

Personal and Institutional Objection: Individual and Collective Liberties from the Sacred to the Secular

Written by

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I. Background:

Conscientious Objection, defined as the disobedience of a legal duty on the grounds that it collides with the axiology, moral or religion of an individual or group, involves a tradition that exceeds cultural, state, political and geographic boundaries. The Bible itself depicts several and diverse such cases, like Abraham, the patriarch, who refused to commit idolatry when ordered by King Nimrod;² the Hebrew midwives Shiphrah and Puah, who ignored the Pharaoh's command to kill every Jewish newly-born baby boy;³ or Chananya, Mishael and Azarya, who refused to worship the statue erected by Nebuchadnezzar.⁴ At the beginning of the Book of Joshua it is expressly stated, accordingly understood by the Talmud and thus legally codified, that a person must strive and be courageous to challenge the orders of a king or coercive power-holder and their enforcement if they contradict the provisions of the Torah.⁵ Numerous cases in the Talmud account for the Jewish disobedience of Greek and Roman laws which banned the study of the Torah and the accomplishment of other precepts.

Admittedly, the earliest episode of resistance against a genocidal order is the previously outlined Exodus 1:15-16. Once the Israelites had been enslaved and in order to reduce the

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² See among other homiletic texts, *Midrash Breishit Rabbah*. Aramaic-Hebrew edition by Isasmar Beer. Berlin: Zusman-Iabetz, 1866. Vol I, 38:9, p. 69b. *Seder Eliahu Rabbah*. Aramaic-Hebrew edition by Lector M. Friedman, *Seder Eliahu Rabah uSeder Eliahu Zutah*. Vienna: Israelitisch Theologischen Lehranstalt, 1900. Chapter 6 (5), p. 27.

³ Exodus I:15-16.

⁴ Daniel III.

⁵ Yehoshua (Joshua) I:18. *Babylonian Talmud*, "Sanhedrin" 49a. Maimonides, *Mishneh Torah*, "Ilchot Melchim uMilchamot" III:(9) [10]. Hebrew edition by Yosef Kapach. Kriat Ono: Machon Mishnat HaRaMbam, 2007. Vol. "Shofetim II", p. 259.

growth of their people and prevent their liberator's birth, the Pharaohs requested all Hebrew midwives, two of whom were called, as it was already said, Shiprah and Puah, to kill all of the baby boys born at the deliveries they assisted. In the words of the Bible: *"But the midwives feared God, and did not do as the king of Egypt commanded them, but saved the male children alive"*. On receiving the news, the Pharaoh required, under pain of death, a satisfactory explanation from the midwives, who replied: *"Because the Hebrew women are not like the Egyptian women; for they are lively and give birth before the midwives come to them"*.⁶ Curiously, the denigration of Hebrew women by comparing them with animals diverted the suspicion and they cleverly achieved their goal by using the Pharaoh's own prejudice against the Israelites. Naturally, any kind of confrontation with such tyrannical and ruthless power would have led to their death, along with that of many others. The midwives' objection to such genocidal ruling which, among other reasons, contradicted the quintessence of their job was graceful in the eyes of God, who proceeded: *"Therefore God dealt well with the midwives, and the people multiplied and grew very mighty. And so it was, because the midwives feared God, that He provided households for them [He rewarded them with families whose offspring were the priestly, levitical and monarchical dynasty]"*.⁷ Notoriously, the definition of genocide according to article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide -approved and in force since 1948- regards as such any measures intended to prevent births within a national, ethnical, racial or religious group.⁸

Centuries later and distant from the Jewish culture, Sophocles' Antigone disobeys Creon, the tyrannical king of Thebas, who abandons her brother Polynices' body unburied and exposed to vermin for participating in a rebellion against him, and condemns to death anyone who shall dare to inter him. Antigone gives her brother ritual burial and upon such accusation she replies: *"...nor deemed I that thy decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of to-day or yesterday, but from all time, and no man knows when they were first put forth"*.⁹ Also Socrates, confronting the State's demand to cease his speculative-questioning activity, states: *"Men of Athens, I honor and love you; but I shall obey God rather than you, and while I have life and strength I shall never cease from the practice and teaching of philosophy, exhorting anyone whom I meet after my manner, and convincing him..."*.¹⁰

There are two fundamental aspects to be underlined of these three episodes of objection and disobedience. First, they were not intended to seize political power, or change one regime or government in particular, neither to impose a new legal order by insurrection,

⁶ Hebrew-Spanish edition by Aryeh Coffman with commentaries. México: Editorial Jerusalem de México, 2001. The square brackets in italics are textual, the others are of my own.

⁷ The square brackets are of my own and according to the Babylonian Talmudic exegesis in "Sotah" 11b, and to the RaShI's commentaries on that same biblical verse.

⁸ Rafael Nieto Loaiza (Coord.). *Convención para la Prevención y la Sanción del Delito de Genocidio*. Costa Rica: Instituto Interamericano de Derechos Humanos, 1992. Ver también *Documento de la Oficina de las Naciones Unidas para la Prevención del Genocidio y la Responsabilidad de Proteger*. <https://www.un.org/en/genocideprevention/>

⁹ Sófocles, "Antígona". Spanish edition and translation by José Vara Donado, *Sófocles: Tragedias Completas*. Madrid: Cátedra, 1996, p.148. See also p. 137, when Antygona says: "It is an honor for me to die fulfilling this duty. Loved by him, in his company I will lie, in the company of whom I love, after having carried out holy actions, because the time during which I must please those below is longer than the time that I must please those above. I will lie there forever. But you, if you like it, continue to despise what the gods appreciate." (My own translation)

¹⁰ Platón, "Apología de Sócrates". Spanish edition and translation by J. Carlonge Ruiz, E. Lledo Íñigo y C. García Gual, *Platón: Diálogos I*. Madrid: Gredos, 1993, p. 168, 29d.

subversion or revolution. Second, they are founding events. The former, Abraham's and the midwives' biblical stories, give support to the primary nation and monotheistic culture and their continuity; the next constitutes the work of the greatest playwright and scholar of the ancient world; and the latter, the father of philosophy's production. All of them encourage the fight against injustice, either by confrontation or silence. As summarized by Ralph Emerson "*good men should not obey the laws too well*".¹¹ It is needless to mention Thomas More and King Henry VIII, as well as the objection to military service in Vietnam, among other contemporary examples.

II. Authority and Power, Duty and Obligation:

From the Jewish view, these biblical examples and the millenary development of their legal corpus itself as an individual and collective legal frame presume a diasporic Jew subject to a gentile government, therefore, someone prepared to embrace a preexistent political, legal and administrative system. A clear example of this, key to the subject at issue, is the principle stating, in Aramaic, "*dina de-malkhuta dina*" or "the Law of the Kingdom is Law". Thus, the Jewish people will abide by the taxing, administrative or commercial law of the State,¹² provided it is not abusive towards them per se, in comparison with the rest of the citizens. In this respect, the Jewish legal corpus, the oldest one and currently in force, supports state legality but, in case of conflict between them, the duty towards state law expires because religious Law is imperishable. This distinction between divine law as authority and state law as the power of a society which produces for itself a governmental mechanism in the form of existential frame that conforms to its principles is what avoids despotism, restricting the natural totalitarian inclination of power. Hence, the notion of authority, in terms of a value imposing a duty that constrains a man, includes and restricts the notion of power as an instrument imposing a duty that satisfies him.¹³ For Judaism, only those duties emanating from precepts give meaning to existence; it is not inherent in anything else. It is man who gains meaning and value by acknowledging his condition of such in front of God, as a prayer for the Day of Atonement says: "*so that a man hath no preeminence above a beast: for all is vanity*".¹⁴ *You [God] have distinguished man from the beginning and you will recognize him standing before You*". And the ending of the Ecclesiastes, quoted in the first verse of that prayer, reads: "*Let us hear the conclusion of the whole matter: Fear God, and keep his commandments: for this is the whole duty of man*".¹⁵ Therefore, and in accordance with the reference of Deuteronomy 32:47 to the compliance of precepts and their transmission across

¹¹ Ralph Waldo Emerson, *Ensayos*. Spanish edition and translation with commentaries by Javier Alcoriza. Madrid: Cátedra, 2015. "Política", p. 434.

¹² See Yitzjak Alfasi's commentaries on *Babylonian Talmud*, "Baba Kamma" 40, in Hebrew-Aramaic edition by Friedman. Jerusalem: Oz veHadar, 2006. [RI" F 113a-115a], pp. 113-119. See also Shlomo ben Aderet, *Jidushei HaRaShbA*. Hebrew-Aramaic edition by Mordechai Leib Katzenellenbogen with commentaries. Jerusalem: Mossad HaRab Kook, 2008. Vol. "Baba Batra (I-IX)" 54b, pp. 895-908. Tosafot on *Babylonian Talmud* "Baba Kamma" 58a. Maimonides, *Mishneh Torah*, "Ilchot Guezelah uAbdah" V:11[9]-18 [17]; "Ilchot Zejjah uMatanah" I:15 [17]. *Op. cit.* Vol. "Nezikin", pp. 343-348; "Kinyan I", p. 381; Yosef Karo, *Shulchan Aruch*, "Joshen Mishpat" 369:11.

¹³ Yosef Albo, *Sefer HaYikarim*. Hebrew edition by Guidlei Shlomo with commentaries. Warsaw: Yitzchak Breizbalt, 1930. I:7-10. pp. 38-49.

¹⁴ Kohelet (Ecclesiastes) III:19. Hebrew-Spanish edition by Katz. Translated by Yaakov ben Yitzchak Huerin, with commentaries. México: Editorial Jerusalem de México, 2006. Vol. V.

¹⁵ *Ibid.* The square brackets are of my own.

generations with the warning: "*For it is not a vain thing for you; because it is your life*",¹⁶ biblical patriarchs and matriarchs, prophets and even Job represent this by repealing any human institution when in conflict with a precept. In this framework of human duties and obligations, the authority and value is God, whereas the State is the instrumental power for axiological concretion. Then, the unconditional duty to obey the Torah differs from the conditional designation of the king of Israel, which depends upon the people, since it is not possible to impose on them an unwanted government.¹⁷ In addition to this and in order to portray a drastic case on the nature of legal enforcement and acceptance, according to the Talmud's narrative, the Torah itself was forcefully imposed to the people of Israel when God uprooted Mount Sinai from the ground and held it over the people, constraining them to accept it or be buried under it.¹⁸ The most popular explanation to such extreme degree of coercion was that the imperative and essential vital character of the Torah for the existence of the people of Israel was such that its acceptance or validity could not be trusted to human will.¹⁹ Nevertheless, the Talmud exegesis itself warns that mere coercion would, according to Law, exempt from penalty any Jew who failed to comply with it since, in such terms, the one compelled would be relieved in case of breach. Therefore, it is also explained, based on Esther 9:27, that in the time of Achashverosh (Xerxes I / Artaxerxes II), the Jews willingly accepted the Torah.²⁰

Consequently, the duty to the State is not absolute and thus, it admits objections and appeals, as an instrument consistent with duty and even within a democratic period, when such obligations contradict the duty imposed by the Torah and its legal development, since it entails an axiological rather than instrumental significance. Otherwise, if mere legitimacy meant absolute obedience, transforming an instrument that society created for itself into its own significance, fascism would rise. In fact, this was what Adolf Eichmann argued in his defense of the crimes against humanity charged on him, saying that he was a citizen who obeyed legitimately enacted law, regarding the State as the supreme value and duty. He considered himself unable to challenge or hesitate about its compliance, refraining from any kind of axiological, moral or religious judgment that would question his duty towards the State. This is how Judaism every day actually expresses the constant tension coercion-acceptance, along with the permanent watchful attention towards the difference between purpose and instrument, authority and power, duty and obligation, value and law. This restricts absolutism, avoiding devotion to the profane and making individual and collective liberties stronger.

This pristine distinction of authority, duty and value from power, obligation and law has always been regarded by philosophy as the conflict of personal or collective axiology towards the law when the latter is inconsistent with the former. This has been so from individualism, in which the subject is considered theoretically and detached from his principles, such as for Hobbes, Locke and Hume; to historical contextualism, like for Plato, Aristotle, Aquinas, Maimonides, Rousseau, Hegel and Marx. The same cross-cutting approach appears in the right to objection, both iusnaturalistic, from Greece and Cicero, for whom there is a universal law, common to all humanity, which is categorically

¹⁶ Aryeh Coffman, *op. cit.* The square brackets are of my own and according to the RaSHI's exegesis and his super-commentaries.

¹⁷ See Naftali Yehudah Berlin, (Hebrew), *HaEmek Davar*. Jerusalem: El HaMekorot, 1984. Vol. "Devarim" (Deuteronomy) XVII:14, pp. 154-155.

¹⁸ *Babylonian Talmud*, "Avodah Zarah" 2b; "Shabbat" 88a.

¹⁹ See MahaRaL's commentary on Exodus XIX:17, in Yehudah Betzalel Loew (Hebrew), *Sifreh HaMahaRaL / Gur Arie'el al HaTorah*. Israel, 1972. Vol. II, p. 119.

²⁰ See RaSHI's commentary on *Babylonian Talmud*, "Shabbat" 88a.

superior to positive law; as well as for the modern constructivism of John Rawls, or the interpretative praxis of Ronald Dworkin, or the analytical jurisprudence of Joseph Raz. To them, assuming law as artificial, there is always a Kantian principle of personal autonomy or intimate sphere in force, whose exercise and protection against public authority grants freedom to disregard a legal command.²¹ Therefore, law must be conceived in a way that the individual's fundamental rights are always guaranteed in order to achieve legal efficacy, since it depends on the acceptance of its rules and whose only chance is moral coherence.

Nevertheless and even if in a democratic society, in the words of Jorge Portela, "*civil disobedience arises as one of the central issues of contemporary political ethics*",²² the resistance to those rules or commands which contradicted a civilization's most basic and essential elements of morality, religiousness or axiology, which cost the life of those who objected and disobeyed them, far from becoming laws fully guaranteed by the State, wrongfully and deliberately undermined axiological, religious and moral convictions and, therefore objection turned into disobedience. Such denigration and even stigmatization could well be explained as the concealment of the lack of legitimacy or even of the effect of the law enacted and objected or disobeyed, as well as the lack of representation of the democratic institutions themselves. This means the admissibility of state interference in the axiological realm of the citizens, quite dangerous as a social trial if not properly justified.

III. The Case of the IVE (Voluntary Interruption of Pregnancy) 230-D-2018 Bill:

This is exactly what the recent bill to regulate voluntary abortion, IVE 230D2018, propounds. Not only does it explicitly state in section 15 of Title II, "*Conscientious Objection can be withdrawn in the same way, and shall be sustained in all the areas of activity, whether in the public or private sector, where the professionals may practice [...] Institutional and/or ideological objection is forbidden*", incurring a *contradictio in terminis*, but it also fails to provide necessary and sound justification for the legal killing of a human being inside another, when there are alternatives to deal with the problems of maternal death for unsafe abortion and unwanted pregnancy, though by consented sexual intercourse, which are not so extreme; an issue that is beyond the scope of this article. Moreover, the express prohibition of institutional or ideological objection included in the same section involves a denial of an institution's conscience. It is not the preachable conscience of a man for his humanity, but for his autonomy, as part of his fundamental right to have his own ideology, institutional ethics. The same argument is applied to children, whose conscience is not legally recognized, not because of absence of humanity but of full autonomy, what relieves them of responsibility. In bioethical terms, although the integral personalist school, or moral-philosophical realism, agrees with the objection, so does the principled one, since it is based on autonomy, nonmaleficence and justice. The problem in the latter case is that, on implementing its principles without support on ontology or anthropology, they become relative as well as ambiguous and voluble at hierarchical classification. They depend on external factors which affect the assessment of

²¹ See Immanuel Kant, *Fundamentación para una Metafísica de las Costumbres*. Spanish edition and translation by Roberto R. Aramayo. Madrid: Alianza Editorial, 2008. Capítulo II, pp, 82-139.

²² Jorge Portela, *La Justificación Iusnaturalista de la Desobediencia Civil y de la Objeción de Conciencia*. Buenos Aires: Editorial de la Universidad Católica Argentina, 2005, p. 27.

dignity and liberty quantities arbitrarily, and this way their equality status is *a priori* broken.

In this particular, an institution's conscientious objection makes complete sense. According to Jorge Llambías,²³ a well-known Argentinean jurist, the legal entities' non-pecuniary rights present characteristics inherent in personality, like honor, and they can exercise the subjective rights there involved. Under the amended sections 117 and 117 *bis* "Crimes against the honor" of the Argentinean Penal Code, it is not even necessary, as it used to, a provision specifically stating that such wrongdoings comprise both natural and artificial persons, since it is obvious that label and slander may well be committed against an entity. Jurists unanimously support the right of institutions to bring either civil or criminal actions to defend their honor and good reputation. Santos Cifuentes,²⁴ another remarkable Argentinean author, agrees on this point in connection with non-governmental organizations or foundations whose objectives are altruistic and nonprofit, not necessarily because it affects their property but their autonomy, considering ideology as an essential subjective and identity-forming immaterial element subject to legal protection. In other words, there is a moral damage suffered by the legal entity, since a law can affect the presumed non-pecuniary legitimate interest within such right. Otherwise, the absolute dimension of law can undermine such attributes like prestige, honor, good name, reputation and righteousness of the actions and practices deriving from the religious or ideological character of the institution, treasured by the community and not necessarily limited to the detriment to business trustworthiness or loss of clients, sales and profits. This loss of subjectivity of the legal person caused by the absolute dimension of the law, which contradicts its ideology, is not considered in terms of spiritual, sentimental, physical or conscientious aspects belonging to a natural person, but, as explained by the Argentinean jurist Eduardo Zannoni,²⁵ as a subject regarded in opposition to the outside world bearing a personality or idiosyncrasy, an ethical code based on its ideology and purpose, what eventually inflicts moral damage on the legal person. Hence, there is no monetary damage nor entitlement of the legal person to rights exclusively belonging to the natural one, instead, the former becomes holder of those rights related to the latter in fundamental and essential terms, as provided mainly under section 279 of the new Argentinean Civil and Commercial Code, which states that the representation of the will of a legal person bound to produce legal effects shall be endowed with morality. In line with the foregoing, even for Karl Marx, who considered inadequate for transformed societies, in our case from a dictatorship into a democracy, to be limited by the existing justice and necessary for them to innovate on the basis of values like the self-fulfillment of every community and their destiny, it is mandatory to solve today's logical contradiction which, on the one hand, denies the institution's morality and its conscientious objection and, on the other, it demands it acts according to moral.

Therefore, imposing the obligation to render services to people or institutions under pain of criminal charges, disregarding the professional axiology or institutional ethics or breaching fundamental rights protected by the Argentinean National Constitution, as provided under articles 14, 19 and 32, to the extent of preventing them from practicing

²³ Jorge Llambías, *Tratado de Derecho Civil (Parte General)*. Buenos Aires: Abeledo-Perrot, 2010. Vol. II, p. 62-63.

²⁴ Santos Cifuentes, "El Daño Moral y la Persona Jurídica". In F. Trigo Represas y R. Stiglitz (Dir.) *Derecho de Daños (Primera Parte)*. Buenos Aires: La Rocca, 1991.

²⁵ Eduardo Zannoni, *El Daño en la Responsabilidad Civil*. Buenos Aires: Astrea y Depalma, 1982, pp. 462-465.

their profession due to their principles, becomes unconceivable in a so-called democracy and, in the words of Rawls' doctrine, under the rule of reasonable pluralism. This National Constitution, just like most constitutions, whose main purpose is to restrict political power, implicitly acknowledges the right to objection, defined by Rawls²⁶ as the breach of a direct or indirect administrative or judicial order, critically transformed into disobedience, and defined by Hugo Bedau²⁷ as the public, non-violent and conscientious breach of law intended to frustrate a law, policy or government decision. None of these involve subversion or rebellion against the rule of law; on the contrary, they accept their legitimacy as abiding citizens rather than refusing their duties. Although disobedience embraces the majority's justice beliefs, whereas objection is more personal, related to religious or moral principles, both involve what Rawls calls natural duties, meaning axiological not legal ones, which, out of ignorance, exclude minorities, thus jeopardizing social cooperation and giving rise to the right to resist.²⁸

IV. Conclusion:

For that reason and in order to reduce disobedience and enhance efficacy at Law, any bill should in the first place comply with the basic principle of reasonability, which consists of three trials: (A) Adequacy, to assess if its purpose is legitimate and consider, in turn, if the means propounded is both factually and legally suitable. (B) Necessity, to estimate if the measure attempted is the least restrictive and equally efficient in comparison with the rest available to accomplish such purpose. (C) Proportionality, to consider if the citizens' claims arising from such law are acceptably balanced against the benefits its application would obtain for common welfare.²⁹ This kind of analysis avoids confusion as regards the justifying burden, which demands the individual or group to produce arguments and evidence to be relieved from abiding a law which contradicts their axiological, moral or religious background, when it is the State the one who must support satisfactorily the requirements to impose an obligation to citizens that is legitimate, representative and unlikely to interfere inadmissibly with their axiological domains. Natural and historically, behavioral freedom was always first and after that came the legal restriction in order to conform to social, national and state regulations, where the Rule of Law must guarantee the protection of the axiological decisions to allow his citizens perform in accordance with their personal autonomy and identity. That is to say, in times of plural democracy, every order and legal rule must protect a person's autonomy and intimacy sphere when it collides with their axiological criteria. Thus, the objection in terms of disobedience cannot be tolerated, or *contra legem*, as a concession without consent to solve conflicts between majorities and minorities. Instead, it must be respected *secundum legem*, as a liberty and fundamental right. It is a principle of human dignity, rather than a legal duty. In the words of the father of the social contract, Jean-Jacques Rousseau: "*To renounce liberty is to renounce being a man, to surrender the rights of humanity and even its duties. For him who renounces everything no indemnity is possible. Such a renunciation is incompatible with man's nature; to remove all liberty*

²⁶ See John Rawls, *A Theory of Justice*. Cambridge: Harvard University Press, 1971.

²⁷ See Hugo Adam Bedau, "Civil Disobedience and Personal Responsibility for Injustice". In Hugo Adam Bedau (Ed.), *Civil Disobedience in Focus*. Londres: Routledge, 1991. pp. 49-67.

²⁸ See John Rawls, *op. cit.*

²⁹ See Robert Alexy. *Teoría de los Derechos Fundamentales*. Spanish edition by Ernesto Garzón Valdés. Madrid, Centro de Estudios Políticos y Constitucionales, 1993.

from his will is to remove all morality from his acts.”³⁰ Therefore, the present denial to exercise the right to personal and institutional objection, either omissive or active, undermines a fundamental right and breaches individual and collective liberties, along with the right to be free of discrimination on the grounds of religion or moral.

³⁰ Jean Jaques Rousseau, *El Contrato Social*. In J.J. Rousseau, *Discurso sobre el Origen de la Desigualdad entre los Hombres. El Contrato Social*. Spanish translation and notes by José López y López and Consuelo Berges. Buenos Aires: Ediciones Orbis, 1984. “De la esclavitud”, p. 161.