Africa and Asia.

Recognition of CO in most countries is not protected at the constitutional level, but it is in secondary laws. Nor is CO explicitly recognized in international legal instruments, except in the case of CO to compulsory military service. However, the vast majority of constitutions and international documents include the rights to freedom of thought, conscience and religion, from which the right to freedom of conscience and religion derives, as a consequence, the right to conscientious objection. Moreover, this right is reinforced by legal provisions prohibiting discrimination on religious grounds.

However, in order to be able to exercise CO, it is not strictly necessary for it to be recognized by the laws of a country; it does not depend on the will of the legislators. Even if CO is not recognized in the legal order, it is automatically justified by ethical principles and the right to freedom of thought, conscience, religion, as well as non-discrimination on religious grounds, which are recognized in all constitutions and in various international legal instruments. Human rights can be understood as a type of moral rights, which do not arise from the norms of positive law (9), but, as Nino indicates (20): *...it is understood that the rights thus created constitute only a consecration, recognition or means of implementation of those rights that are logically independent of this juridical reception. Respect for human rights is demanded even in the face of legal systems that do not recognize them and precisely because they do not recognize them.* It is currently untenable to refuse to accept CO if, at the same time, the right to freedom of conscience is recognized. Although a legal system may not recognize the right to CO, it can be claimed on the basis of a justification, not only in terms of human rights, freedom, autonomy, integrity, dignity, but also on the basis of these rights explicitly recognized in international legal instruments, which are described below (9):

1. *UN Universal Declaration of Human Rights* (21), which in Article 18 states: *Everyone has the right to freedom of thought, conscience and religion;*

*this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*

Furthermore, Article 2.1 indicates that religion may not be a factor of discrimination in the enjoyment of the individual rights and freedoms set forth in the Declaration: *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

2. *International Covenant on Civil and Political Rights of the UN (22)*, which is legally binding in the States that have adopted it, including Mexico, which states in Article 18.1, similar to the previous document: *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

In addition, Article 8.3 mention CO for military service. Paragraph «a» says: *No one shall be compelled to perform forced or compulsory labor.* But in paragraph «c» it lists several activities that: *Shall not be considered as forced or compulsory labor, for the purposes of this paragraph.* Among them, subparagraph «ii» refers to military service as excluded: *Service of a military character and, in countries where exemption for reasons of conscience is admitted, national service must be performed in accordance with the law by those who are opposed to military service for reasons of conscience.*

On the other hand, Article 26 maintains the principle of non-discrimination on religious grounds of Art. 2.1 of the previous document, and states: *All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this regard, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

3. *UN International Convention on the Elimination of All Forms of Racial Discrimination* (23), legally binding in the States that have adopted it, including Mexico. Article 5 prohibits discrimination and guarantees equality before the law: *...States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights. Among the various rights it guarantees, in paragraph «d.vii» is: The right to freedom of thought, conscience and religion.*

4. *Convention (number 111) concerning Discrimination in Respect of Employment and Occupation of the International Labor Organization* (24), legally binding in the States that have adopted it, including Mexico. Article 1, paragraph «a» of Article 1 indicates what is meant by the term *discrimination*, and paragraph «b» explains the right to complain in the event of a *distinction, exclusion or preference*:

a) *Any distinction, exclusion or preference based on grounds of race, color, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation.*

b) *Any other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, which may be specified by the member concerned, after consultation with representative organizations of employers and workers, where such exist, and with other appropriate bodies.*

5. *American Convention on Human Rights, or Pact of San José of the Organization of American States* (25), legally binding in the States that have adopted it, including Mexico. Similar to the previous documents, Article 1.1 refers to respect for rights and freedoms without discrimination of any kind: *The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and*

*freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or other status.*

On the other hand, Article 12 on freedom of conscience and religion reaffirms what was expressed in previous documents:

*a) Everyone has the right to freedom of conscience and religion. This right implies the freedom to maintain their religion or beliefs, or to change their religion or beliefs, as well as the freedom to profess and disclose their religion or beliefs, individually or collectively, both in public and in private.*

*b) No one may be subjected to restrictive measures which would impair the freedom to maintain his religion or belief or to change his religion or belief.*

*c) The freedom to manifest one's religion and beliefs is subject only to such limitations as are prescribed by law and necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.*

6. *European Convention on Human Rights of the Council of Europe* (26), legally binding on the European states that have adopted it. Article 9 protects freedom of thought, conscience and religion, similar to the previous documents. As in the other international legal instruments, it also does not recognize the general right to CO, except in the case of CO to military service, which indicates it in Article 4, in a manner similar to the UN International Covenant on Civil and Political Rights (22).

#### **4. Problems raised by conscientious objection**

Among the ethical and legal problems raised by CO are the following:

*a) How to manage the diversity of ethical convictions, with legislation that requires certain acts to be carried out that go against personal moral convictions.*

Ethical, philosophical or religious convictions are a central element of the individual's moral personality. This implies that the motives

of conscience, are fundamental for the objecting person, both in believers and in non-believers of a religion and is therefore very different from a simple opinion, which is always much more superficial and changeable. The CO is a concretization of the right to freedom of conscience to choose a type of action, within fair limitations, which is part of human rights and is protected in all international legislation and in most countries. The authorities are obliged to respect the basic freedoms that are part of human rights, and the CO is currently a mechanism to avoid coercion by the authorities against the integrity of conscience of citizens, which is part of their deep identity (5). CO requires harmonizing the interpretation of legal norms in terms of the application of rights.

On the other hand, the laws of a State cannot always be conceived as neutral, or as results of purely rational deliberation, since they sometimes emerge from a dominant group of society in the legislative chambers, which have ideological, social, cultural, historical and religious traits. Consequently, minorities may have differentiated features in the face of approved laws; for example, when a holiday of the week is determined on the basis of a predominant religion, in order to benefit the faithful of the majority confession so that they can practice their worship without labor or educational interference. But this penalizes the faithful of minority denominations, who should have the right to be allowed to be absent from work or school on a working day (8).

Consequently, the right to freedom of conscience should have no other limits than that of causing serious harm to another person. For example, Jehovah's Witness health care personnel cannot refuse to perform a blood transfusion when they have a patient in a life-threatening emergency situation. However, there is no reason to compel or prohibit conduct by a conscientious objector when there are no significant consequences for others.

*b) How to fit the right to disobedience to a law by CO, with the obligation to obey legal norms.*



In CO, a special treatment is requested above the laws as a matter of conscience, which implies introducing disobedience to laws into the law; that is, opposing the authority of the law and the obligation to comply with them. Can the law protect its own disobedience? In a very formalist position of law, it is even claimed that, if disobedience to legal norms is allowed, law itself loses its meaning. For some it is not easy to admit the regime of exception or privilege that CO implies, whenever there is a conflict between personal conscience and a law, to the point of thinking that allowing CO may be the first step of a slippery slope, which ends up annulling the authority of the law (9). There are three main positions on this problem:

1. *Inadmissibility*. The possibility of CO is rejected, since the mandatory and coercive nature of the legal rule prevails. An example of this position is Article 61 of the current Constitution of Venezuela, which protects freedom of conscience, but explicitly prohibits CO: *Everyone has the right to freedom of conscience and to manifest it, unless its practice affects the personality or constitutes a crime. Conscientious objection may not be invoked to evade compliance with the law or to prevent others from complying with it or from exercising their rights* (27).

It is based on the fact that the essence of law is its general, impersonal, obligatory and coercive character, seeking that it be obeyed in order to guarantee legal certainty and the stability of society. It cannot be accepted that personal beliefs have primacy over legal norms. This position usually includes a robust defense of the social and political order, since the absence of laws or their repeal produces disorder, being a danger to the stability of society, by not guaranteeing legal certainty. It is also usually included that laws in democracy are a reflection of the general will, and arise from an open and reasoned debate, so there should be no possibility of rejection of the approved norms (8). It is a very formalistic position of the law and inadmissible, since the CO does not constitute any authorization to disobey the law, since it would be absurd, but it is only a clause in attention to the conscience of the subject, which

allows exemption from the fulfillment of certain obligations or the suffering of the corresponding sanctions (28).

2. *Protected admissibility.* This position considers that CO is a fundamental right that cannot be denied, except in exceptional circumstances provided for by law. It is based on the fact that personal autonomy and freedom of conscience are above the legal norm. It is also based on religious freedom, which is one of the human rights and a constitutional right. Consequently, this position asserts that the civil norm must yield to the fundamental convictions of objectors (27). CO is considered valid, since law is more than a series of provisions that bind people. The law must also create spaces of freedom from interference by the State and legislative majorities associated with ideological or religious groups. Human rights recognize the moral autonomy of individuals, their identity and their right to be different in the face of State interference (8). There are specialists who affirm that human rights are the «trump card against the majority», or «the law of the weakest» (29).

3. *Regulated acceptance.* This position attempts to reconcile personal autonomy and ethical conscience with the requirements of the legal system, especially with regard to the rights of others. The regulation of CO must comply with a series of substantive and formal requirements (27), like any other legal procedure. But the regulation must be minimal, since it is not possible to try to regulate all aspects of the exercise of CO; if attempted, it would be an over-regulation difficult to apply in practice, with all the problems involved in trying to think of all the possibilities and, in addition, with the problems created by trying to apply a regulation that is too specific (9). Nor can CO be reduced to a conflict between the rights of persons, since this can lead to false dilemmas, opposing rights of persons that are in themselves reconcilable. The motives of conscience must be relevant to the law, and constitute a legitimate reason for not complying with a given legal provision (5). The author of this work considers it admissible to accept some regulation of CO, but to a minimum degree, which must be acceptable as long as

there is no significant violation of the human rights of others, among others, the right to life, which is the first, or a significant affectation of the public and democratic order of society.

*c) How best to consider the nature of CO: as a fundamental right or as an exception tolerated by the legal system?*

CO implies a tension between legal duty and moral duty, which is fundamentally linked to the conflict between professional duties and personal convictions (30). Thus, there are two opposing conceptions of the nature of CO. Some consider it as a fundamental right of the objector, which can be demanded before a State or authority. This implies that freedom is the rule, and regulation would be the exception, which must be very well justified. The other position is that of considering CO as an exception tolerated by the legal system, as part of democracy and the diversity of society, although the law must always take precedence over individual conscience. This implies that CO is a concession to objectors, and the authorities can set all the limits they deem appropriate to maintain the legal norm, social order and avoid extra-legal social disorders (9).

But as it was exposed in the first essential characteristic of the CO, this is fundamental for the integrity of the conscience of the person, which is an important part of his individuality and of the conception that he has of himself (16). On the other hand, the legal nature of CO is to be a modality of the human right to freedom of conscience and, therefore, its foundation is the same as that of other human rights, i.e., human dignity. Consequently, like the freedoms of thought, conscience and religion, it must be respected in all cases, except if there is a clear need for its limitation, for serious and fully justified reasons, as established by international human rights law (5).

*d) Some consider that the massive use of CO is being used as a collective strategy to oppose controversial laws, producing a boycott of the law and the State, which should provide a public service.*

Indeed, some claim that CO is being used, not only in a personal way to preserve the integrity of conscience, but as a collective strategy to disrupt public health policies and prevent women from accessing a service (31). This is somewhat similar to conspiracy ideas to justify their opposition to CO, or to admit it in other professional fields, but not in the health field. Trying collectively to block and change a law or a public policy is characteristic of civil disobedience, which is characterized as collective and whose purpose is to achieve political change. However, CO is always personal, and does not aim to go against the State, but only to request an exemption to defend one's personal integrity of conscience.

But when a law is enacted by a legislative majority based on an ideology that goes against the ethical, scientific, cultural or religious criteria of a good part of the citizens, a simultaneous individual CO of many professionals can occur. It is still a CO on a personal level, as this law seriously affects their personal ethical or scientific conscience. For example, this usually occurs among health professionals when a law decriminalizing elective abortion is passed.

All scientific data agree that after fertilization the life of a human being begins, and there is not a single piece of information to the contrary, so that this constitutes a perfectly proven scientific fact (32). There is no medical textbook that denies that human life begins with fertilization. There are only ideological arguments, which are not supported by scientific data. On the other hand, the purpose of a physician, since the Hippocratic Oath (4th century B.C.), is to save lives (to cure, or at least to palliate or comfort), but never can his aim be to eliminate a human life. No code of medical ethics endorses abortion, and the Hippocratic Oath explicitly forbids it. Consequently, in the face of certain types of ideological laws, it is logical that a large number of professionals refuse to perform this elective procedure, based on their scientific knowledge and ethical principles. This opposition is not an organized civil disobedience, but an individual and isolated CO, in which many pro-

professionals may coincide in a personal capacity. Another thing is when the patient presents a vital emergency, with risk of death, which, because of professional duty, the physician cannot refuse a procedure necessary to save a life by CO. For example, in the case of an ectopic pregnancy or incomplete spontaneous abortion, the obligation is to perform a therapeutic curettage.

*e) There is a possibility of fraud when appealing to CO, and it is necessary to study how to determine whether it has a true substrate.*

The word of the person requesting the right to CO is often the only direct evidence of his or her ethical convictions. Thus, there is the possibility of abuse, appealing to CO for not performing an act, when the true motive is really something else. For example, it could happen that some unethical physicians in public hospitals, which are usually saturated with patients, appeal to CO not to perform certain procedures, the real reason being to reduce their workload, which is usually very heavy (9). Therefore, it is necessary to discuss how to determine whether PO has a real substrate, or is only a means to reduce their work obligations.

The first question to ask ourselves is: can the law judge the data of an intimate and impenetrable conscience for anyone outside the objector? Can the subjective parameters of the objector be made objective? To answer the first question, the observations made by Desantes regarding the conscience clause are interesting (33): *the law does not pass judgment on the intentions nor on the facts that occur within the personality of man [...], but the fact that the fact of conscience has its origin and development within man, does not prevent that, after its external manifestation, it has repercussions on the life of the community whose order, without ceasing to be ethical, is already juridical by nature [...]. The extrapolation of the inner fact of conscience to the external sphere, which already falls under the rule of law, occurs in various ways [...]. One of them, because the same man who has lived the successive experiences of the conscience, wants to externalize them or, at least, to externalize their effects.*

Therefore, law cannot determine precisely the codes of conscience of an individual, but it deals with conscience through the consequences of his actions. It cannot enter into whether the formation of his conscience is right or wrong, whether his internal unfolding is certain or doubtful, or whether the decision of the will coincides with the dictates of his conscience. The law protects the privacy and free conscience of the individual, allowing, for example, the professional secrecy of the informant or of religious ministers in a civil process. Justice always presupposes the good faith of the informant, unless there is data to the contrary, although there is always the risk of error (5).

Regarding the second question as to whether it is possible to objectify the subjective parameters of the objector, it must be said that this is the most difficult element to prove. The truthfulness can only be verified through his own conduct, without this implying a violation of the right to privacy. But, in general, the objector's word must be taken as good, unless there are reasons to believe otherwise (9). Another way to ensure that there is no fraud is to substitute another type of work of equal magnitude for the activity being objected to. This is one way to avoid colleagues feeling that they are being burdened with work because of a colleague's CO.

*f) How to reconcile the freedom of conscience of healthcare personnel with the rights of patients to receive a service, as in the case of abortion.*

The problem is whether healthcare personnel can put their ethical and scientific convictions before a legal request from a patient, which they make on the basis of their autonomy. As stated in the fourth essential characteristic of CO, it must respect fair limits, so that it does not seriously affect the rights of third parties. The physician has only those rights that the patient grants him. If the patient freely entrusts his cure to him, the physician is responsible for a qualified service for his health, based on his science and conscience. The patient cannot be forced into a procedure, since his

conscience cannot be violated. But neither can the conscience of the physician be violated by the patient, so that the physician cannot be reduced to a mere instrument of the patient's will. The freedom and rights of both are equal. No one can force physicians to restrict their human rights, since they are persons, and not a mere means of administrative bodies.

Physicians are free and responsible persons, with values that govern their professional conduct. No one can force them to perform an act that is against their medical and ethical criteria. Any health personnel can object when they are asked to do something that is ethically or scientifically inappropriate. If the patient requests an act that he considers contrary to his scientific freedom or conscience, he can refuse to act according to the patient's wish in the name of his conscience and science, interrupting the «therapeutic alliance». The only limitation for a physician to exercise his CO is not to cause serious harm to third parties, as in the case of a medical emergency, since the patient's life is at risk, as established by international human rights law. For example, the physician may refuse to prescribe a drug requested by the patient, because it is not indicated or contraindicated; to perform futile or disproportionate procedures, which may occur in unconscious terminally ill patients at the request of relatives, who threaten lawsuits if the requested action is not performed. If the physician considers that this request is a clear therapeutic overkill, the ethical thing to do is to explain to them that this is against medical criteria and their conscience. However, if they persist in their position, they should talk to the director of the institution to suggest that, if they do not accept the scientific and ethical convictions of the treating physician, they are free to go to another hospital and look for another physician. If there were a lawsuit against the physician for not accepting the patient's request, it would not succeed.

All this has been included in many of the codes of medical deontology or codes of conduct for health personnel in different countries, in which the CO is an expression of absolute respect for

the dignity of the physician (7). These codes follow the recommendations of the World Health Organization, the Pan American Health Organization and the United Nations Educational, Scientific and Cultural Organization (UNESCO), which refer to the establishment of national guides or codes of ethical conduct in medicine. To cite those of some countries, in Mexico there is the Charter of General Rights of Physicians (34), which specifies that their first right is: *To practice the profession freely and without pressure of any kind. The physician has the right to have his clinical judgment (diagnostic and therapeutic) and his prescriptive freedom respected, as well as his probable decision to decline the care of a patient, provided that such aspects are based on ethical, scientific or regulatory grounds.* Similarly, numeral 28 of the Code of Bioethics for Health Personnel of the National Bioethics Commission of Mexico (35) states: *Health personnel may refuse to apply diagnostic and therapeutic measures that, in their judgment, put the life or function of patients or their offspring at risk, either at the request of the patients themselves, their hierarchical superiors or institutional authorities, when this is opposed to commonly accepted medical practice, bioethical principles, their professional capacities or reasons of conscientious objection.*

The most complex situation arises when there is a conflict between the woman's right to reproductive health and the right of health personnel to CO, especially in the case of abortion in public hospitals, since the State must guarantee this service in safe conditions. Technological development in medicine currently allows situations to arise that go against the fundamentals of the health profession. These are procedures which, instead of being aimed at the protection of life and health, are intended to directly end the life of a human being, as in the case of euthanasia or abortion. Physicians have taken an oath to save the lives of their patients. In almost all countries with decriminalizing legislation, CO is recognized as a specific right, with clauses prohibiting discrimination against health personnel who refuse to participate in these practices on grounds of conscience (4). The CO of health personnel is produced when faced with a procedure that is requested by a patient, and to which



they would be professionally obliged to perform because it is legal, but which in their conscience seems unlawful from an ethical point of view (36), as it is contrary to ethical standards, scientific data, their ethics or religious precepts.

The problem of medical CO in the face of the decriminalization of abortion has been discussed in problem 4, as to whether it can be a boycott strategy in the face of a controversial law. It should be added that it is up to the State to provide solutions to ensure that the right to CO of health personnel is respected, without sanctions or discrimination and, at the same time, to guarantee that the patient can undergo an elective termination of pregnancy under conditions of sufficient quality. The first way to guarantee this is to have sufficient non-objecting health personnel in public hospitals. If it turns out that a public hospital has no non-objecting physicians, new non-objecting personnel must be recruited. If it fails to do so, patients have to be transferred to other public hospitals in the area. Finally, if all public hospitals in a region lack non-objecting staff, patients must be referred to private clinics that perform abortions, through an economic agreement with the State, as long as they are registered clinics to ensure a service of sufficient quality, safety and hygiene. What in no case can be allowed, because it would be illegal as it would go against the human right of freedom of conscience for not allocating sufficient resources, is to force health personnel to perform abortions against their conscience, except in cases of urgency due to risk to the patient's life. But an elective abortion desired by a patient is never a matter of urgency, nor of risk to her life, and can even be considered not really a health issue.

## **5. It is necessary to determine when and how co should be manifested**

Regarding when to express CO, ideally, do not wait to be asked to perform a procedure that is against your conscience. This is espe-

cially important for healthcare personnel, since if the head of the facility or service does not know in advance who is or is not an objector, this can create major conflicts when on duty. The first thing to do is to know what CO is. Then, object in advance to the specific practices to the hierarchical superior, but not verbally, but in writing. This should be done when you start working in an institution or when you approve a practice that goes against your personal ethical convictions. By communicating this, the service may be organized with non-objecting personnel, and the objector may be assigned other procedures. If the objection is not met, the next steps are:

a) The health personnel will appeal to the Hospital Bioethics Committee, which is responsible for the CO issue, to ensure the honesty and consistency of the objector. But it is not their responsibility to determine the ethicality of the procedure alleged by the objector, since no one can replace their conscience.

b) If the professional is on the payroll, he can also appeal to the union, whose mission is to defend the human rights of the worker.

c) If their CO is not accepted and they want to force them to carry out a procedure they object to, while the time is running out before the different instances, then a legal protection should be requested.

d) In order not to face a denial of the right of CO alone, you can ask for the support of the specialty council or other colleagues, to make joint decisions.

e) In the case of resident physicians, who can also exercise the right to CO, it is good that they receive support from their university of origin, since they are the most vulnerable due to their youth and inexperience. In addition, there are cases of pressure from the hospital institution to perform procedures that go against their conscience, such as an abortion, as a professional apprenticeship. But this can be learned perfectly well by performing therapeutic curettage in spontaneous abortions, which are about half of the

abortions in a hospital. It is not necessary to learn it with a voluntary interruption of pregnancy, whose objective is not to save a life, but to end the life of one of the patients.

It is important to protect the objector's right to privacy, to determine whether he/she should communicate his/her CO only to the authorities of the institution where he/she works or whether it should be done publicly, which would not be appropriate. If a government regulation were to require professionals to register their position on CO for a procedure, for example, for abortion, given that the vast majority would object for scientific reasons and for reasons of ethical coherence with respect to the purpose of their profession, it would be logical to register only those who are in the minority. In the case of abortion, it would be the non-objectors, since it was shown in Mexico City that, when the law on elective abortion up to 12 weeks was passed, around 88.5% of the physicians and health personnel in thirteen hospitals declared themselves objectors (37). Finally, it should not happen that non-medical politicians try to restrict CO in any country, and that health personnel do not come forward to give their professional opinion, since, if they do not do so, they may be blamed for their failure to appear.

Finally, regarding the documents that must be submitted to request a CO, the objector will submit a letter addressed to his superior, indicating his name, profession or specialty, professional cell number (which must be attached in a simple copy), job position, clinic where he provides his services, area where he works, and full details of his address to receive notifications and documents. Next, you must request to be excused from participating in a series of medical acts (you must specify the medical procedure, program, activity, practice, treatment, method or research, which causes you a conflict of conscience), for being contrary to your freedom of thought, conscience and religion. Finally, you must indicate that: *All this, without detriment to my professional commitment to the medical institution you represent, as well as the best disposition on my part so that we can*

*find together the provision of an alternative service, which is compatible with my area of knowledge and experience, and is equivalent in time to the act or conduct objected to, with the aim of finding a balance in the workload with my colleagues.*

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