Euthanasia and conscientious objection

Eutanasia y objeción de conciencia

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https://doi.org/10.36105/mye.2025v36n1.08

Navarro-Valls, R. Martínez-Torrón, J. Valero, M. J. *Eutanasia y objeción de conciencia*. Madrid: Palabra; 2022.

To begin with, its publication is due to the treatment given to conscientious objection in *Organic Law 3/2021, of March 24,* on the regulation of euthanasia in Spain. With this legislation, euthanasia went from being considered a crime to becoming a right to be provided by the Public Administration. Therefore, its objective is to analyze the conscientious objection of healthcare personnel in the practice of this "new right".

The work consists of seven sections including the introduction (pp. 9-16). In the second chapter, *The constitutional and international protection of freedom of conscience* (pp.17-54). Here, conscientious objection is considered not as a fundamental right but as a situation derived from freedom of conscience when the person is compelled by a legal obligation that tries to impose itself on him even against his moral convictions (religious or otherwise).

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Received: 27/06/2024 Acceptance: 08/07/2024

The key is the fundamental right of freedom of conscience, and for this reason its protection is provided by the Spanish Constitution, as interpreted by the Constitutional Court, as well as by international instruments protecting human rights, for example, Article 9 of the *European Convention on Human Rights* (ECHR). Moreover, within the European Union, Article 10.2 of the *Charter of Fundamental Rights* does recognize the right to conscientious objection. This fact does not go unnoticed by those of us on this side of the Atlantic who study this institute.

> "...] if it had been intended that the protection of conscientious objection should depend [...] on national laws, it would not make sense to have included it as a fundamental right in the European Charter [...] [it] is a legal text binding on the Member States of the European Union*"* (pp. 22-23).

There are undoubtedly many lessons to be learned from this chapter; I would highlight the relevance of the religious or ethical convictions of individuals, which are not an accidental, dispensable or easily replaceable aspect and form part of the very identity of the person, deserving of legal protection, both constitutionally and in international documents protecting human rights. Therefore, an error when dealing with conflicts between conscience and law is to approach them from the perspective of legal exemptions, for this reason we suggest mentioning that it is about the recognition of the right to freedom of conscience.

> "[The ECHR has] stated that, where there is an unavoidable conflict between a legal obligation and a moral duty supported by 'genuinely and seriously held religious or other beliefs' the situation must be approached on the basis that freedom of conscience is protected by Article 9 of the ECHR" (pp.32-33).

Derived from the above, they mention the conditions for restrictions on freedom of thought, conscience and religion in Article 9. 2

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ECHR: (i) that the restriction is "provided by law"; (ii) that the restriction pursues a "legitimate aim" (the protection of public safety, public order, public health, public morals or the rights and freedoms of others); (iii) that the restriction is "necessary in a democratic society" (p. 35).

It is worth mentioning that freedom of conscience is not an absolute right, only the freedom to choose one's own beliefs. In the case of conscientious objection to euthanasia, it is generated when there is a conflict between freedom of conscience and other legal interests emanating from the legal norm objected to. The treatment will consist of weighing the interests at stake and it will always be necessary to verify the fulfillment of some conditions in the person of the objector, such as: (i) his sincerity; and (ii) to specify those "interests". Therefore, moral gravity and its imperative and unavoidable nature will have to be determined.

Consequently, the authors consider as *"*superficial the recourse to the argument that the general interest of the law, equal for all, must prevail, as if freedom of conscience were not part of the legal system and of the essential public interests*"* (pp.45-46).

In relation to the conscientious objection of institutions with ideology, the authors cite as an authoritative argument the *Report of the Spanish Bioethics Committee, on conscientious objection in relation to the provision of aid in dying of the organic law regulating euthanasia, July 15, 2021*. From which it emerges that the "institutions possess conscience [...] and the importance of guaranteeing their freedom of conscience" (p. 50).

The third chapter *The Organic Law 3/2021 regulates euthanasia and the moral problems it generates in health professionals* (pp. 55-64). For the first time, the "right to die" is created in the Spanish legal system. In other words, a right to euthanasia and assisted suicide provided by the health system. Hence, the authors state that "these are not medical acts aimed at procuring the patient's health, but precisely the opposite: to end the patient's life.

They are rather sanitary acts because they are carried out in health institutions and by health personnel (not necessarily medical) [...]

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the State cannot delimit at its discretion the meaning and purpose of medicine" (pp. 60-61).

This section is the central theme of the work, since the legal redefinition of medicine in Spain, in relation to euthanasia, will lead to objections to its application, both by physicians and other healthcare personnel.

The fourth chapter, *Conscientious objection to euthanasia in comparative law* (pp. 65-102). The authors review the European cases where medicalized death at the patient's request is legal, starting with the Netherlands, Belgium and Luxembourg; as is well known, in Switzerland it is illegal, but article 115 of the penal code "does not criminalize assisted suicide as long as the person who helps the applicant to end his or her life does so for altruistic reasons and not because of personal interests" (p.66). There, assisted suicide is used as a legitimate option to end life. It is also demanded for execution by foreigners, a phenomenon known as "death tourism".

Meanwhile, outside Europe, euthanasia is legal in Colombia; Canada; New Zealand; in Australia, in the territories of Victoria, Western Australia, Tasmania, South Australia and Queensland. The above-mentioned legislations allow the conscientious objection of the physician "who is asked to provide assistance in dying, subjecting him, depending on the case, to different obligations of referral" (p. 66).

In some U.S. states (California, Colorado, District of Columbia, Hawaii, Montana, Maine, New Jersey and Washington) assisted suicide is only permitted in the form of self-administration, similar to Switzerland. However, "no physician or health care institution is required to intervene in aid in dying" (p. 67).

Chapter five *The regulation of conscientious objection in Organic Law 3/2021: Positive aspects and shortcomings* (pp. 103-136). Here, the regulation of the institute is analyzed, thus article 16 mentions the "right of conscientious objection of healthcare professionals". However, the authors warn of the trap of legislative technique present in this paragraph when it says: "health professionals may exercise their right to conscientious objection". In their opinion, "[it is] as if it were a

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gracious concession by the legislator *pro bono pacis* [...] an expression of the type the right to conscientious objection is guaranteed would probably have revealed a different, and less distrustful, attitude towards freedom of conscience on the part of the legislator" (pp. 105-106).

The truth is that Article 16.1 restricts the exercise of the right to conscientious objection to "health professionals directly involved in the provision of assistance in dying", raising questions such as what is meant by "health professionals"? What is to be understood by "directly involved"?

The answer came from the Spanish Bioethics Committee "[...] the expression 'health professionals should be interpreted in a broad sense [...] directly involved in carrying out the activity that leads to death [...] is in favor of an extensive interpretation' (pp. 107-108).

Chapter six, *The Manual of Good Practice of the Ministry of Health (*pp. 137-149). This document is limited to providing recommendations to "guarantee the correct implementation of the law" (p. 137). The authors separate the positive and unfavorable aspects. Of the former, they indicate that the Manual accepts "supervening conscientious objection", as well as the "revocation of the declaration of objection presented at the time". From this point of view, the professors are in favor of ensuring that the process of registering the objection (or its revocation) is always open, without time limitation (p. 139).

In addition, the Manual stresses the necessarily ethical nature of conscientious objection; the confidentiality of the registry of objectors; the right of health professionals to be informed about the registry in their respective autonomous community; non-discrimination on the basis of their status as objectors; their freedom of choice will be guaranteed without pressure, negative consequences or incentives that seek to dissuade them from exercising their freedom of conscience.

The Manual presents unfavorable aspects such as ignoring institutional conscientious objection, in my opinion, from a reductionist perspective in which only natural persons have the right to define

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their acts in accordance with their convictions or values; it advocates the duty of information and referral of applicants for aid in dying to the detriment of objectors.

Chapter seven *A law that needs to be revised as soon as possible* (pp. 151-159). The writers suggest four actions to modify the law. First, eliminating the-political-registry of objectors, for "the foreseeable deterrent and inhibiting effect it may have, and indeed appears to be having, on the freedom of conscience of healthcare personnel, may well be replaced by a database containing (confidential) information on individuals and teams willing to participate in the provision of aid in dying" (p.155).

Secondly, to broaden the modalities of individual conscientious objection, either by recognizing the possibility of partial objection, for example, to certain phases or actions of the protocol provided for by law, and not necessarily to its totality; and even "selective" objections to certain euthanasia procedures, due to the circumstances of the specific case. And to eliminate, the requirement of "directly involved" in the procedure, to make it a reality for "any person who has a serious moral scruple to participate in any activity that is related to the provision of aid in dying, whatever their function or job in the healthcare facility [...]" (p. 157). Third, clarify that no duty of reference or referral can be imposed on conscientious objectors. Fourth, they urge recognition of institutional conscientious objection.

In short, the book is essential reading in order to understand the course of conscientious objection in Spain and presents arguments for its defense. Specifically, its content is useful for overcoming the fallacious dilemma that considers compliance with the law to be in the general interest as opposed to personal convictions reduced to the sphere of private interest, so often used by the detractors of conscientious objection.

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