

Denial of Services due to Conscientious Objection

POSITION PAPER

Ana Cristina González Vélez

**Grupo
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POR EL DERECHO
A DECIDIR
GDC COLOMBIA

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Denial of Services due to Conscientious Objection

P O S I T I O N P A P E R

| Ana Cristina González Vélez |

With the support of
Gloria Inés Penagos, Efraín Noguera, Ximena Cortés

Grupo Médico por el Derecho a Decidir - Colombia
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The **Grupo Médico por el Derecho a Decidir** is a network of doctors from different specialty areas that advocates for timely, comprehensive access by women to sexual and reproductive healthcare services, grounded in respect for their freedom to make choices. It is part of the Global Doctors for Choice (GDC) network.

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Antecedents

In 2006 the Colombian Constitutional Court, through the C-355 ruling, decriminalized abortion in three instances:

- (i) When continuing the pregnancy puts the woman's life or health at risk, as certified by a medical doctor.
- (ii) When there is a significant malformation that would make it impossible for the fetus to survive outside the uterus.
- (iii) When the pregnancy is a result of non-consensual sexual intercourse, incest, unauthorized artificial insemination or in vitro fertilization and this event has been duly reported to the authorities.¹

¹ Colombian Constitutional Court Ruling C-355, 2006

This ruling is cited nationally and internationally for promoting sexual and reproductive rights within a global human rights framework, reflecting the importance of protecting sexual and reproductive rights in order to guarantee the full and free exercise of human rights for women. It is comprised by a series of solid arguments for the defense of sexual and reproductive rights. Nevertheless, we have found practical difficulties in the application of this ruling due to the misinterpretation of the concept of conscientious objection and the procedure for its correct use. The following examples can be cited:

1. Entire institutions stating that they conscientiously object, collectively.
2. Personnel other than the provider who is performing the procedure (such as administrative employees) conscientiously objecting.
3. Providers who do not explicitly state that they are conscientious objectors.
4. Providers who exercise their right to conscientiously object but do not refer the patient to someone who will perform the procedure.
5. Providers who do not explicitly conscientiously object attempting to convince women not to have abortions, often demanding unnecessary consults and tests. In other words, placing barriers as opposed to openly objecting.
6. Providers who do not conscientiously object and yet do not perform procedures or provide information to women about where to go.
7. Providers who are not sure about whether or not they are conscientious objectors.

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There are two main themes to be analyzed within this ruling: assessment of rights and conscientious objection.

Regarding the assessment of rights, the court stated:

- (i) None of the values, principles or fundamental constitutional rights protected by the constitution can lead to the absolute denial of another value, principle

of constitutional right. They can be assessed in relation to other values, principles and constitutional rights which are also ensured and relevant from a constitutional standpoint.

- (ii) The Colombian constitution protects the value of life and the right to life, encompassing the value of fetal life within the general scope of the right to life.
- (iii) Measures taken to protect the life of an unborn fetus cannot interfere with the rights of the gestating woman, amongst which are the right to be free of all discrimination or violence as well as the right to the full enjoyment of sexual and reproductive rights.
- (iv) Additionally, the gestating woman's right to dignity, her right to freedom and her ability for self-determination cannot be affected by any measures taken to protect fetal life. All measures must focus on preserving her life and her integral health- both physical and mental.
- (v) Prioritizing fetal life to the point of criminalizing abortion on any and all instances is equivalent to allowing the state to interfere disproportionately and unreasonably.²

Since the T-396 ruling in 1996, the constitutional court has clarified that "legal entities are not subject to the same inherent rights as legal persons", moreover, it has specified that rights regarding human dignity and rationality cannot be applied to legal entities. In this case, the Court explicitly states that it is forbidden for legal entities providing health services to exercise the right to conscientious objection by denying abortion services. (Constitutional Court Ruling T-396 of 1996).

² Taken from a summary of the T-388 ruling written by Paola Salgado, lawyer for Mesa por la Vida y la Salud de las Mujeres.

What court ruling C-355 8 states about conscientious objection

It is important to remember that conscientious objection is not a right that applies to legal or state entities. It is only possible for legal persons to exercise this right; therefore there can be no health providing entities —clinics, hospitals, health centers— that claim to be conscientious objectors regarding abortion. Concerning legal persons, it is important to highlight that conscientious objection must stem from deep moral and religious convictions, it is not about the provider’s opinion for or against abortion and it cannot entail lack of knowledge of women’s rights.

When a provider claims to be a conscientious objector, they must immediately proceed to refer the patient to another provider who is willing to perform the procedure, without subjecting her to prejudice, through the devices established by the medical profession.³ The concept of prejudice includes any conduct that compromises, infringes upon, or risks the right to health of the girl, teen or adult woman.

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If the provider refuses to make a referral, they would be carrying out an illegal act by generating barriers for women to access services, education and information pertaining sexual and reproductive health. In this regard, the CEDAW (Convention on the Elimination of all Forms of Discrimination against Women) states that laws which punish medical interventions that affect women specifically constitute access barriers for medical care, compromising their right to gender equality in health, thus violating the obligation of all states to respect international rights. (CEDAW, General Recommendation No. 24).

After ruling C-355 of 2006, the Health Ministry issued decree number 4444 of 2006, which states that conscientious objection is of an individual —not institutional— nature and only for direct providers —as opposed to administrative personnel— (Art. 5). This organism also issued a set of Technical Norms for Legal Abortion Services, article 4905 of 2006,⁴ establishing guidelines related to the rights of women requesting an abortion and facing conscientious objection. It states: “When direct service providers consider

³ Ruling C-355 of the Colombian Constitutional Court.

⁴ This is currently suspended due to pending administrative legal issues.

that they cannot perform an abortion procedure due to conscientious objection, they are obliged to follow professional ethics codes, which indicate that they should refer patients to capable colleagues who are not against legal abortion. In these cases, the following rules should be observed:

- a. Information regarding the sexual and reproductive rights, treatment options and choices (if any) of the gestating woman cannot be denied or withheld, changing her mind or persuading her to act differently should not be attempted.
- b. Patients should receive necessary counselling and be immediately referred to a non-objecting, trained provider within the same institution or within another, easily accessible establishment that is able to guarantee service provision.
- c. When the conscientious objector is the only professional capable of providing the service and it is not possible to refer the patient to a non-objecting provider in a timely manner, or when the patient's life is at risk, the provider must perform the abortion procedure in keeping with his obligation to protect the woman's life and health.
- d. Confidentiality must be respected regarding the patient's identity, in case of future trial by a medical ethics committee. (6.2. Admission of the gestating woman)

New constitutional court rulings and conscientious objection

After the C-355 ruling of 2006 and stemming from several cases where women's rights were violated after requesting a legal abortion, three crucial decrees were issued regarding conscientious objection. In these cases, conscientious objection was applied incorrectly or used as an argument to avoid mentioning the existence of other barriers: The T-209 ruling of 2008, the T 946 ruling of 2008 and the T-388 ruling of 2009, which forbids judges from claiming conscientious objection.⁵

The following pages describe the contents of these rulings⁶ in order to enable a better understanding of why the legal framework constitutes a kind of policy guideline for

⁵ For this revision of the rulings, summaries prepared by Paola Salgado were used.

⁶ Rulings performed under ward of the Colombian Constitutional Court.

abortion service provision, defining standards and limits for conscientious objection. It is a jurisprudential, political response with tangible instructions for each area of service provision, interpreting conscientious objection within the framework of the current Colombian constitution.

Ruling T-209 of 2008

Ana (her name has been changed to protect her identity) was 13 years old when she tried to kill herself. This is how her mother found out that she was pregnant because she had been raped. This pregnancy seriously affected Ana's mental and physical health. After filing a police report and obtaining a request for an abortion from the Center of Attention to Victims of Sexual Violence (CAIVAS) Ana was denied a procedure by every available specialist, claiming conscientious objection. They based their argument on the fact that it was impossible to prove that Ana's pregnancy was a result of rape because the gestational age did not coincide with the date of the rape incident. The ward judge agreed with this argument to deny service. After being continuously questioned and rejected as well as threatened by the rapist and his family, Ana was forced to carry the pregnancy to term and inevitably, to assume all the inherent risks that it posed to her health.

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What did the court say?

- a. Health professionals in all areas have the ethical, constitutional and legal obligation to respect women's rights.
- b. Abortion is not a crime when it is voluntarily requested by a woman who has filed a legal report denouncing an instance of rape.

- c. Health professionals and/or administrative personnel cannot refuse to perform or authorize an abortion procedure by demanding paperwork or requisites other than the ones approved by the law.
- d. Conscientious objection is not a right assigned to legal entities.
- e. Conscientious objection is a right that can only be assigned to legal persons.
- f. Conscientious objection should be presented individually, in a document that duly describes motives and justifications.
- g. Conscientious objection cannot stem from a person's opinions regarding abortion.
- h. Conscientious objection cannot infringe upon the fundamental rights of women.
- i. Any health professional that refuses to perform an abortion due to conscientious objection must immediately refer the patient to another provider who is willing and able to perform the abortion. A list of these providers must be readily available.
- j. When abortion services are denied due to conscientious objection, the procedure must be performed by another professional, without prejudice and without the possibility of future questioning or reprisals.
- k. The social security system must be able to guarantee an adequate number of available professionals who are willing and able to provide abortion services.

Ruling T-946 , October 2nd 2008

Berta, 19, who was severely physically and mentally disabled, was 18 weeks pregnant when her mother noticed and requested an abortion to their attending physician. The doctor refused to perform the procedure augmenting that it was impossible to tell whether the pregnancy was in fact, a result of rape. Berta was forced to carry the pregnancy to term and her mother, to assume the child's care. The case was reviewed, as it became evident that constitutional law was breached by imposing disproportionate burdens on the patient as well as by demanding additional unlawful requirements. The Constitutional Court and the National Medical Ethics Tribunal agreed that the doctor did not meet the requirements established by the court to declare himself a conscientious objector, infringing upon Berta's rights to integrity, health, autonomy and intimacy, denying her an abortion without appropriate justification and wrongfully citing conscientious objection.

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What did the court say?

- a. Conscientious objection is not an absolute right and it is limited by the constitution when it infringes upon fundamental rights.
- b. When a pregnancy results from sexual violence it is only necessary to file an official report with the appropriate authorities in order to obtain an authorization for an abortion from health providers. Demanding any other requisite in this context represents an obstacle to the full and free exercise of women's sexual and reproductive rights.
- c. Clinics, hospitals and/or any other institution providing health services may not be declared conscientious objectors when it comes to performing an abortion.

- d. Conscientious objection may only and exclusively be cited by direct providers, not by administrative personnel.
- e. If a provider wishes to declare themselves a conscientious objector, they must provide appropriate referrals to other professionals who will perform abortion procedures in order to avoid posing access barriers to this essential health service.
- f. Members of the health system must have a list of public and private abortion service providers readily at hand.

Ruling T-388 of 2009

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Maria was 23 weeks pregnant when she found out that, according to a medical review board, her son would not survive past birth due to severe bone malformations. She was also informed of her right to end her pregnancy. When she was referred, the provider demanded a court order to perform the abortion procedure, posing a significant delay. The first judge who reviewed the case declared himself to be a conscientious objector, delaying the painful process even more, until Maria was 31 weeks pregnant.

What did the court say?

- a. There can be no additional requirements other than those described by the C-355 ruling of 2006. This represents a disproportionate, arbitrary burden on women.
- b. Judicial authorities cannot declare themselves to be conscientious objectors in order to abstain from authorizing abortion requests when the patient is within the guidelines established by de C-355 ruling of 2006.

- c. Women who are within the guidelines of the C-355 ruling of 2006 have the right to choose without pressure, coercion, haste or manipulation whether or not to end a their pregnancy.
- d. All women should be sufficiently and appropriately informed in order to be able to fully and freely exercise their sexual and reproductive rights.
- e. Abortion services within the guidelines of ruling C-355 of 2006 should be available throughout the country and at every level of care.
- f. Neither the women who choose to end their pregnancy nor the providers of abortion services may be victimized, discriminated or subjected to any action that limits their access to a workplace, educational facility, health service or professional indemnity insurance.
- g. No health service providing entity —public or private, religious or laic— can deny abortion services when the patient is within the guidelines of the C-355 ruling of 2006.
- h. It is forbidden to raise obstacles, demands or barriers other than those established by the C-355 ruling of 2006 for the provision of abortion services within the guidelines posed herein. Inadmissible barriers include, amongst others: medical review boards pending approval, institutional audits, unwarranted delays, collective conscientious objections that lead entire institutions to withhold abortion services and informal pacts to refuse to perform procedures.
- i. Only medical personnel who is directly involved in the abortion procedure may appeal to conscientious objection, administrative personnel may not. Similarly, health professionals in charge of preparation and recovery may not declare themselves to be conscientious objectors.
- j. Conscientious objection must be manifested in writing and the document must include the reasons why the provider refuses to perform a procedure. More specifically, the following requirements must be met :

- (i) The document must list the ways in which performing an abortion contradicts the provider's most intimate convictions in this specific instance, the use of formats and templates is unacceptable.
 - (ii) The provider to whom the patient is referred must be available and ready to perform the procedure.
- k. Judicial authorities may not cite conscientious objection as an excuse to act unconstitutionally and go against a legitimate precept. In regards to abortion, judicial authorities are required to give a verdict and, additionally, do to so in accordance to the C-355 Constitutional Court ruling of 2006. If this does not take place on the grounds of conscience, this conduct could be interpreted as a criminal offense.

Abortion guidelines according to the Colombian Constitutional Court: Grounds and Purposes

Since 2006, the Colombian Constitutional Court has defined a series of general guidelines aimed at protecting the rights of women when it comes to accessing abortion services. Simultaneously, it has defined specific parameters with the purpose of safeguarding the exercise of conscientious objection by health providers. Court rulings center around two areas: access and availability of general abortion services and access in cases of conscientious objection. It is important to highlight that the first encompasses the latter.

General Guidelines

General guidelines encompass measures regarding:

- (i) **Availability.** Indicating that there must always be service providers available throughout the country and at every tier of the health system. Additionally, there must be referral and counter-referral systems in place, as well as personnel trained to provide abortion services.
- (ii) **Accessibility.** Ensuring the provision of precise, adequate and necessary information to all women requesting abortion services and encompassing the illegal nature of demanding unlawful requirements.
- (iii) **Quality:** Defining the obligation to provide high quality, timely, lawful services which allow women to make free, uncoerced choices.

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Specific Guidelines

Specific guidelines regarding conscientious objection encompass measures regarding:

- (i) **Protecting the rights of women in the face of objections, entailing limiting said objections to the following instances.**
 - a) Objections are individual, not collective or institutional.
 - b) Only direct providers may object, not administrative personnel.
 - c) Objections may not apply when they place a disproportionate burden on women (for example, when their life is at risk or when the provider is the only one available).
 - d) Judges may not declare themselves to be conscientious objectors.

- e) Women who seek abortion services cannot be discriminated against.

(ii) Continuity in service provision:

- a) The conscientious objector must ensure that the patient is referred to a capable provider.
- b) There must be a list of public and private providers available to perform abortions readily at hand.
- c) The provision of services must be ensured by the provider to whom the patient is referred.
- d) The health system must be able to guarantee an adequate number of available providers of abortion services.

(iii) Protecting the rights of conscientious objectors:

- a) Conscientious objection must take place in writing and be based on deep, intimate convictions; religious or otherwise.
- b) Neither conscientious objectors nor service providers can be discriminated against.

Conclusion

In spite of the fact that the Constitutional Court recognizes that conscientious objection is a fundamental right, it can also be interpreted as a tool that is applied on an individual level, which aims to protect fundamental rights like equality, freedom of thought, conscience and religious beliefs.

As the Court has stated, these rights are not absolute, as they are limited by the exercise of the fundamental rights of women when they are impaired by conscientious objection. From the cases brought forth by the Court, it can be inferred that providers generally exercise conscientious objection without officially declaring themselves to be objectors and frequently, this may be masked by the imposition of other access barriers. These include additional unlawful requirements, case reviews or demanding proof that a rape took place, amongst others, and may cause significant service delays, often forcing patients to carry their pregnancy to term. In this context, it is important to ask: is objection truly an exercise of conscience or does it reflect a personal standpoint about abortion?

The following is a list of items described by Lisa Harris regarding “conscience” in abortion service provision.⁷ This author describes five crucial elements:

- Provision —not just denial— of abortion services is based on conscience. By not recognizing this, we are failing to protect health professionals who perform abortions and are motivated by conscience.
- Even in contexts where abortion is legal, those who provide this service are stigmatized, marginalized, harassed, threatened and victimized.
- In spite of this, they continue to provide the service because they are morally obliged given their profound ethical beliefs in women’s autonomy and self-determination, and they prioritize the woman’s life above the potential life of the fetus.
- Comparing conscience with conscientious objection and /or denial of services contributes to the stigmatization of abortion service providers.
- If one of the arguments against abortion is that providers are motivated not by conscience but by political beliefs, conscientious objection should also be scrutinized in order to determine whether it is due to deep personal values as opposed to political beliefs, discrimination, stigma or misinterpretation of medical evidence, among others. The exercise of conscience should be closely linked to standards in medical learning and service provision.

The latter leads us to conclude that conscientious objection must therefore differ from the imposition of access barriers and that conscience applies to objection as well as to provision of services. In this sense, conscientious objection can be defined as “denial of services that stems from reasons of conscience”.

⁷ Harris Lisa, M.D. Ph.D. Recognizing Conscience in Abortion Provision. *The New England Journal of Medicine* 367; 11.

The guidelines established by the court are a source for public policy and define the standards used to mitigate and eliminate the negative effects of conscientious objection on the exercise of women's sexual and reproductive rights.

In a context that recognizes women's right to abortion, each health professional must examine their conscience and define, in a structured and objective manner, whether they are a conscientious objector or not. The fundamental question is: Am I willing to perform an abortion? This individual look at one's conscience should not be confused with whether or not one agrees or disagrees with a woman's choice to terminate a pregnancy; nor with an analysis of individual cases. Ending a pregnancy is exclusively a woman's dilemma and the state should respect every decision when it is made within the framework of the law. Regardless of the health professional's standpoint, it is a woman's right to obtain this service.

When a provider decides that they are not willing to perform an abortion, they must exercise conscientious objection according to clear guidelines and within a framework of medical ethics. In this way, the health professional will not pose an obstacle to a woman's well-being or even cause her harm by denying her access to a medical procedure, undermining her autonomy and her dignity. Grupo Médico por el Derecho a Decidir considers that the "denial of services for reasons of conscience" should take place within the following strict guidelines:

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1. Abortion service access barriers violate the right to equality of access to health services and have a disproportionate impact on socioeconomically vulnerable women who are often forced to turn to unsafe options when services are denied.
2. The obligation to protect life, in keeping with international human rights, implies taking every necessary measure to keep women from perishing as a result of unsafe abortions.
3. Conscientious objection is individual, not collective or institutional, and it only applies to direct providers, not administrative personnel.
4. An individual examination of conscience should not be confused with determining whether or not a person agrees with abortion.

5. When a provider is not willing to perform an abortion they must strictly adhere to conscientious objection guidelines.
6. Conscientious objection does not apply when it poses a disproportionate burden on women (for example, when their life is at stake, or when the provider is the only one available)
7. Conscientious objectors must guarantee referral to another available health provider, who must then ensure that the patient gets the necessary services.
8. A list of available public and private abortion providers must be readily at hand and the health system must guarantee an adequate number of providers who are trained to provide abortion services.
9. Conscientious objection must be submitted in a written document, detailing the motivations and deep, intimate convictions —religious or otherwise— that led to the decision. The provider’s responsibility does not end here, similarly, it does not end when they refuse to provide services due to conscientious objection. A conscientious objector is responsible for referring the patient to an institution that can and will perform the procedure.
10. Conscientious objection does not apply in technical, theoretical or clinical interpretations regarding abortion. It is the result of a detailed philosophical, ethical and/or religious introspection performed by a provider in regards to their personal perspectives on abortion.
11. Conscientious objection must be the result of a thorough, personal process of analysis regarding abortion, it is not subject to change depending on the grounds upon which it is applied.
12. Conscientious objectors cannot be discriminated, neither can abortion service providers or the women who request their services.
13. Those who conscientiously provide abortion services are motivated by ethical beliefs and deep set convictions regarding respect for women’s autonomy.

14. Comparing conscience with conscientious objection and/or denial of services contributes to the stigmatization of abortion service providers.
15. It is necessary for medical education to include information about conscientious objection. The aforementioned service guidelines must be respected.

Providing —not only denying— abortion services is based on reasons of conscience.

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