

Conscientious objection

La objeción de conciencia

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Abstract:

Conscientious objection is a means of exercising freedom of belief, conscience and ethical convictions in the face of legal orders that could collide with their principles by excessively invading their autonomy. Although this right corresponds to every person, the health field is one of the most frequent to invoke it, generating bioethical dilemmas at the time of its exercise.

Keywords:

Bioethical, *Conscientious objection, Autonomy*

Resumen:

La objeción de conciencia es un medio para ejercer la libertad de creencias, de conciencia y de convicciones éticas, frente a los ordenamientos legales que pudieran colisionar con sus principios al invadir excesivamente su autonomía. Aun cuando este derecho corresponde a toda persona, el ámbito sanitario es uno de lo más frecuentes para invocarlo, generando dilemas bioéticos al momento de su ejercicio.

Palabras Clave:

Bioética. *Objeción de Conciencia. Autonomía.*

INTRODUCTION

Conscientious objection, understood as a refusal to comply with certain legal norms because they are contrary to a person's personal convictions or religious beliefs, is an interesting topic by virtue of its legal implications.

Since the normative order has its origin in society, it is possible to affirm that it will regulate social phenomena with juridical transcendence. By virtue of this, it cannot be disregarded that Law is related to various disciplines, although different, but which are intimately related.

Due to the above, and in accordance with the meaning of conscientious objection, this constitutes a legal-social phenomenon, since it is a manifestation of society to safeguard fundamental rights such as freedom. Although the legal order has been created to achieve human coexistence and restricts individual freedom in order to protect the public interest, it must not be forgotten that the human being retains his individuality

even within the social group and therefore has the right to freedom of conscience and privacy.

Furthermore, conscientious objection is invoked by the individual when he argues that the legal provision is contrary to his ethical or religious principles, i.e., it tends to protect his individual freedom. However, a fundamental part of the analysis of this social-legal phenomenon is to identify whether the subject is legitimized to not comply with the law when it orders unjust things and what criteria would support the judgment of what is unjust; consequently, to analyze whether it is possible to separate morality from legality.

In the practice of medicine, conscientious objection has become important because ethical reasons, even religious ones, of the physician may conflict with legal orders and with the patient's preferences, in cases such as termination of pregnancy, euthanasia, transfusion or the application of definitive methods of family planning, to mention a few. In other words, freedom of

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conscience and religious freedom provoke conflicts between legal and moral requirements.

However, conscientious objection implies respect for the freedom of the health personnel and the patient, but, following the Voltairian position, the confrontation of two ideological positions does not prevent guaranteeing the right of the other person to express his or her opinion.

WHAT IS CONSCIENTIOUS OBJECTION?

Addressing the issue of conscientious objection is very interesting.

This expression of the will refers to the fact that the person, based on his moral, religious or ethical beliefs, may face the fulfillment of a legal duty, being able to withdraw from it, because there is a collision with them.

Freedom is a fundamental right and one of the most precious goods of the human being, it implies the faculty of self-determination and only yields part of it to achieve social coexistence. However, a part of it is reserved in relation to his conscience, an intimate space to which every subject has the right.

In this sense, the so-called conscientious objection has been defined by various authors:

Martínez-Torrón considers it as the "attitude of abstention from a legal duty, driven by moral imperatives that have for the subject the rank of supreme normative instance" (Durany Pich, I. 1998, p. 13).

On the other hand, León Correa affirms that it is "the subjective right that aims to achieve the dispensation of a legal duty or the exemption from liability when the breach of this duty has been consummated (León Correa, 2007).

Similarly, Sierra Espinoza defines it as "opposing one's own conscience to compliance with a law, according to which the objector, by professing certain ideas, is not entitled to the benefits that are imposed by the legal order to society" (Sierra Espinoza, B. 2008, p. 1).

For Navarro Valls, it is "the pretension of not complying with a law - or disregarding a precept - of a non-religious nature, for religious or ideological reasons" (CasaMadrid, et al. 2004, p. 1). Therefore, it can be stated that conscientious objection is the possibility of not complying with the normative mandate, when the objector considers that it is contrary to his or her ethical or ideological principles and values.

This phenomenon is applicable to various spheres; namely, in military service, in tax obligations or in the field of medical care, which is precisely what this paper addresses.

Rivera Flores (Rivera-Flores. & Acevedo-Medina, 2009, p. 157), paraphrasing Dworkin, distinguishes three types of objection:

- (a) The "policy-based", when the subject deems the norm to be prejudicial.

- b) The "justice-based", when the person considers that the rule is unjust.

- c) "Integrity-based", when the subject considers that the law requires behavior contrary to his beliefs.

As has been explained, the human being tries to safeguard that area of freedom to which he is entitled within the conglomerate, an area which he neither renounces nor yields. That is to say, the objector, as a person, is invested with dignity and intrinsically enjoys fundamental freedoms such as religious freedom, freedom of conscience and freedom of thought, which constitute a sphere in which he has full control of himself, and in which the State should not interfere.

FREEDOM OF CONSCIENCE AND FREEDOM OF PRIVACY

By conscience is understood the element of the ethical conformation of the human being, which allows the moral integrity of the individual and his free development and should not be confused with subjectivity, tendency, taste or habit, but really the sphere of the ethics of the person.

In these terms, the freedom of that sphere of the individual protects the rational, reflective process and his adherence or not to values or beliefs, as well as rejecting those he considers erroneous. This freedom corresponds to the inner self of the human being, which demands an external behavior in accordance with his own values. This internal sphere is inviolable and, therefore, must be respected by the State, avoiding any intrusion into this intimate sphere of the subject.

Freedom of conscience also involves a conflict, that of obeying oneself rather than the State, refusing to act against one's values and beliefs, thus manifesting conscientious objection.

Although this freedom, like other subjective rights of the individual, is not absolute, the State must guarantee its respect, since it is a limiting act in which the State must act with tolerance. As has been said, if the legal system regulates conscientious objection and, as far as possible, contemplates different cases, it would be a conscientious option. In this way, it would not be appreciated as a simple non-observance of the legal precept, but as a replacement for another obligation of relevance to society.

Freedom of conscience is related to freedom of belief, which means the juridical possibility of acting or not acting. Consequently, freedom of conscience allows the individual to act or not to act based on his moral values or beliefs. In the Mexican legal system, Article 24 of the Constitution grants the individual the right to freedom of belief.

This freedom -including objection- belongs to the inner self of the subject, to that inviolable sphere in which he sustains his integral development in moral and ethical principles.

Hence, the authentic exercise of freedom of conscience must be protected and respected by the public power, because, it is insisted, it belongs to the internal forum, but if in the expression

it affects the rights of third parties, the subject must limit himself to not act, but without preventing another, whose values do not conflict with the legal norm, from doing so. It is evident that what the legal order guarantees is the possibility of the subject to disregard the provisions he considers opposed to his values and ethical and moral beliefs, including religious ones.

CONSCIENTIOUS OBJECTION AND THE RIGHT TO HEALTH PROTECTION

Within the field of health law, medical care is one of the areas in which conscientious objection occurs most frequently.

This activity generates a legal relationship between the physician -or other service provider- and the patient. Therefore, in order to approach the subject with greater precision, it is necessary to turn to the rights and obligations that emanate from it and the legitimizing criteria of the biomedical act.

According to CasaMadrid (CasaMadrid Mata, 1999, p. 4), the biomedical act is legitimized in a subjective ontological criterion in which the elements of an end recognized by the State, the free acceptance of the patient and the protection of third party rights concur.

To a greater extent, the first element refers to the participation of a publicly recognized purpose, such as the protection of health, which is established as a fundamental right in article 4 of the Constitution. In the second case, in order to safeguard autonomy -or also the principle of permission-, the patient must freely manifest his will for the application of the medical-surgical procedures necessary for his medical care, through informed consent. As for the third element, it refers to the correct evaluation of the social impact of the rights and obligations arising from this legal relationship.

In the process of medical care, as a legal relationship and therefore eventually conflicting, differences may arise between its personal elements, so it will be necessary to harmonize the right to health protection, the obligations and the prescriptive freedom of the physician and the principle of autonomy or permission of the patient.

One manifestation of these conflicts is conscientious objection. On the one hand, the physician must exercise his profession in accordance with the scientific and ethical principles that guide medical practice, and therefore enjoys the subjective right of freedom of conscience, which is enriched by his moral and religious values as a person.

With respect to the patient, the principle of autonomy empowers him to freely accept or reject the indicated medical procedures; such principle is not absolute, so if in this decision are at stake legal goods that the person cannot dispose of by virtue of being protected by public law, the subject finds a limitation to the exercise of this faculty -understood as a subjective right.

Therefore, conscientious objection can be exercised both by the physician -or, as the case may be, by other health professionals- and by the patient. That is to say, both parties can argue that they do not observe certain duties -medical indications in the case of

patients- arguing that they are in conflict with their conscience, with those ethical, moral and often religious values

The conscientious objection exercised by the physician should not seek to modify the rule objected to, but rather it is an individual act and in each of the cases that he/she considers to be up to date, he/she will exercise it separately.

It is considered useful to refer to the requirements that CasaMadrid (2004), citing Arrieta, proposes for the physician to be able to invoke conscientious objection:

- It must be based on an imperative of medical ethics.
- It must be of an individual nature, with primacy of the subject's internal conflict over any claim of social repercussion.
- It is expressed on a personal basis, as a logical consequence of the personal nature of the act of conscience for each subject, and therefore cannot and should not be invoked by third parties.
- It is formalized publicly, usually in the ordinary courts, but also in special bodies, such as ethics, research or biosafety commissions or internal control bodies.

In this regard, allow the author of this paper to add in the last point the hospital bioethics commissions, as a collegiate body suitable for analyzing any objections that may arise.

This makes it possible to identify the minimum requirements for a conscientious objection to be considered valid. With regard to support in medical ethics, the principles contained in various provisions that have been issued for the medical profession should be considered: e.g., the Hippocratic Oath, the declarations of the World Medical Association. Secondly, it is essential that the contrast with the legal system be based on the individual, so that positions belonging to the social sphere must be excluded: e.g. the refusal to perform an abortion because it is considered to be against the Hippocratic Oath and not because of the prevailing culture of the community that could reject this procedure.

Thirdly, and as a consequence of the previous point, the only person entitled to exercise conscientious objection is the subject to whom it causes conflict with his/her internal environment, being inadmissible the claim by a third party: e.g., a chief of service who requests not to transfuse patients, assuming the representation of all his/her assigned physicians. As regards the fourth point, these commissions generate ethical and bioethical criteria for the analysis of various cases, also constituting a source for health law. It is to be applauded that conscientious objection cases are presented more frequently in the ordinary courts, as this will provide more jurisprudential background.

In this context, it should be specified that conscientious objection, as has been said, cannot be exercised when public order or the rights of third parties are affected. Furthermore, legal

assets such as life and personal integrity are not subject to disposition by the individual, since they are protected by public law. In this way, it is also pointed out that in emergency medical care, the physician cannot refrain from providing the service, otherwise life itself would be endangered.

The complexity of identifying an authentic conscientious objection in medical care is evident, which is why one must resort to the legal provisions, to the ethical and bioethical principles to which the law has given legal value and to the pronouncements of the jurisdictional bodies and commissions which, in the field of health law, generate general criteria for the solution of this conflict.

Article 10 Bis of the General Health Law recognizes that medical and nursing personnel may invoke conscientious objection, except in cases where the patient's life is endangered or there is an emergency. However, the National Human Rights Commission filed an action of unconstitutionality, which has not been resolved, considering that it violates the human right of women to have access to the termination of pregnancy -when there is no emergency- because the health personnel would invoke conscientious objection and they would be left out of exercising their right.

IMPORTANCE OF HOSPITAL BIOETHICS COMMISSIONS

The complexity of the medical care process requires a special legal regime that guarantees respect for the rights of each of the parties to the legal relationship, without harming assets protected by public law, such as life.

In order to assist the doctor in making decisions with bioethical implications, as in the case of conscientious objection, collegiate bodies such as hospital bioethics commissions have been created.

These commissions, based on Article 41 Bis of the General Health Law, are competent to hear, at the request of the physician concerned, cases involving bioethical implications such as interruption of pregnancy, refusal to accept blood transfusions, application of extraordinary measures that could cause therapeutic cruelty, to mention a few. They should be formed in a multidisciplinary manner: physicians, lawyers, philosophers, civil society, etc., so that the opinion issued has precisely that approach.

By virtue of the prescriptive freedom of the doctor, it is up to him/her to decide how to act. Consequently, the pronouncements of the hospital commissions do not have binding effects, i.e., they are not coercive for the person who submitted the particular case to them, but they are very useful because of their multidisciplinary approach and the formulation of criteria that will serve as a precedent for similar cases.

It goes without saying how important it is for each hospital unit, according to its degree of complexity, to have this type of commission - auxiliary to the health authority which in addition to generating guidelines or standards for the resolution of future cases, helps to find the best solution to a conscientious objection.

From the experience of the author of this work in his participation in hospital bioethics committees, some frequent cases in which conscientious objection is invoked by the doctor have been identified.

- Legal termination of pregnancy: In cases of rape in which the judicial authority or the Public Prosecutor's Office, in accordance with the law, orders the abortion.
- Indication of artificial methods for family planning: Especially in cases of definitive methods such as vasectomy; however, it has also been presented in other cases of artificial means, arguing religious beliefs.
- Application of blood transfusions: They invoke conscientious objection on religious grounds. Refusal is also opposed by patients.
- Sex change surgeries and circumcisions performed by persons other than rabbis.

CONCLUSIONS

It is unquestionable that conscientious objection consists of the legal possibility of a person's opposition to the fulfillment of a legal obligation, arguing that it is contrary to his ethical or moral principles, including religious ones. This faculty originates from the freedom of conscience that every individual possesses. As a subjective right, it is limited by public order and the rights of third parties.

It is of great importance in disciplines such as bioethics and bio law, since it is a legal act that generates consequences in the normative world.

Identifying an authentic conscientious objection is not an easy task, since the particular case must be studied and the objector's claim is really based on personal convictions or religious beliefs, and not as a subterfuge to break the law.

In this work, conscientious objection was addressed in the health field, especially in medical care; however, it has been seen that it is not exclusive to this field, but that there are other cases such as military service and tax obligations.

This right makes it possible to guarantee the principle of autonomy, with the proviso that it will encounter limits when it affects the sphere of a third party.

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