

Conscientious objection as a legal need: a look from abortion

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Abstract

In medical community there are very different opinions about abortion. We propose to analyze the philosophical premises that frame the opinion of doctors regarding the legalization of abortion and corroborate how they vary according to the generational belonging of professionals; as well as establishing the role that conscientious objection plays to achieve a balance against the variety of existing positions. We conducted semi-structured interviews to doctors and students about their opinion about abortion legalization and the reasons on which they based their positions. Younger physicians were who approved legalization in greater proportion with arguments offered with a public health perspective. Due to the great variability of positions and idiosyncrasies that coexist in the medical field, conscientious objection is established as a necessary legal instrument to protect the moral integrity of each person.

Keywords: Abortion. Conscience. Philosophy, medical. Civil rights.

Resumo

Objecção de consciência como necessidade legal: um olhar sobre o aborto

Na comunidade médica há opiniões muito diferentes sobre o aborto. Propomos analisar as premissas filosóficas que enquadram a opinião dos médicos sobre a legalização do aborto e corroborar como elas variam de acordo com a pertença geracional dos profissionais, bem como estabelecer que papel a objeção de consciência desempenha para alcançar um equilíbrio ante a variedade de posições existentes. Realizamos entrevistas semiestruturadas com médicos e estudantes sobre suas opiniões sobre a legalização do aborto e as razões que basearam suas posições. Os médicos mais jovens foram os que aprovaram a legalização em maior proporção com argumentos apoiados em perspectiva de saúde pública. Devido à grande variabilidade de posições e idiosincrasias que coexistem no campo da medicina, a objeção de consciência é estabelecida como um instrumento legal necessário para proteger a integridade moral de cada pessoa.

Palavras-chave: Aborto. Consciência. Filosofia médica. Direitos civis.

Resumen

Objeción de conciencia como necesidad legal: una mirada desde el aborto

En la comunidad médica existen opiniones muy dispares frente al aborto. Nos proponemos analizar las premisas filosóficas que enmarcan la opinión de los médicos respecto a la legalización del aborto y corroborar cómo varían según la pertenencia generacional de los profesionales; así como establecer qué rol juega la objeción de conciencia para lograr un equilibrio ante la variedad de posturas existentes. Se realizaron entrevistas a médicos y a estudiantes de medicina interrogando si les parecía correcto o no legalizar el aborto y las razones en las cuales basaban sus posturas. Los médicos más jóvenes fueron quienes se mostraron a favor de la legalización en mayor proporción con argumentos brindados con una perspectiva en salud pública. Ante tan variadas posturas e idiosincrasias que conviven en el ámbito médico, la objeción de conciencia se erige como un instrumento legal necesario para proteger la integridad moral de cada persona.

Palabras clave: Aborto. Conciencia. Filosofía médica. Derechos civiles.

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Declaram não haver conflito de interesse.

In 2018, the “Voluntary Interruption of Pregnancy (VIP)” bill¹ was presented for possible approval in the legislative chambers of Argentina. It proposed the decriminalization and legalization of the right to abortion for every pregnant person, accessible through all the country’s healthcare providers.

But beyond the process in chambers, at the social level abortion occupies a prominent place in the public debate, being addressed through a range of fundamental aspects such as life, death, health, religion, ethics and morals, among others. We live in the age of reason, yet are immersed in a cultural heterogeneity where reasons are as numerous and diverse as individuals and where frequently, arguments are opposing²: each person presents their own framework of convictions in ethical, religious, moral and philosophical matters, in other words, their own *conscience*.

Article 14³ of the National Constitution of Argentina defends freedom of conscience and worship, while the right to autonomy is established in article 19⁴. In this way, each individual can, in exercising their autonomy, act with freedom of conscience. This fact stands as an ethical imperative and its contemplation forms part of the fundamental human rights.

Respect for this freedom translates into two dimensions: on the one hand, in tolerance towards diversity and discrepancies and, on the other, in seeking to avoid the imposition of moral principles that go against the intimate convictions of others. In other words, respect for the morals of others is among the fundamental values of modern democratic society⁵.

Within this concept is framed Conscientious Objection, defined as the subjective right of an individual to disobey a legal norm that imposes actions or omissions contrary to their religious, moral or ethical convictions⁶. In this framework, it can be established that conscientious objectors are all those people who have given priority to their moral opinions over legal mandates and norms or any other authority. The basis for disobedience of the Law is therefore precisely in the split between legality and morality⁷.

Morality is a social construction, in which interests and desires, affections and attitudes, values, ideals and preferences, relations of power and knowledge intervene, in which the social changes that affect our *ethos* therefore operate at all times. Moral norms constitute *social artifacts* that attempt to respond to the conflicts that give rise to new situations⁸.

Then, given that the moral norms are not static, but, as social constructions, have the potential to change as the ideology of the social collective varies and that the medical community, conformed as it is by different social actors, encompasses very different opinions regarding ethically dilemmatic issues in general, and regarding abortion in particular; we propose to analyze, through moral philosophy, the premises that frame the opinion of doctors regarding the legalization of the practice of abortion and assess whether they vary as the generation to which health professionals belong changes; as well as to assess the role that conscientious objection plays as a legal tool so that no individual shall have violated the mandates of their morals if they oppose the law promulgated by the agreement of the majority. This will favor understanding and tolerance among colleagues, allowing each to respect their own moral convictions, without neglecting the rights of patients.

Materials and method

This qualitative study was carried out through semi-interpretive interviews with doctors from the city of Santa Fe and students from the medicine course of the school of Medical Sciences of the Universidad Nacional del Litoral. The interviewees were asked about their opinion of the bill, specifically whether it seemed right to legalize abortion or not; if the answer was negative, the interviewee was asked if they agreed with the grounds under which the Argentine Criminal Code declares abortion not punishable⁹ (to avoid danger to the life or health of the mother, and if this danger cannot be avoided by other means; or pregnancy due to rape)¹⁰.

Four generational groups were analyzed, formed as follows:

- Baby Boomers Generation: those born between 1945 and 1964;
- Generation X: those born between 1965 and 1981;
- Generation Y, the millennials: those born between 1982 and 1994;
- Generation Z, the centennials: those born from 1995 to the present day.

The Y group (millennials) was subdivided into two parts: Graduates and Students.

Results

A total of 25 interviews were conducted, 14 women and 11 men. Of these, 15 involved medical professionals in the city of Santa Fe: five involved doctors belonging to the baby boomer generation (60 to 71 years of age), five to doctors belonging to generation X (40 to 46 years) and five to doctors belonging to Y generation or millennials (24 to 33 years old).

The rest of the interviews were conducted with Medical Sciences students from the Universidad Nacional del Litoral: five with students belonging to generation Y or millennials (5th and 6th year students aged between 24 and 26 years) and five with students of generation Z (1st and 2nd year students, aged between 18 and 21 years old).

The total answers of the interviewees were paired, with 13 people in favor and 12 people against the approval of the bill.

The reasons given by those who were in favor, regardless of age, were similar: to ensure a safe environment for abortions to be carried out, minimizing the complications caused by clandestine operations and ensuring equity in cases where requesting an abortion was beyond the economic conditions of the pregnant woman. In this way, they argued, all women could obtain abortions on equal terms and with the same degree of safety. This, they believed, would guarantee a reduction in the number of secondary deaths caused by abortions performed under precarious conditions as a result of the negligence and recklessness that frame clandestine practice.

Regarding those who spoke out against legalization, the reasons basically emerged from two stances. On the one hand, the majority stated that they were opposed to the practice by arguing that in principle the focus should be placed on sexual education, which they consider a fundamental foundation of reproductive health, stating that until this is strengthened they do not consider it appropriate to approve abortion. However, they agreed with the conditions under which abortion is considered non-punishable in the criminal code (namely, rape and risk of maternal health that cannot be avoided by other means), considering that both situations involve a physical or psychological risk for the mother, therefore choosing to prioritize the health and decision of the woman, considering it the "lesser evil".

On the other hand, a minority said they were against the proposal on the basis that it is never right to kill a living being, perceiving abortion as

inadmissible from the ethical principles of our society. It should be noted that this latter group also did not agree with the grounds contemplated in the criminal code, stating that no life should be sacrificed under any circumstances.

Finally, analyzing the responses by generational group, positions in favor were most prevalent in the millennial group, particularly among those that were already doctors, who expressed the arguments previously described. The majority disagreed in the two older generations (baby boomers and generation X), with a greater preponderance of negative responses in generation X; on the other hand, only the latter group contained people who did not agree with the permissiveness of abortion in case of rape or illness: *"I prioritize life, I would not punish an innocent being, whatever the mother has gone through, I would seek to help her in another way through accompanying and hospitalizing her"* (Female doctor, 41).

Discussion

There is a wide variety of opinions on the issue of abortion. Broadly speaking, two types of arguments were observed (whatever the position), some of which make a moral judgment of the practice of abortion and others that apply reasons from a public health perspective.

In turn, within each group there are arguments of a deontological nature and other that are more utilitarian. As an example, among those in favour were the following: some argued that by legalizing the practice a reduction in the number of secondary maternal deaths from abortions performed under unsafe and unhealthy conditions would be achieved, understanding that, although the number of abortions would not decline, maternal mortality would. Others stated that abortion is a problem that crosses all social strata transversally, and that legalizing it guarantees that all women can do undergo the operation in the same security framework, and not only those who have enough money to pay for it, or in other words, the security of the process does not depend on the economic power of each woman, therefore erasing the inequality generated by the clandestine business. This example shows how arguments emerging from the same approach (public health), result in different positions, on the one hand, a utilitarian argument that seeks to reduce the number of maternal deaths (lesser evil), and on the other a deontological approach that pursues equity and equal rights for all women.

On the other hand, those who were against abortion also did so on the basis of two approaches: some from a moral, deontological approach, arguing that “*All life is important, killing is wrong in any situation*”; others, with a public health perspective, said that the root of the problem lies in the lack of sex education, and so addressing the issue of abortion would be simply dealing with the last link in the chain, whereas the priority should be strengthening the primary issues and then, once this is achieved, considering abortion as a tool of last resort.

In this context of such varied positions, it is worth asking how an agreement can be reached as a society. John Rawls¹¹ called this variability of arguments reasonable pluralism, that is, diversity of reasonable doctrines (both religious, philosophical and moral) which are incompatible with each other, in order to achieve communion between them, the author establishes the concept of “political liberalism”, he does not fight against the aforementioned plurality of doctrines, but tries to establish a justice which all citizens, regardless of their beliefs, can accept and subscribe to, that is, the reasons that support various political decisions must have interference in the public reason.

In other words, if free and equal citizens are considered, it is logical to state that public deliberation should be guided by a political conception whose principles and values are acceptable to all individuals in a society, and thus excluding those arguments which it cannot be demanded others understand or accept, constituting a way of imposing limits on the type of reasoning that can be provided in the democratic debate¹².

In summary, to establish debates of public interference it is necessary to set aside personal arguments and take into account only those that approach the issue from a social perspective, without imposing personal judgments on general causes. That is, for decisions of social repercussion, such as the declaration of a law, arguments made from personal morals such as those expressed by some respondents would not be valid.

On the other hand, some of those who expressed agreement with the law in terms of public health, said that, although at the collective level it seems to them that the law would have a positive impact and therefore should be approved, from the personal level they find it highly aversive given their moral convictions, and so they state they could not carry out an abortion in their medical practice.

In this context, we ask ourselves: what happens when a certain norm violates the moral principles of a person? What is the use of this individual fighting the regulations imposed by society in defense of their own morals? How is disobedience to that which is socially established as legal justified as a “right”? In principle, and before analyzing disobedience to the law, it is pertinent to ask what drives citizens to comply with legal duties.

Rawls¹³ argues that in a society with a fair constitution such as that of Argentina (fair in the sense of treating everyone equally and being based on democratic decisions), where laws are chosen by vote, there will always be a minority that disagrees with the law established, especially from its moral principles. Then, he wonders, what leads this minority that disagrees with a law to comply with it anyway? Thus, it concludes that the constitution defines a scheme of fair cooperation through which the benefits that the same person is entitled to enjoy, as long as each citizen participates, implies a certain sacrifice on the part of each person, or at least a certain restriction of their freedom.

In this sense, the person who has accepted the benefits that this social pact proposes is morally committed to the *duty of fair play* to do their part and not take advantage of said benefits without cooperating; It is an obligation acquired towards other citizens. Finally, it is important to mention that the role of the legal apparatus is to declare laws chosen in democracy through majority law, without falling into the analysis of their morality. The framework of social cooperativity and renunciation of individual freedoms in pursuit of a common social good raised by Rawls’s theory recalls the concept of “Social Pact” that Rousseau had proposed centuries before.

This philosopher in his work “The Social Contract”¹⁴ argues that the most successful way to organize a society is through a social pact to create a common force that is governed under a general will, which neglects individual wills and where each man yields to this in order to seek a greater and common good. For Rousseau¹⁴ no law can be unfair since they are records of the general will, functioning as a common denominator of individual wills, without responding to individuals. In other words, for Rousseau, disobedience to power would not be justified under any aspect, since in this case the social contract by which order is established in a society would be violated.

Another great representative of political philosophy is Thomas Hobbes¹⁵ who argues that man forms societies in order to ensure his survival, since the natural passions of human beings would lead to

a constant state of war; therefore, they choose to restrict their individual freedom by forming states, in order to care for their own conservation and achieve a more harmonious life. But, given that man is selfish by nature and that the state of collaboration and tolerance required to hold agreements is not inherent to the human being, a certain power is required that generates fear in order to keep man's passions under control and guarantee the correct functioning of the State. It is this State or "Leviathan" that watches over our peace and our defense.

Thus, Hobbes defines that by the authority that each particular man confers on the State, it, through the terror it inspires, is capable of shaping everyone's will for peace and mutual assistance.

In summary, all the theories set forth above agree that the best option to achieve a social order is based on the renunciation of individual freedoms in order to form an agreement that guarantees general well-being. However, they differ in the way in which people come to correspond to the law; on the one hand, Rousseau's *social contract* or Rawls's *theory of fair play* appeals to human conscience as an engine to comply with the law; while Hobbes argues that legal obedience is given by the terror generated by the punishment imposed by the State in the event of the disobedience of the established norm.

Now, having analyzed the way in which individuals comply with the law, it is appropriate to return to the original question: How is disobedience to a norm justified when it negatively affects personal morals? Rawls, in a later work, considers *at what point does the duty to comply with laws enacted by a legislative majority cease to be binding (...) in view of the right to defend one's liberties and the duty to oppose injustice?*¹⁶

In principle, it should be remembered that the objective of conscientious objection as a legal tool is not the obstruction of a norm, but to obtain legitimate respect for one's conscience. The objector agrees that the rule is part of a fair judicial system, but for moral reasons he or she cannot comply with it, justly differentiating conscientious objection from civil disobedience. In this context, the author's main theory is that the respect and tolerance for certain rejections of conscience is due to the fact that they agree reasonably well with one of the principles of justice, namely: *each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others*¹⁶.

In this sense it is reasonable that no one should see their right to freedom of conscience violated and,

given that conscientious objection should not influence the freedom of others, but only respect their own, it can be said in general that the principle of justice exposed above is more, rather than less safe.

Then, given the great variability of moral positions that coexist in a society, it is reasonable to assume that, under the protection of a fair constitution, laws may be enacted that, under certain circumstances, will be contrary to the moral considerations of some of the citizens. Thus, the legal system must try to resolve these discrepancies, if it wishes to maintain the political-social stability intended. An effective way of achieving this task is through the recognition of the moral character of the citizen, embodied in the right to disobey the law when the consequences of obeying it are more harmful than the first action¹⁷, without this impeding the right of third parties.

Several authors believe that conscientious objection is a necessary legal tool for any person, whatever their profession or trade, that allows and encourages them to refuse to comply with an order, an imposition or a determination, whatever the origin thereof, that is in contradiction with their convictions and that their conscience tells them not to obey, since it is this (and not the law), which primarily protects the proper and irrevocable dignity of the human being¹⁸.

However, the basic problem posed by conscientious objection is the difficulty in finding its limits and establishing the circumstances of its fair application, in order to resolve these issues, it is important to understand that there is no right to conscientious objection, but rather the right to freedom of conscience, and the latter is what enables objection as the prerogative of the professional in order to safeguard their moral principles¹⁹.

On the other hand, it is a tool for individual use adopted to maintain the moral integrity of those individuals who believe that compliance with the law would go against their deepest moral convictions, and cannot be used as a means of protest against the norm, in order to impose alien ideologies, much less hinder or delay the practice of the procedure or conduct which is being objected to (a situation in which there would be a collision of rights), to avoid such a situation, the professional objector must provide the patient with necessary means so that the practice or procedure requested and protected by law can be fulfilled in a timely manner by another non-objecting professional²⁰.

It could be said, then, that conscientious objection should never harm or hinder the rights of patients, thus establishing the limit of its application.

Properly used and regulated, conscientious objection is a resource that does not affect the patient, but only protects the doctor, in other words, extends freedoms without restricting rights.

Final Considerations

Within the medical field, the positions against the legalization of abortion are based on a wide variety of moral positions and differing approaches, with a tendency to favor the process as the age of doctors decreases; in these groups, the arguments

move away from personal morals and take a social and general approach based on issues of public interference, such as those of Public Health. Faced with such varied positions and the idiosyncrasies that coexist in a society and in particular in the medical field, conscientious objection represents a necessary legal instrument to protect the moral integrity of each person, respecting individual conscience, provided that this does not affect the rights of another person. This seems to be the fairest way to act in ethically dilemmatic situations to avoid violating the autonomy of doctors without neglecting the rights of patients.

Referências

1. Argentina. Proyecto 1376-D-2018. Ley de interrupción voluntaria del embarazo [Internet]. Cámara de Diputados. Buenos Aires, 2018 [acceso 31 out 2018]. Disponível: <https://bit.ly/2N4lpXT>
2. Sánchez FF. Aborto no punible: cuestiones filosóficas de un debate que nos trasciende. *Inmanencia* [Internet]. 2013 [acceso 31 out 2018];3(1):6-9. Disponível: <https://bit.ly/2KMZVx3>
3. Argentina. Ley nº 24.430, de 15 de diciembre de 1994. Constitución de la Nación Argentina [Internet]. Congreso Nacional. Buenos Aires, 3 jan 1995 [acceso 31 out 2018]. art. 14. Disponível: <https://bit.ly/2eedveP>
4. Argentina. Op. cit. 1995. art. 19.
5. Fernández Lerena MJ. La objeción de conciencia. *Diccionario enciclopédico de la legislación sanitaria* [Internet]. 2017 [acceso 31 out 2018]. Disponível: <https://bit.ly/2KC4ewk>
6. Provincia de San Luis. Ley nº I-0650-2008, de 17 de diciembre de 2008. El estado provincial garantiza a todos los habitantes de la Provincia de San Luis el derecho fundamental a no actuar en contra de la propia conciencia personal. *Boletín* [Internet]. San Luis, nº 13372, 31 dez 2008 [acceso 31 out 2018]. art. 2. Disponível: <https://bit.ly/2Z3hlyx>
7. Santos LGR. La objeción de conciencia: fundamentos y justificación. *Bioética* [Internet]. 2010 [acceso 31 out 2018];10(3):I-IV. Disponível: <https://bit.ly/2KAVPcp>
8. Helier M. La construcción social de las normas morales. *Tópicos* [Internet]. 2008 [acceso 31 out 2018];(16). Disponível: <https://bit.ly/2OYjWWX>
9. Argentina. Ley nº 11.179/1984. Código Penal de la Nación Argentina [Internet]. 1984 [acceso 31 out 2018]. art. 86, incisos 1-2. Disponível: <https://bit.ly/2gH2pl5>
10. Argentina. Corte Suprema de Justicia de la Nación. F. A. L. s/ medida autosatisfactiva [Internet]. 13 mar 2012 [acceso 31 out 2018]. Disponível: <https://bit.ly/2HbocvU>
11. Rawls J. *Liberalismo político* [Internet]. Ciudad del México: Fondo de Cultura Económica; 2014 [acceso 31 out 2018]. Disponível: <https://bit.ly/2HkTeTI>
12. Papayannis DM. La objeción de conciencia en el marco de la razón pública. *Revista Jurídica de la Universidad de Palermo* [Internet]. 2008 [acceso 31 out 2018];(1):55-82. Disponível: <https://bit.ly/2YRi1I7>
13. Rawls J. Legal obligation and the duty of fair play. In: Freeman S, editor. *Collected papers*. Cambridge: Harvard University Press; 1964. p. 117-29.
14. Rousseau JJ. *El contrato social*. Buenos Aires: Libertador; 2015.
15. Hobbes T. *Leviatán*. Buenos Aires: Libertador; 2013.
16. Rawls J. *Teoría de la justicia*. 2ª ed. Ciudad del México: Fondo de Cultura Económica; 1995.
17. Cotroneo C. ¿Obligación moral de obedecer al derecho? La desobediencia civil en Rawls y su inclusión en el positivismo jurídico incluyente. *Derecho Humanidad* [Internet]. 2015 [acceso 31 out 2018];(25):63-85. Disponível: <https://bit.ly/2YL4Qs6>
18. Velásquez-Córdoba LF, Córdoba-Palacio R. Objeción de conciencia y la antropología filosófica. *Pers Bioét* [Internet]. 2010 [acceso 31 out 2018];14(2):167-75. Disponível: <https://bit.ly/2N4Xf0x>
19. Távara Orozco L. Objeción de conciencia. *Rev Peru Ginecol Obstet* [Internet]. 2017 [acceso 31 out 2018];63(4):581-90. Disponível: <https://bit.ly/2P0xux4>
20. Beca JP, Astete C. Objeción de conciencia en la práctica médica. *Rev Med Chile* [Internet]. 2015 [acceso 31 out 2018];143(4):493-8. Disponível: <https://bit.ly/2Wcm4WY>

Participation of the authors

All the authors participated equally in the development, writing, discussion and correction of this manuscript.

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Annex

Semi-structured interview carried out with doctors in the city of Santa Fe and medical students of the School of Medical Sciences of the Universidad Nacional del Litoral:

Gender: _____

How old are you? _____

Do you think the bill seeking to legalize abortion in Argentina should be passed?

Why? _____

Are there any exceptions based on which you would change your mind? _____

What repercussions would this law have in medical practice? _____

In the event that you have answered negatively to the second question, do you agree that abortion should not be punishable in the event that the pregnancy entails a risk to maternal health or is the result of rape as currently established by the Penal Code?

Why? _____

If so, why does it seem right to have an abortion under these circumstances and not in others? Where does the difference lie?

Is there any exception that would change your mind?
