

COMPULSARY VACCINATION VS. PARENTAL RIGHTS:

A FALSE CONFLICT OF RIGHTS*.

(Draft. Please, do not quote)

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1. As per the title, this paper does not deal with the right of all human beings to benefit from the medical and scientific progress to enjoy a better and healthier life, preventing and eradicating illnesses that not long ago could be deadly or cause lifelong consequences, such as limp, deafness, etc. Sometimes it is necessary to fight for what seems obvious, but it is not the case here now. Universal vaccination is not a philosophical, but a political problem. On the contrary, this paper deals with those that reject the use of vaccines for them or for their children, appealing to an alleged right, even when this means a serious risk for their own health and, more important, to the health of others. More precisely, I will discuss the very concept of (constitutional) right that underlie their claim of consider this conduct part of a right (freedom of religion, the right to raise their children according to certain values, etc.).

(I have tried to conform to the transdisciplinary character of the meeting, thought I am afraid I could not avoid a theoretical bias in my paper).

But, let me start with a short story. Not an impressive, but a common one; a true story after all. In the city of Granada, on the slope of a hill and looking to the Alhambra, there is a typical andalusian neighborhood, with narrow alleys and white houses. It is called El Albaicín. In the year 2010, an outbreak of measles was detected in El Albaicín. The main focus was located at the state school of the area where most of the children had not been vaccinated. Obviously, this circumstance

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had favoured the spreading of the disease. According to Health Authorities, for the outbreak not to become a serious epidemic, the children liable to contract the illness shall be vaccinated. From the beginning of this situation, Health Authorities requested the parents to vaccinate their children and to submit a certificate of vaccination in order to the readmission of the children at school.

A great number of parents did not answer the authorities request and a smaller group actively denied to vaccinate the children. Health Authorities ordered the compulsory vaccination with the authorisation of the Trial Court of Granada, that considered that this measure was in accordance with the law, justified by the epidemiological report and proportional as it does not implies a great or disproportionate sacrifice.

At least two parents appealed to the Higher Court arguing that the decision of the Health Authorities violated the right to education of the children and the right of the parents to rear their youth accordingly to their moral or religious values, and in general, to their beliefs, therefore deciding, among others aspects of their lives, about their children health protection and education.

I will focus on the later issue: the right of the parents to rear their children according to their beliefs, moral and empirical (Article II, Section 12 Philippine Constitution).

The Higher Court presented the problem as a conflict of rights, that is as if there were two legitimate legal claims in competition. In the one hand, there was a "right" of the State to force compulsory norms in order to ensure public health, and in the other hand there was a right of the parents to decide if their children should be protected that way. [It is –continues the Higher Court– a conflict between the Authorities that considered that every children should be vaccinated in order to avoid the risk of epidemic and the parents that think that not getting vaccinated is a better way to protect their children health.] The Court, not only found arguable this way of protecting children health, but also established the greater importance of the collective goods or rights protected by the action of the Health Authorities.

I will analyze this argument and the conception of rights presupposed by the Court. But prior to go further, I would like to clarify two points of this argument.

First, I think more accurate to speak about State *powers* instead of *rights*. And indeed, many norms that confer powers to the public authorities, also impose a *duty* to protect or promote a certain state of affair. [Therefore they are constitutive (as they confer powers) and –simultaneously– regulative norms (as they state a command).] This is the case with public health: authorities have the power, and at the same time, the duty to take the necessary measures (by ruling certain conducts) to protect it.

But, we cannot present this problem as a conflict between a power of the state and the right of the parents. In my opinion, this is a misunderstanding of the systematic and teleological relation between the two kinds of norms. Thus, constitutional rights function as limits of state powers. Therefore, when a public authority, in the exercise of a power violates a constitutional right, there is no conflict between norms, but, simply a right violation. The other way around, when a public authority exercises power within the constitution, there cannot be a conflict of norms either.

Second, if we present this problem as a disagreement about the best way of protecting the health of the children, so there is no conflict of rights either. This is an epistemic disagreement that shows a conflict of beliefs about the effects –good or bad – of getting vaccinated. This kind of conflicts can be solved by empirical and scientific evidence, that, as a matter of fact, are (or can be most of the times) quite conclusive at this point. [Children vaccinated against measles from 12 months of age reached a degree of protection of 94% to 98%. This degree rises up to 99% if the children get two doses at 15 months and 3 years old. Only 10% of the children present febrile episodes between the fifth and the twelfth day after vaccination. These symptoms seldom last for more than two days, slightly affecting the normal activity of the child.]

[Of course, freedom of opinion, religion, etc. involve the right to have whatever beliefs and act accordingly, even if these beliefs are obviously false for everyone else. There is a right to be wrong; in other words: freedom does not involve a commitment with truth. However, this is so unless the practice of your ideas puts in risk or causes harm to others (as it happens when some parents deny

the vaccination of their children in a hazardous situation that could turn into an epidemic)].

With all that, most of the academics as also constitutional and international courts (particularly, the European Court of Human Rights) would agree with the Trial Court of Granada in presenting this issue as a conflict of constitutional rights or as a conflict between constitutional rights and a public interest. In what follows I will argue that this way of understanding legal problems rest on a unsound conception of constitutional rights.

2. This conception is known as “The Global Model of Constitutional Rights” (Möller 2012). This conception of rights rest on three main thesis:

First, a theory of constitutional norms. According to this, constitutional rights norms present a different logical structure to that of legal norms. The former are principles whereas the later are rules. Rules connect a certain action or state of affairs with certain legal consequence, be it a position within a legal relation, be it a penalty, compensation, etc.; in other words, rules prescribe an action or state of affairs as an obligation, a prohibition or a permission. On the other hand, principles express ideal requirements that impose the obligation to optimise a certain (empirical) content (Alexy). In contrast to rules, that express a definitive command, principles, as optimization requirements express a *prima facie* requirement (but still not their definitive content).

The second thesis refers to the structure of the legal system. As objects of optimisation, a trend toward rights inflation cannot be avoid (is unavoidable). Thus, not only important issues, but all autonomy interest should be protected as a (constitutional) right, what also includes trivial and even immoral activities. The continuous expanding of rights scope is –to use an image– necessarily interrupted by the growing scope of other rights that equally expand from the opposite direction. That is, under this conception, constitutional rights tend to conflict or interfere between them or with a public interest.

[If we connect the rights inflation thesis and the so-called “radiation effect” (Alexy), according to which constitutional norms radiate into all areas of the legal

system, it turns out that not only those legal cases regarding constitutional rights or public interest, but almost any legal problem, is set out as a conflict of norms. Given that almost any claim can be founded on a (inflated) constitutional right, every single legal conflict is to be conceived as a conflict of constitutional norms].

The ways of solving this conflicts is the content of the third thesis, as conflicts of principles are not to be solved by the classical criteria (*lex superior, lex posterior* or *lex specialis*), but by means of a balancing guided by the principle of proportionality. Thus, the principle of proportionality plays an important role regarding constitutional rights as it provides a criteria for the resolution of conflicts between rights or between a right and a public interest and, at the same time, it allows for the identification of rights definitive content.

And now, let's go back to our story. The conceptual scheme of this conception of rights allows to defend a *prima facie* freedom of parents to decide about the administration of vaccines to their children even when the health of children themselves or the health of others is put in risk. Any limitation of this right must be justified by the principle of proportionality.

3. [This conception of rights shakes the foundations –so to speak– of the usual understanding of the role of rights in legal and political discourse. As one of the champions of this conception puts it: “The challenge that proportionality in general and balancing in particular present to traditional theories of rights is that they do not recognize any *special normative force* of rights, for example by regarding them as trumps or side constraints. Rather, rights operate on the same plane as (conflicting) policy considerations, and it is precisely for this reason that it is appropriate to balance them against conflicting public interests” (Möller 2014: 156)].

Such a conception of rights must face some criticism that make it questionable.

First, rights inflation means the pre-admission in the content of constitutional rights of whatever claim the right holder wants to. That includes trivial activities, activities that can cause harm to others or put them in risk, or even immoral activities. Is there a *prima facie* right to infect others? In my opinion,

inclusiveness at this first stage suppose to downgrade the notion of “right” in the political as well as in the legal discourse.

Second, the distinction between *prima facie* and definitive content is problematic as it implies two important conceptual distinctions.

Firstly, it separates the *definition* of a right and its *limitation*. The identification of the initial content –definition– of the right do not consider any other rights or public interests, but only the autonomy interests of the holder; it has to do only with the lifeplans of the holder whereas the definitive content is the outcome of the confrontation of the right with other rights or public interests through the filter of the principle of proportionality. Thereby every ruling of the exercise of the right, not to say a prohibition, is seen as an interference or external limit of the right.

I think this way of understanding rights ignores the relational nature of rights and liberties. The ruling of the exercise of a right or the diminishing of its scope in the interest of everyone cannot be seen as an external limit, but as the very delimitation of the right, that is, the specification of the conditions in which the holder can really exercise the right or ask for protection.

The second distinction originates from the former and refers to the *assertion* of a right and its *normative consequences*. The price to pay for a wide initial content of rights is its stringency. [As Möller says], within this conception, rights have no special normative force. To have a right does not mean that everything that is considered part of the right will be legally enforced.

This can lead to nonsensical conclusions, mainly regarding evil activities or those activities that can cause harm to others, since within the conceptual scheme of this conception, a certain conduct can be described as belonging to a right (*prima facie*), and at the same time, it can be described as an illegal conduct (definitive) according to a certain legal norm that rules or limit justifiably the exercise of that right .

And moreover, if any ruling or limitation of *prima facie* constitutional rights (widely considered) is to be seen as an interference, thus, democratic legislation appears invariably as the antagonist of rights. Of course, there is a strain between

constitutional rights and legislation, but this conception of rights disfigure their relation. In addition, every intervention of democratic legislator would be subjected to the principle of proportionality, reducing dramatically their legitimate capacity to decide about public issues.

Another line of criticism affects not the notion of right itself, but that of legal system. As we have seen, this conception of rights is a machine of generating conflicts between constitutional norms. [This conflicts of norms are to be solved later by means of the principle of proportionality.] Within this conception, every social conflict is translated into legal, or rather constitutional, language, but not solved by legal norms. It is only in a later stage, when both norms are compared that the judge decides which norm defeats the other, which one is to be applied. But the question is, are not normative systems, and particularly legal systems, suppose to provide a solution to social conflicts? In this sense, logical coherence is not only a structural formal property (Alchourrón / Bulygin 2002: 101), but also a pragmatic requirement of any effective normative system. Of course, there are moral dilemmas and legal hard cases; we cannot avoid them when dealing with norms, but they are to be decided –and actually are– through interpretation and specification, not necessarily as norms conflicts.

And finally, if the principle of proportionality has the last word, we should not waste our time trying to elucidate the content of rights as we know them (that is, freedom of speech, right not to be tortured, etc.) based on the wording of the legal texts, or historical reconstructions of legal concepts, nor the will of constitutional legislators or their reasons to rule things the way they did it. The final consequence of this conception is to ignore the constitutional guarantees and even rights because they all are reduced to one: the right not to be treated disproportionately.

4. My argument is that another conception of rights is possible. One that conceives rights as the result of an interpretative activity, and not the starting point for balancing. Of course, utility arguments –that are on the basis of proportionality– can be used in interpretation, but not only. And most of all, taking rights seriously, to use Dworkin's famous words, exclude in many cases this kind of arguments.

Anyway, setting the content of rights cannot ignore the rights of others and public interests; these are not reasons to a subsequent limitation, but circumstances that determine the true content of constitutional rights.

Once all legally relevant arguments have been considered and the scope of rights has been specified, –but only then– have rights an absolute normative force and therefore operate in practical reasoning as second order reasons, that is, excluding any other reason.