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L'obiezione di coscienza all'aborto legale: una prospettiva comparatistica*

The Conscientious Objection to Legal Abortion: A Comparative Perspective

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1-Introduction: Origins of conscientious objection

Conscience is described in the Bible by the term 'heart'. Its corresponding Hebrew term *leb* delimits inside man the space where God makes His judgments resound¹.

Both the Greek² and the Roman³ civilizations develop the notion of conscience referring to the capability of comprehension, knowledge, awareness, and also to the concept of complicity and connivance.

In early middle age, the notion of conscience can be found in ascetic writings, where both moral judgment and their sources are described⁴.

During renaissance, new humanistic ideas spread to those countries involved in the protestant reformation whose postulates are based on a

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¹ F. Stolz, entry *Leb*, in E. Jenni, C. Westermann (ed.), *Dizionario teologico dell'Antico Testamento*, Genova 1982, p. 744; Cf. Gen., 3, 7.

² A. Ziółkowska, *Hermeneutyczna wykładnia sumienia (Heidegger-Ricoeur)*, in "Diametros" 13 (2007) 9, p. 58; M. Cassani, *Teologia morale fondamentale. Parte terza: Coscienza. Dal discernimento alla decisione*, Bologna 2006, pp. 7-12, in <http://www.fter.glauco.it/...20discernimento%20alla%20decisione.pdf>, p. 7; F. Montanari, *Vocabolario della lingua greca*, Torino 2004, p. 2035.

³ Cf. L. Castiglioni - S. Mariotti, *Vocabolario della lingua latina*, Torino 2007, pp. 259-260 e 301-302; J. Römelt, *La coscienza. Un conflitto delle interpretazioni*, Roma 2001, pp. 50-51.

⁴ Cf. A. Andrzejuk, *Filozofia moralna w tekstach Tomasza z Akwinu*, Warszawa 1998, pp. 50-51.

vision of subjective and hardly tolerant conscience⁵. During middle age this leads to relativize any dimension transcending all creation⁶.

Today conscience, which is influenced by culture and society, is considered as ‘a kind of self-regulation of the system through its internalization within man’. In other terms, the concept of conscience varies depending on what the individual believes about the matter⁷.

⁵ Cf. J. Laffitte, *Storia dell'obiezione di coscienza e differenti accezioni del concetto di tolleranza*, in E. Sgreccia - J. Laffitte (ed.), *La coscienza cristiana a sostegno del diritto alla vita* (Atti della tredicesima assemblea generale della PAV, Città del Vaticano, 23-25 febbraio 2007), Città del Vaticano 2008, p. 136; G. Dalla Torre, *Il primato della Coscienza. Laicità e libertà nell'esperienza giuridica contemporanea*, Roma 1992, pp. 99-104.

During Renaissance western Christianity experienced its rupture. New Humanistic ideas, concepts such as tolerance, religious freedom, and social recognition of the right to freely express one's own belief or creed are spreading in Protestant countries. The first adopted regulations, namely 1598's Edict of Nantes in which Henry IV recognises religious and political privileges to Huguenots; The Virginia Bill of Rights of 12th June 1766, and the *Déclaration des droits de l'homme* of 26th August 1789 start, since then, the process of recognition of human rights. On the topic, cf. J. F. Renucci, *L'article 9 de la Convention européenne des Droits de l'Homme. La Liberté de pensée, de conscience e de religion (CE), Dossier sur les droits de l'Homme*, n. 20), Strasbourg 2004, pp. 6-7; R. Vinciguerra, *Introduzione allo studio dei Diritti Umani*, Acireale 2003, pp. 56-57; P. Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna 2000, pp. 325-326; P. Di Marzio, *La libertà di coscienza come diritto soggettivo*, in R. Botta (ed.), *L'obiezione di coscienza tra la tutela della libertà e disgregazione dello stato democratico* (Atti del Convegno di studi, Modena, 30 novembre – 1 dicembre 1990), Milano 1991, pp. 268-270; A. Janssen, voce *Probabilismo*, in AA. VV., *Enciclopedia apologetica della religione cattolica*, Alba 1953, transl. T. Dragone, pp. 1125-1126.

⁶ Cf. E. Sgreccia, *Manuale di Bioetica*, Milano 2007, p. 216; L. Tundo Ferente, *Moralità e storia. La costruzione della coscienza moderna*, Paravia 2005, pp. 227-229; P. Dieterlen Struck, *La objeción de conciencia (Relazione tenuta nel Simposio Internacional La objeción de conciencia en México y en el mundo, Città del Messico 9-10 luglio 1997)*, in AA. VV., *Objeción de conciencia ("Cuadernos del Instituto de Investigaciones Jurídicas UNAM")*, Città del Messico 1998, pp. 189-191; G. Lo Castro, *Law and Conscience* in R. Botta (ed.), *L'obiezione di coscienza tra tutela della libertà e disgregazione dello stato democratico* (Atti del Convegno di studi, Modena, 30 novembre – 1 dicembre 1990), Milano 1991, p. 101; A. Rawls, *Theory of justice*, Harvard 1971, p. 13 ss.

⁷ Cf. F. D'agostino, *L'obiezione di coscienza nelle dinamiche postmoderne*, in V. Guitarte Izquierdo – J. Escrivá Ivars (ed.), *La objeción de conciencia (Actas del VI Congreso Internacional de Derecho Eclesiástico del Estado, Valencia, 28-30 mayo 1992)*, Paterna 1993, pp. 23-30; C. A. Nicolini, entry *Obiezione di coscienza*, in R. Marengo (ed.), *Enciclopedia Garzanti del diritto*, Milano 1993, p. 821; D. Mieth, entry *Coscienza/responsabilità*, in P. Eicher (ed.), G. Francesconi (ed. italiana), *Enciclopedia teologica*, Brescia 1989, p. 151. See also P. Palomino, entry *Objeción de conciencia*, in J. Otaduy, A. Viana, J. Sedano, *Diccionario general de derecho canónico*, vol. V, Navarra 2012, p. 661, where we read that: “*La objeción de conciencia en la negativa por motivos de conciencia someterse a un mandato jurídico que prescribe una conducta obligatoria y exhibible, ya provenga dicho mandato directamente de la norma legislativa ya de un contrato, ya de una orden judicial o resolución administrativa*”. Cf. F. Palazzo, entry *Obiezione di coscienza*, in AA. VV. *Enciclopedia del diritto*, vol. XXIX, Milano 1979, p. 539, according to which: “*l'atteggiamento di chi rifiuta un precetto, all'osservanza del quale il soggetto è tenuto giacché suddito dell'ordinamento di cui quel precetto fa parte. Tale rifiuto deve trovare la sua causa psicologica in motivi di coscienza cioè in una norma, di contenuto opposto al comando*

In this context, to the objection genuinely determined by religious concerns other political or philosophical reasons are added, which in turn secularize the phenomenon of conscientious objection⁸.

2. *Conscientious objection to abortion: general profiles*

According to current dictionary definition, conscientious objection means ‘opposition for moral or religious concerns to the fulfilment of an obligation required by law’⁹.

Conscientious objection can be direct or indirect. It is indirect when the subject has been requested “*the illicit cooperation to others’ conduct*”; it is direct if “*an immoral conduct is directly requested’ to an individual*”.

Objection to abortion, in particular, consists in refusing to perform abortive practices and acts aiding its realization.

Conscientious objection has been legally recognised at international level by article 18 of UDHR, which stated freedom of conscience, of thought, and of religion. Such a provision is then reaffirmed in states’ Constitutions by article 9 of ECHR, and other documents of UN and EU¹⁰.

The institute of conscientious objection is specially recognised also by the Charter of fundamental rights (CFR) of European Union of 2000. In article

osservato. Questa causa ricava la propria forza psicologica cogente a seguito di un processo di interiorizzazione della coscienza dell’obiettore”.

⁸ Cf. J. T. Martín De Agar, *L’obiezione di coscienza*, in *Btcada* (conn.: 22.04.2013), p. 3 [original version: J. T. Martín De Agar, *Problemas jurídicos de la objeción de conciencia*, in *Scripta theologica*, n. 27, fasc. 2 (1995), pp. 519-543].

⁹ Cf. M. Martínez León, *Aspectos médicos legales y deontológicos de la objeción de conciencia sanitaria*, in J. Rabadán, M. Martínez (ed.), *La objeción de conciencia: Implicaciones biojurídicas y clínicas de la objeción de conciencia de los profesionales sanitarios (Comisión de Ética y Deontología Médica del Colegio Oficial de Médicos de Valladolid)*, Valladolid 2009, pp. 79-80; J. T. Martín De Agar, *Problemas jurídicos de la objeción de conciencia*, in *Scripta Theologica*, 27 (1995/2), pp. 519-543; P. Consorti, *Obiezione, opzione di coscienza e motivi religiosi*, in R. Botta (ed.), *L’obiezione di coscienza tra tutela della libertà e disgregazione dello stato democratico* (Atti del Convegno di studi, Modena, 30 novembre – 1 dicembre 1990), Milano 1991, p. 252.

¹⁰ W. Chavkin - L. Leitman - K. Polin, *Conscientious objection and refusal to provide reproductive healthcare: A white paper examining prevalence, health consequences, and policy responses*, in *International Journal of Gynecology and Obstetrics*, n. 123, fasc. 3 (2013), pp. 41–56; A. Heino - M. Gissler - D. Apter - C. Fiala, *Conscientious objection and induced abortion in Europe*, in *Eur J Contracept Reprod Health Care*, n. 18, fasc. 4 (2013), pp. 231–233; M. Wicclair, *Conscientious objection in health care*, Cambridge 2011, pp. 31 ss.; J. Savulescu, *Conscientious objection in medicine*, in *Br Med J.*, 332 (2006), pp. 294–297.

10, § 2 it states that “*the right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right*”.

3. Short analysis of abortion laws in force in some of European countries

3.1 Abortion Law in Austria

In Austria, abortion law is in sections 96-98 of Criminal Code of 23rd January 1974¹¹. These regulations especially provides for abortion on request for psychological or social reasons, following the mere decision of the mother. Specifically, abortion on request is permitted during the first three month of pregnancy with medical advice¹². The same regulation provides for clauses of conscience for medical staff. Article 97 §3 (2) states “*No physician is obliged to perform an abortion or to take part in it, except where it is necessary ("notwendig") without delay to save the life of the pregnant woman from an immediately threatening danger which cannot otherwise be averted*¹³. This applies also to persons in para-medical, medico-technical, or auxiliary health employments”. Moreover in article 97 §3 (3) we can read that “*No one may be in any way disadvantaged because he or she has performed a justified abortion, or taken part in it, or because he or she has refused to perform or take part in such an abortion*”. Austrian regulation respects precepts of conscience of medical staff also because it does require no prior declaration.

3.2 Abortion Law in Belgium

Abortion law in Belgium was first adopted on 3rd April 1990. The regulation, besides having decriminalized abortion, also granted medical and para-medical employees the right to abstain from performing or assisting voluntary termination of pregnancy. According to this regulation, if the consulted doctor wishes to refuse the performing of the termination of pregnancy, he/she is required to inform the woman concerned during

¹¹ Cf. StGB, L. 23th January 1974, in *BGBL*, no. 60/1974.

¹² Cf. Eunief, Opinion n° 4-2005: *The right to conscientious objection and the conclusion by EU members States of Concordats with the holy see*, in http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdfopinion4_2005_en.pdf, p. 30 [nota 88], p. 9.

¹³ Cf. StGB, cit. See also *Italian translations* in G. Gallo, *L'obiezione di coscienza all'aborto in Europa*, Roma 2009, pp. 55-56.

the first visit. The objector is not asked to provide prior declaration, and communicate his/her objection on a case-by-case basis. On 13th August 1991 the National Committee of Evaluation was founded, to secure 1990's law enforcement- since then, the number of litigations concerning conscientious objection have greatly decreased¹⁴.

3.3-Abortion Law in France

According to French jurisprudence freedom of conscience is the power “*not to act against the imperative of one's own conscience*” except for the compliance with legal obligation¹⁵. In this sense, an example is given by clauses about conscientious objection to abortion contained in the Law no. 75-17 of 17th January 1975, which permitted abortion on demand within 12th week of pregnancy, previously illegal according to article 317 of Penal Code. The latest provision is now part of Public Health Code (Code de la Santé Publique), where the regulation for conscientious objection is provided for in article 162-8 (1-2)¹⁶.

The clause of objection can be asked by physicians, midwives, nurses, members of the allied health professions, and also by those responsible for

¹⁴ Cf. Law. 3th April 1990, art. 2, in *Moniteur belge* [O. J.] of 5th April 1990, in *Code Pénal* 8 juin 1867 (update of 14th December 2012, into force from 2nd May 2013, version), *Titre VII, Chapitre I: De l'Avortement*, artt. 348- 353. Cf. V. Prieto, *Dimensiones individuales e institucionales de la objeción de conciencia al aborto*, in *RGDCDEE*, n. 30, 2012, p. 52; cf. R. Torfs, *L'objection de conscience en Belgique*, in AA. VV., *L'obiezione di coscienza nei paesi della Comunità Europea* (Atti dell'incontro del Consorzio europeo di ricerca sui rapporti tra Stati e Confessioni Religiose, Bruxelles-Lovanio, 7-8 dicembre 1990), Milano 1992, pp. 242-243.

¹⁵ Cf. M. Cebriá García, *Objeciones de Conciencia a Intervenciones Médicas. Doctrina y Jurisprudencia*, Navarra 2005, p. 117; L. Renzoni Governatori, *Il riconoscimento dell'obiezione di coscienza nell'ordinamento giuridico francese*, in R. Botta (ed.), *L'obiezione di coscienza tra tutela della libertà e disgregazione dello stato democratico* (Atti del Convegno di studi, Modena, 30 novembre – 1 dicembre 1990), Milano 1991, p. 297.

¹⁶ As the regulation is highly important, it becomes necessary to quote it in full, “*Un médecin n'est jamais tenu de pratiquer une interruption volontaire de grossesse mais il doit informer, sans délai, l'intéressée de son refus et lui communiquer immédiatement le nom de praticiens susceptibles de réaliser cette intervention selon les modalités prévues à l'article L. 2212-2[807]. Aucune sage-femme, aucun infirmier ou infirmière, aucun auxiliaire médical, quel qu'il soit, n'est tenu de concourir à une interruption de grossesse. Un établissement de santé privé peut refuser que des interruptions volontaires de grossesse soient pratiquées dans ses locaux. Toutefois ce refus ne peut être opposé par un établissement mentionné au 2° de l'article L. 6161-5 [808] ou par un établissement ayant conclu un contrat de concession en application de l'article L. 6161-9 [809] dans sa rédaction antérieure à la loi n° 2009-879 du 21 juillet 2009 portant réforme de l'hôpital et relative aux patients, à la santé et aux territoires que si d'autres établissements sont en mesure de répondre aux besoins locaux*”.

Hospital service (as for the latter, a private hospital establishment may refuse to allow voluntary termination of pregnancy to be performed on its premises).

By decree (*décret*) no. 80-285 of 17th April 1980 Regional hospitals are required to ensure the right to abortion. By decree 82-1172, such requirements are requested also to public hospitals.

However, it seems that the only category disregarded by article L162-8 (3) were pharmacists who, in compliance with article 569 of Code of the French Public Health were obliged to stock in pharmacies “*simple drugs, chemical substances and stable preparations described by Pharmacopoeia*”. Furthermore, article L645 granted the category with a certain freedom. The issue is currently of concern, after the creation of RU 486 pill. Meanwhile, the Ordinance no. 86-1243 of 1st December 1986 (included in article L122 of the Code de la Consommation) states that it is prohibited to refuse to sell the drug prescribed¹⁷.

3.4 Abortion Law in Germany

According to German law, until 1974 abortion was a crime, except for medically-indicated termination of pregnancies¹⁸. On 26th April 1974. German Parliament (Bundestag) approved the Fünfte Gesetz zur Reform des Strafrechts (FGzRS), that is the Fifth Law of Reformation of Criminal Law. The law should have entered into force on 22nd June 1974, but the regional government of Baden-Württemberg has demanded the Federal Constitutional Court to suspend its entry into force. On 21st June the Constitutional Court ruled on the matter. The Court temporarily suspended

¹⁷ As far as the pharmaceutical industry is concerned, those companies producing contraceptive pills had recently to face numerous complaints in relation to the side effects of third and fourth generation pills. On 14th December 2012 Marion Larat, 25 years old, “*appealed against Bayer pharmaceuticals laboratories, selling the pill Meliane. The young woman brought charges against the so-called third generation contraceptive pill to be the cause of her cerebrovascular accident that in 2016 led to her disability*”. Should the ongoing proceeding be concluded with a positive ruling, conscientious objectors’ position in healthcare sector would be reinforced.

On the matter, cf. P. Kremer, *Pilule: Marion Larat, l’injustice transformée en combat*, in “*Le Monde*” of 14th December 2012, in <http://www.lemonde.fr/sante/article/2012/12/14>.

¹⁸ Condemnation of abortion was essentially founded on three pillars, criminal law (cf. art. 218 of StGB); special law (cf. DEUTSCHE REICH, *Erbgesundheitsgesetze, art. 14(1)*, in *RGB*, I, 1933, p. 529, §12) and jurisprudence (cf. *Le sentenze*, in *Bundesgerichtshof in Strafsachen*, vol. 2, pp. 111-116 [113-114]); cf. M. Zubik, *Problem aborcji w dokumentach i orzecznictwie sądowym*, Warszawa 1997, p. 115.

article 218A of FGzRS, according to which abortion on demand, within 12th week from conception, could not be punished; yet approving article 218B that stipulates abortion cannot be punished if an unlawful act has been committed¹⁹.

On 12th February 1976 the Bundestag implemented the 15th modification of Criminal Law (“Fünfzehntes Strafrechtsänderungsgesetz”). The provision allowed abortion within or even after 12 weeks from conception, if necessary to save life or preserve health of the woman. Nevertheless, article 218A described such a vague notion of ‘difficult situation’ as to allow the woman to, anyhow, declare her incapacity to endure pregnancy. In order to contain this risk, the Constitutional Court, by a sentence of 28th May 1993, established that abortion is admissible only if medically necessary, and not in the hypothesis of a difficult situation for the woman²⁰. However, in the same sentence, the Court established that those who have performed abortion under these circumstances should not be punished. Hence, even if abortion is considered illegal, it should not be punished. As a consequence of such an ambiguous stance, a new provision of 21st August 1995 entered into force. Therefore on demand abortion is allowed within 12 weeks following conception or until 22 weeks in case of danger of life or physical or psychological danger of the woman.

It is necessary that the woman has obtained medical counselling at least three days before the operation. A provision of 26th August 2009, substituting 1995 law, restricted the terms for counselling in case of abortion for eugenics reasons.

3.5 Abortion Law in Greece

In Greece clauses of conscientious objection is recognized by Act no. 3418 of 2005 which, in article 31 allows doctors the possibility of raising conscientious objections on the grounds of personal morality or religious

¹⁹ V. Prieto, *Op. cit.*, pp. 1-64; M. ZUBIK, *Op. cit.*, pp. 116 ss.

²⁰ S. Rowlands, *Abortion law of Jurisdictions around the World*, in <http://www.fiapac.org/media/Divers/ABORTION%20LAW%20OF%20EACH%20NATION%20STATE%20Sam%20Rowlands%20rev%202012.pdf>, pp. 7-8 e 13-15; R. W. Piotrowicz - S. K. N. Blay, *German Monitor. The unification of Germany in International Domestic Law*, Amsterdam – Atlanta 1997, p. 182.

beliefs, and of refusing to perform abortion²¹. Though, this power has some restrictions, in fact, objection is suspended if there is an inevitable danger for the woman's life or health. The regulation is applied along with Law no. 821 of 14th October 1978, which admits abortion of demand. Since Law 3418/2005 has entered into force, the National Committee of Bioethics in 2002 and 2010 has confirmed the value of conscientious objection. Specifically, the Committee underlines that "*physicians keep the right to refuse to carry out a treatment which, according to their point of view, is not medically indicated, even if the patient insists to receive it*"²².

3.6 Abortion Law in Italy

Article 546 of 1930's Criminal Code considered abortion among crimes "against integrity of bloodline, and forbade publicity on contraception. During the 70's both regulations have been judged as constitutionally illegitimate.

On 29th July 1975 Italy enacted a law on the establishment of family counselling centres. The law, which brought important changes to Criminal Code's provisions concerning family and women's Statute, aimed at launching Family Planning Centres whose main goal was to inform on the use of contraceptive methods. In this context, on 22nd May 1978 Law no. 194 was adopted, establishing "*regulations for social safeguard of*

²¹ HSPH, ALoFw: Greece: Law No. 3418/2005, the Code of Medical Ethics: "*Άρθρο 31. Τεχνητή διακοπή κύησης: (1): Ο ιατρός μπορεί να επικαλεσθεί τους κανόνες και τις αρχές της ηθικής συνείδησης του και να αρνηθεί να εφαρμόσει ή να συμπράξει στη διαδικασία τεχνητής διακοπής της κύησης, εκτός εάν υπάρχει αναπότρεπτος κίνδυνος για τη ζωή της εγκύου ή κίνδυνος σοβαρής και διαρκούς βλάβης της υγείας της. Στην περίπτωση αυτή, απαιτείται σύμφωνη και αιτιολογημένη γνώμη του κατά περίπτωση αρμόδιου ιατρού; (2): Ο ιατρός οφείλει να παρέχει συμβουλευτική υποστήριξη στη γυναίκα που ζητεί την παροχή των υπηρεσιών του, πριν προχωρήσει στη διακοπή της κύησης"; la traduzione inglese – padre John Luke Gregory (Vicario generale dell'Archidiocesi di Rodi): "(1): The doctor can invoke the rules and principles of moral/ethical conscience and refuse to carry out or to join in the process of artificial interruption of pregnancy unless there is inescapable risk to the life of the pregnant woman or risk of serious and permanent damage to her health. In this case, a consistent/agreeable and reasoned/justified opinion of any other competent physician is required/demanded; (2) The physician must/is obliged to provide counseling/consultative support to women seeking his services, before proceeding with a termination of pregnancy".*

²² Cf. National Bioethics Commission, *Report: On prenatal and pre-implantation diagnostic tests and the question of choice of embryo*, in <http://www.bioethics.gr>; National Bioethics Commission, *Opinion: Consent in the patient-physician relationship*, Athens 2010, on page 7 we read, "*The Commission points out that physicians reserve the right to refuse a treatment which is not medically indicated in their view, even if the patient insists upon it*".

maternity and on voluntary termination of pregnancy". Thought it, abortion has been liberalised, and it is still into force.

Article 9 of Law no. 194/1978 on pregnancy termination states that "*Health personnel and allied health personnel shall not be required to assist in the procedures referred to in Sections 5 and 7 or in pregnancy terminations if they have a conscientious objection, declared in advance*"²³. This article recognises the right to conscientious objection with some limitations and complying with the definite right to obtain abortion. First of all, conscientious objection shall exempt health personnel and allied health personnel from carrying out procedures and activities specifically and necessarily designed to bring about the termination of pregnancy, and shall not exempt them from providing care prior to and following the termination. Secondly, as for the terms of objection, the exemption requires the medical personnel to make a prior declaration (that will take effect one month later) in which it is invoked the right to conscientious objection, so to allow hospital establishments to substitute the objector with a non-objector. Objective limits to conscientious objection, as above mentioned are within the line drawn between "*activities specifically and necessarily designed to bring about the termination of pregnancy*" and "*care prior to and following the termination*", the latter being not covered by the clause of conscience. Particularly, according to some legal theories, the requirement of specificity demands an evaluation of the act, in order to ascertain if it uniquely refers to an intervention of voluntary termination of pregnancy: in the abstract, in fact, an intervention could concern different operations, and becoming specific only if it performed within a procedure of pregnancy's termination. Other theories, on the contrary, specificity should be evaluated in the abstract, and therefore specific activities aimed at terminating pregnancy are only those that cannot be related to any other treatment. The requirement of necessity limits the actions without which the procedure could not be performed. In the light of this, for example,

²³ We make a distinction between the following: 1. Main healthcare professions (physicians, veterinarians, pharmacists, [cf. D. Regale 30th September 1938, no. 1706, Approval of regulation for pharmaceutical services, in Official Journal no. 259, of 14th November 1938]); 2. Auxiliary healthcare professions (midwife, nurse, healthcare assistant); 3. Provider of technical assistance (masseur, prosthodontist, optician, orthopaedic technician, etc.) On the matter, cf. M. L. Di Pietro - C. Casini - M. Casini, *Obiezione di coscienza in sanità. Vademecum*, Siena 2009, pp. 47-48. See also, Royal Decree of 27th July 1934, no. 1265 "*Approval of Consolidated Law on healthcare*", Official Journal of 9th August 1934, no. 186, and Law of 26th February 1999 no. 42 "*Provisions on Healthcare professions*", Official Journal no. 50 of 2nd March 1999.

jurisprudence has excluded the possibility for a midwife to raise conscientious objection in case an ECG or a sterile field are necessary to perform an abortion, with a consequent conviction for omission of official deeds (art. 328 Italian Criminal Code)²⁴. As for the time frame, the regulation excludes the possibility for medical staff not to provide assistance prior to or following termination of pregnancy. This means that objection can be invoked only in relation to assistance's activities required during the intervention, when even a mere act of assistance is regarded as specifically and necessarily related to abortion. In any case, it should be reminded that objectors must guarantee healthcare if it is, considering the peculiar circumstance, "*essential to save the woman to save the life of a woman in imminent danger*"²⁵.

²⁴ M. Bo - C.M. Zotti - L. Charrier, *Conscientious objection and waiting time for voluntary abortion in Italy*, in *The European Journal of Contraception Reproductive Health Care*, n. 20, fasc. 4 (2015), pp. 272-282; M. Gius, *The impact of provider availability and legal restrictions on the demand for abortions by young women*, in *The Social Science Journal*, n. 44, fasc. 3 (2007), pp. 495-506; R.M. Blank - C.C. George - R.A. London, *State abortion rates: the impact of policies, providers, politics, demographics, and economic environment* in *Journal of Health Economics*, n. 15, fasc. 5 (2006), pp. 513-553; R. Brown - R.T. Jewell - J. Rous, *Provider availability, race, and abortion demand*. *Southern Economic Journal*, n. 67, fasc. 3 (2001), pp. 656-671; P.J. Cook - A.M. Parnell - J. Moore - D. Pagnini, *The effects of short-term variation in abortion funding on pregnancy outcomes*, in *Journal of Health Economics*, n. 18, fasc. 2, (1999), pp. 241-257; D. Haas-Wilson, *Women's reproductive choices: the impact of Medicaid funding restrictions*, in *Family Planning Perspectives*, n. 29, fasc. 5 (1997), pp. 228-233; S. Matthews - D. Ribar - M. Wilhelm, *The effects of economic conditions and access to reproductive health services on state abortion rates and birthrates*, in *Family Planning Perspectives*, n. 29, fasc. 2 (1997), pp. 52-60; P.B. Levine - A.B. Trainor - D.J. Zimmerman, *The effect of Medicaid abortion funding restrictions on abortions, pregnancies and births*, in *Journal of Health Economics*, n. 15, fasc. 5 (1996), pp. 555-578; R.W. Brown - R.T. Jewell, *The impact of provider availability on abortion demand*. *Contemporary Economic Policy*, n. 14, fasc. 2 (1996), pp. 95-106; P. Gober, *Why abortion rates vary: A geographical examination of the supply of and demand for abortion services in the United States in 1988*, in *Annals of the Association of American Geographers*, n. 84, fasc. 2 (1994), pp. 230-250; D. Haas-Wilson, *The Economic Impact of State Restrictions on Abortion: Parental Consent and Notification Laws and Medicaid Funding Restrictions*, in *Journal of Policy Analysis and Management*, n. 12, fasc. 3 (1993), pp. 498-511; M.H. Medoff, *An economic analysis of the demand for abortions*, in *Economic Inquiry*, n. 26, fasc. 2 (1988), pp. 353-359; T.A. Deyak - V.K. Smith, *The economic value of statute reform: the case of liberalized abortion*, in *Journal of Political Economy*, n. 84, fasc. 1 (1976), pp. 83-100.

²⁵ Cf. Ministero della Salute, *Relazione del Ministro della Salute sulla attuazione della Legge contenente norme per la tutela sociale della maternità e per l'interruzione volontaria di gravidanza (legge 194/78): dati definitivi 2016*, Roma 2017; M.H. Medoff, *Social Policy and Abortion: A Review of the Research*, in *The Open Demography Journal*, n. 6 (2013), pp. 18-27; M.H. Medoff, *State abortion policies, Targeted Regulation of Abortion Provider laws, and abortion demand*, in *Review of Policy Research*, n. 27, fasc. 5 (2010), pp. 577-594; K. Meier - D. Haider-Markel - A. Stanislawski - D. Mcfarlane, *The impact of state-level restrictions on abortion*, in *Demography*, n. 33, fasc. 3 (1996), pp. 307-312.

3.7 Abortion Law in Portugal

Portugal is one of the few countries where conscientious objection is recognized by the Constitution. Article 41 (6) of Constitution guarantees the right to invoke conscientious objection in accordance to Law no. 16 of 2001 on Freedom of Religion. At paragraph 12 it states that freedom of conscience implies the right to express one's own refusal to implement laws contrary to principles of conscience, even if with some limitations. The ways objection is invoked by health personnel are described in article 4 of Law on abortion of 11th May 1984 (minor modifications with Law 90/97), which decriminalized abortion, also modifying some articles of Criminal code (articles 140-142).

Currently, the institute of conscientious objection is governed by Law 16 of 2007 and by Law n. 32 of 2006²⁶. It allows women to resort to on demand abortion within the first 10 weeks from conception, and until 12th week in case of irreversible injury for the body or for physical or mental health of the woman concerned; within the first 16th weeks if the pregnancy resulted from a rape or sexual assault; within 24th week if there are sound reasons for assuming that the child will suffer from a serious incurable disease or congenital malformation.

3.8 Abortion Law in United Kingdom

As for United Kingdom, the clause of conscience to abortion initially appeared in section 4 of Abortion Law of 27th October 1967, which decriminalized some kind of abortion²⁷. It has been implemented in Great

²⁶ Cf. Lei n. 32/2006 *Procriação medicamente assistida*, in *DIÁRIO DA REPÚBLICA* [G. U.] del 26 luglio 2006, n. 143, p. 5246 [5245-5250], CAPÍTULO II: Utilização de técnicas de PMA, Artigo 11: “*Compete ao médico responsável propor aos beneficiários a técnica de PMA que, cientificamente, se afigure mais adequada quando outros tratamentos não tenham sido bem sucedidos, não ofereçam perspectivas de êxito ou não se mostrem convenientes segundo os preceitos do conhecimento médico. Nenhum profissional de saúde pode ser obrigado a superintender ou a colaborar na realização de qualquer das técnicas de PMA se, por razões médicas ou éticas, entender não o dever fazer.* 3 – *A recusa do profissional deve especificar as razões de ordem clínica ou de outra índole que a motivam, designadamente a objeção de consciência*”.

²⁷ Cf. R. Navarro-Valls - J. Martínez Torrón, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Madrid 2011, p. 119; cf. I. Durany Pich, *Objeciones de conciencia*, Navarra Gráfica Ediciones, Pamplona, 1998, p. 43; cf. I. Durany Pich, *La objeción de conciencia*, Roma 1996, p. 95. Cf. Abortion Act, sez. 4, in HSPH, ALofW: United Kingdom: “*Section 4. (1) Subject to*

Britain (England, Wales, and Scotland) whilst other independent territories of UK remained with the old regulation of Offences Against the Person Act of 1861 and the severe Criminal Justice Act of 1945 (§ 25-26) that limited the possibility to perform abortion if necessary to save mother's life. The above-mentioned territories decriminalized abortion later; nevertheless, while admitting abortion on the 3 or 4 grounds listed by UN (1. to save the life of a woman; 2. to preserve a woman's physical health; 3. to preserve a woman's mental health; 4. in case of rape or incest; 5. because of foetal impairment; 6. for economic or social reasons; 7. and on request), they held a more restrictive regulation than Great Britain where an amendment to the Abortion Act with the Human Fertilization and Embriology Act of 24th April 1990 extended the clause of conscience also to artificial insemination.

Generally, conscientious objection in UK encounters the following limitations: firstly the case of treatments necessary to save a life or to avoid a serious or permanent physical or mental injury of the pregnant woman. Another limitation is laid down in paragraph of section 4 of Abortion Act and concerns "the burden of proof of conscientious objection that shall rest on the person claiming to rely on it"²⁸.

3.9 Abortion Law in Spain

As far as Spain is concerned, on 30th November 1983 the first draft of a national regulation decriminalizing abortion was implemented²⁹. This Law, though allowing abortion, however did not recognized conscientious

subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has conscientious objection: Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it. (2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman. (3) In any proceedings before a court in Scotland, a statement on oath by any person to the effect that he has a conscientious objection to participating in any treatment authorised by this Act shall be sufficient evidence for the purpose of discharging the burden of proof imposed upon him by subsection (1) of this section".

²⁸ J. García Oliva - F. Cranmer, *Objeción de conciencia al aborto en el Reino Unido*, in *RGDCDEE*, n. 23 (2010), pp. 15-16, Traducción del original en lengua inglesa a cargo de Santiago Cañamares Arribas.

²⁹ The first law on abortion in Spain was approved on 26th December 1936 for Cataluña. Cf. R. Navarro-Valls - J. Martínez Torrón (and others). *Le obiezioni di coscienza. Profili di diritto comparato*, Torino 1995, p. 107.

objection. As a consequence an appeal before the Constitutional Court was filed. By a sentence of 11th April 1985³⁰, the Court declared as legitimate, under a Constitutional point of view, for health personnel to invoke conscientious objection according to article 16 of 1978's Constitution³¹. The same court has then confirmed such interpretative choice by two subsequent sentences of 16th and 23rd January 1998³².

The recognition by the Court was sufficient to legally accept the institute of objection, according to Spanish system. In fact, supported by the Constitution, the right to objection could not be easily neglected by the right to abortion.

Conscientious objection obtained a legal framework only by the Organic Law no. 2 of 3rd March 2010 regarding sexual and reproductive health and voluntary termination of pregnancy³³. Article 19 of the above-mentioned law states that "*Health care providers directly involved in voluntary termination of pregnancy may object on conscientious grounds, provided their choice does not undermine access or the quality of care*"³⁴. It also states that Refusal to perform a pregnancy termination procedure for reasons of conscience is a personal decision, which must be made in advance and communicated in writing.

The regulation we are examining, unlike legal cases, acknowledges the right to objection only to health personnel directly involved in performing

³⁰ *Ibidem*, page 108, where we can read, "[...] *L'obiezione di coscienza forma parte del contenuto del diritto fondamentale di libertà ideologica e religiosa riconosciuto dall'art. 16.1 della Costituzione e, come anche il Tribunale ha più volte riconosciuto, la Costituzione è direttamente applicabile, in particolar modo in materia di diritti fondamentali*" (STC 53/1985, BOE del 18 maggio 1985).

³¹ Cf. Constitución Española, of 31st October 1978 (ratified on 6th December and approved by Courts on 27th December 1978), art. 16 (1), "*Se garantiza la libertad ideológica, religiosa y de culto de los individuos y las comunidades sin más limitación, en sus manifestaciones, que la necesaria para el mantenimiento del orden público protegido por la ley; (2) Nadie podrá ser obligado a declarar sobre su ideología, religión o creencias*", in <http://www.legislationline.org/documents/section/constitutions>.

³² Cf. M. Domingo Gutiérrez, *La objeción de conciencia al aborto. Evolución Jurisprudencial*, in *RGDCDEE*, n. 23 (2010), p. 12.

³³ Cf. *Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo*, in BOE, 4th March 2010, section I, pp. 21001-21014.

³⁴ *Ibidem*, art. 19 (2), p. 21011: "*Los profesionales sanitarios directamente implicados en la interrupción voluntaria del embarazo tendrán el derecho de ejercer la objeción de conciencia sin que el acceso y la calidad asistencial de la prestación puedan resultar menoscabadas por el ejercicio de la objeción de conciencia*"; Cf. trad. italiana in www.ain-es.org/informe2010/ita/pdf/spagna.pdf.

abortion; such a right is suspended if “it does not undermine access [to abortion] or the quality of care” is not reduced.

According to 2010’s Law Pregnancies may be terminated within the first 14 weeks of gestation; within the 22nd week of pregnancy, if the woman’s life or health is in serious risk or if there is a risk of serious foetal anomalies; furthermore, after 22nd week from conception in case of foetal anomalies incompatible with life or when the foetus is found to suffer from an extremely serious condition affecting his/her vital functions.

Abstract: Today conscience, which is influenced by culture and society, is considered as ‘a kind of self-regulation of the system through its internalization within man’.

In this context, to the objection genuinely determined by religious concerns other political or philosophical reasons are added, which in turn secularize the phenomenon of conscientious objection.

Objection to abortion, in particular, consists in refusing to perform abortive practices and acts aiding their realization.

At present, conscientious objection is at the centre of heated debates in various countries. Therefore, this paper suggests adopting a comparative perspective in order to address issues concerning the extent to which physicians may refuse to participate in abortion procedures.

Keywords: Conscientious objection; abortion; termination of pregnancy; Law 194/78; article 18 of UDHR; Jurisprudence.