

# Hunger striking in prisons: ethics and the ethical and legal aspects

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## ABSTRACT

Hunger strike is a common form of protest in prisons and is a potential cause of many types of problems, both for the prison administration and the doctors who care for prisoners who participate in one. Issues of conflict of rights and obligations involved, and how to treat people who are subject to the Administration, which in this case takes the position of guarantor, have created major controversies over doctrine. Conscientious objection and the conflict of dual loyalty of doctors working in prisons are also issues closely linked to a prison hunger strike. In this paper we review the solution given to the problem of treatment of a prison hunger strike from three perspectives: ethics, ethical and legal.

**Keywords:** strike; hunger; prisoners; prisons; therapeutics , treatment refusal; ethics; force feeding; Spain.

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## INTRODUCTION

Occasionally, news on hunger striking in prison that put at risk inmates' lives go public on the media, including those cases which have ended in death, as happened last summer in a prison in Teruel. Literally, a hunger strike is the complete abstention of ingesting food, except for water. Usually, it is a vindicatory mean, many times the ultimate mean, used by people who seek to change a certain political, legal or administrative situation that they believe to be unfair or that harms their interests. It is a form of protest and pressure method that can frequently be found in prisons and other detention places, where it is difficult that the demands of those confined therein have the echo they pretend. This is one of the aspects that characterize this form of protest: the need to have a social rebound. Maybe another aspect that can be highlighted is that hunger striking is a pacific mean; the person that starts a hunger strike uses as only weapon their health and life. In fact, the only victim, in case there is one, will be themselves. The striker compromises the Administration before which it lodges his complaints staking assets as precious as their own health and life aiming to force a dialog that hadn't been achieved to that moment, or at least not

achieved in the degree the striker pretended. It is an effective form of protest since the pressure the striker exercises commits the Administration to agree to the striker's demands or, otherwise, watch how his health and life are progressively menaced.

The controversy caused by a conduct with an ideological basis or founded on personal beliefs, that leads to multiple views on its adequacy or legitimacy and the attitude to confront it, increases when the person who goes on a hunger strike is deprived of his/her freedom. This is due to the special relationship between the inmate and the prison administration since what can be applied to a free person may not be applicable in these cases. When the health and the life of the hunger striker face a real threat, a decision will have to be made on whether there has to be an intervention on the striker's body without their consent and against their will or, otherwise, if the administration simply remains impassive, observing the progressive extinction of a human life. As we will see in this paper, the judicial order will always entail furnishing the necessary means to preserve the striker's life, even if such decision is contrary to the striker's will.

The legitimacy of a forced but helpful intervention, of a therapeutic-medical character, from the

Administration has been discussed from a judicial perspective. Most of all, when inmates put themselves at risk threatening their own health and life due to the voluntary and prolonged fasting. Even if their decision not to feed, naturally or artificially, and not to receive medical assistance, is free, conscious and reiterative. Furthermore, other arguments in the matter must be considered, such as those arising from the rules of medical deontology —binding for doctors as medical associations are public law corporations— and those arising from the moral consideration that such forced intervention may have, determined by ethical standards. These three perspectives should jointly answer to the question on whether persons' wills must be respected to their ultimate consequences.

#### **PRELIMINARY QUESTION: IS A STRIKER A SUICIDE?**

Persons who go on hunger strike know that they can die; therefore it is logical to question the suicidal character that such attitude may have. Romeo Casabona believes that strikers don't have the intention to die, but only the aim to achieve their demands. However, he points that it is difficult not to recognize a suicidal will in a striker who persists on such attitude to its ultimate consequences<sup>1</sup>. Miláns del Bosch considers that strikers are suicidal for they consciously put at risk their own lives<sup>2</sup>. In this same line, Díez Ripollés affirms that radical strikers are suicidal because they are willing and ready to die if they don't achieve their demands<sup>3</sup>. This has been a highly polemical matter among doctrine since other authors think that strikers are not willing to die; their only aim is to fulfil their objectives by going on a strike. They want to live, but not just at any price. Bajo Fernández understands the matter this way using as an example the case of a woman who was a Jehovah's witness and was transfused blood against her consent<sup>4</sup>. González Morán affirms that hunger strikes are the manifestation of the individual right to freedom of expression and freedom of religion. The exercise of such rights, in their most extreme expression, can lead to death, but strikers do not directly pursue this consequence<sup>5</sup>. From my point of view, strikers do not intend to die. Accordingly, the vast majority of hunger strikes in prisons are limited to the inmates' personal sacrifice not to eat without the will to threaten their own health. Not even in the most extreme cases can we find a suicidal will since the ultimate goal of strikers is to fight for their ideals,

over the intention of dying, being this only a possible consequence within their personal struggle.

#### **ETHICAL ASPECTS**

From the ethical principles point of view, the controversy herein discussed confronts the individual autonomy that entitles everyone to make decisions on their own lives and health, as long as it doesn't harm someone else's interests, and the moral obligation to act in the best interests of others, which is known as the principle of beneficence. Oppositely, we find the principle of non-maleficence<sup>6</sup>. Actions have to be judged to be right or wrong in view of the specific situation of a person and their freely expressed wills. Therefore, if an inmate has expressed his/her will not to be fed, how are his/her interests not harmed? If inmates are allowed to voluntarily go on a hunger strike once they have appropriately and comprehensively been informed on its possible consequences and having confirmed that they understand them, are we harming their personal autonomy and interests? There are two opinions on the matter. Some, among whom I count myself in, support respecting the inmates' will since they consider an intervention would be an aggression to the inmates' freedom of conscience and an unjustified invasion of their personal autonomy and, thus, of their personal dignity. Human dignity can only be respected if the decision-making process of persons is not restricted and if we take into account their beliefs, values, convictions, preferences and desires. The second opinion group is formed by those who prefer a forced intervention in order to stop a hunger strike. They argue that life is a superior asset that must prevail for the enjoyment of other personal rights.

Actions pertaining to the personal autonomy sphere have three components: knowledge (knowing), intention (wanting) and lack of external pressures that could have an influence on the process (will power). For this autonomy to be respected, we have to analyse two aspects: the appropriate information that favours a comprehensive previous knowledge that enables a correct decision-making process; and the absence of control and limitations to the actions of others, as long as they don't harm someone else's interests<sup>7</sup>. Engelhardt understands that this autonomy doesn't allow an intervention on someone without their consent<sup>8</sup>. From this point of view, it is impossible to justify force-feeding of inmates who have knowledge, will power and freedom of action and have not given their consent. However, an action in the best interest

of someone else is not paternalistic when it tries to do the right thing and help that person, as long as this assistance is voluntarily asked for or accepted<sup>9</sup>. The willingness in requesting or accepting such assistance is essential to the matter in question. If such willingness doesn't exist, an action in the best interest of third parties is not possible. Consequently, if inmates do not ask for feeding the action of public authorities will not be in the best interests of inmates, but a forced intervention, even if the ultimate aim is to preserve life. From this point of view, autonomy and actions in the best interest of third parties are the two sides of the same coin. There is no possible conflict between life and freedom for only life with freedom (freedom of choice) is worth to live. The ethical principle of non maleficence entails that only actions can be considered to be made in the best interests of someone else by taking into account what this person considers to be right for them. An action cannot be considered as right for someone when it contradicts their freely expressed wills and preferences. The capacity to choose between different treatments or no to receive one pertains to the core conditions of a person: personal autonomy and the person as a subject of rights. Therefore, maleficence happens when there is an intervention that doesn't respect someone else's decision and, consequently, when actions go against peoples' interests; for no one, not even the State or other individuals, can replace the subject—in this case, the inmate—in the decision-making process.

Some authors believe that force-feeding is justified on an inmate in view of the motivations that found the strike<sup>10</sup>. Manuel Atienza says<sup>11</sup> that this can unfairly limit inmates' rights "The exercise of a right that involves an obstacle in the enforcement of a governmental policy or that makes Government to face a dilemma cannot be a justification in itself to limit such exercise. If this were the case, the freedom of expression, of manifestation, etc, should be limited for the same reasons whenever they had an illegal end".

In conclusion, from an ethical point of view, force feeding on inmates who go on hunger strike crashes with personal autonomy and cannot be considered an action in the best interest but a practice of maleficence.

## DEONTOLOGIC ASPECTS

Deontology is the complex of norms that rule the chores of a professional collective. Medical deontology seems to clearly establish how to proceed in cases in which a competent, capable and informed

person decides to go on a hunger strike risking their own life: not to feed them and respect their will. The World Medical Association in the General Assembly, held in Tokyo in 1975 established that a competent inmate shall not be fed<sup>12</sup>. The Standing Committee of European Doctors adopted a series of recommendations on ethics and torture<sup>13</sup> in the Assembly held in Madrid on November 1989. For the matter in question, among such recommendations, the following must be highlighted "We urge all national health associations that have yet not ratified the Declaration of Tokyo (Guidelines for Physicians concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to detention and imprisonment) adopted in 1975 by the World Medical Association as the definitive declaration on the medical position on such matter, to do so and to enforce it". Finally, the recently approved Deontological Code of the Spanish Medical Organization refers to this matter in its article 12<sup>14</sup>. It involves an improvement in two aspects: first, since it specifically considers imprisoned people as possible subjects to go on hunger strike and establishes that physicians shall proceed in such cases in the same way that they would act with a free person; and, on the other hand, it observes the right of physicians to conscientious objection in case they were compelled to act against their convictions and against the freely expressed will of their patients.

## LEGAL ASPECTS

There are times in which ethics, medical deontology and legality don't go all together and they adopt diverse solutions on the same matter. Whereas the ethical and deontology perspectives on hunger striking in prisons advocate to respect the freely expressed will of people, even when life is at stake, the legal perspective goes on another direction.

The applicable legal rules to the matter are the following: the Spanish Constitution (CE), the Law on Personal Autonomy (LAP)<sup>15</sup> and the Convention of Oviedo adopted in 1997 and that came into force in Spain on the 1<sup>st</sup> January, 2000<sup>16</sup> and, among the specific penitentiary regulation, the Spanish General Prisons Act of 1979 (LOGP)<sup>17</sup> and the statutory Prison Rules of 1996 (RP)<sup>18</sup>. By examining these texts we can drive to the conclusion that the RP is the only legal rule, in addition to the doctrine of the Constitutional Court that enables medical treatment against the will of a person able to make decisions. Article 210.1 of the aforementioned establishes:

Article 210. Compulsory assistance in vital emergency cases

1. The medical-healthcare treatment will always be carried out with the informed consent of the inmate. Only when life is at stake will this treatment be possible against the will of the interested party, as long as the medical intervention is strictly necessary to try to save the patient's life and with due regard to the corresponding judicial authorization when requested. Knowledge of such action shall be provided to the judicial Authority.

The two main characteristics of this text are:

a) it is a governmental rule and therefore, it is considered neither sufficient nor appropriate to limit the fundamental rights of people, which can only be limited through law; b) the text is clearly contrary to the LAP and the Convention of Oviedo which do not establish exceptions in their enforcement due to the imprisonment of a person. Moreover, this Article does not develop nor interpret other Articles from the General Prisons Act, which establishes the possibility of involuntary medical treatment in Article 45.1.b which enables the use of coercive means "to avoid harms that inmates can inflict on themselves, other people or things..." This article, embedded in the chapter on prison security, is envisaged to solve incidents within the prison and it doesn't refer to forced medical assistance<sup>19</sup>.

On this point, the constitutional doctrine also established a criterion. In order to understand it, first we need to understand the so called Special Subjection Relations (*relaciones de sujeción especial*, RSE) for they were one of the main arguments used by the Constitutional Court (Tribunal Constitucional, TC) on the matter. They are a special legal figure that "founds the weakening or diminishment of civil rights or of the institutions that guarantee them as a consequence of a qualified relation with the authorities"<sup>20</sup>. Lasagabáster calls it the "no-law zone" in order to explain how these relations can run parallel to the Law and even contradict its letter and spirit.

The characteristics of such RSE relations are the following<sup>20</sup>:

- An accentuated situation of dependency, from which obligations result.
- A general state of limited liberty.
- The existence of a personal relationship.
- The impossibility to previously establish the extent and content of the services comprised within such relations and the impossibility, also, to previously establish how intense a coercive

intervention consequence of such relations will be on the affected parties.

- The affected have to follow orders which do not directly result from the law.
- Such situation finds its reasonability in an administrative goal/objective.
- The willingness to be subject to such relationship (although it is pretty doubtful in the case of inmates).
- The justification of such RSE relations is the need for an administrative efficiency and productivity.

The interpretative criteria of the European Court of Human Rights (ECDH or, in Spanish, TEDH) ultimate interpret of the European Convention on Human Rights (ECHR or, in Spanish, CEDH) binds the Spanish Constitutional Court under express constitutional mandate (Article 10.2 CE). The ECDH made an express declaration on the obligations of a State in relation to the life of its citizens in the Sentence *Pretty vs. United Kingdom*<sup>21</sup>: the State shall protect the life of its citizens. Article 2 of the ECHR doesn't confer the right to die "...nor it shall create a right to self-determination that entitles a person to choose to die rather than to live". The European Commission of Human Rights, precursor to the Court, issued a report on the case *X vs. Germany* (1984) 7 EHRR 152 in which an inmate filed a claim because he had been forcefully fed when he went on hunger strike. In its report (pages 153-154) the Commission established that "force feeding can entail certain degrading aspects that, in some cases, can be forbidden under Article 3 of the Convention. It is the Commission's opinion that the Contracting Parties are compelled to ensure the right to life of every person, as established in Article 2. The fulfilment of such obligation may request under some situations a proactive action from the Contracting Parties, especially definite actions to save the life of a person when it is at risk and the person is under detention by the authorities (...) The Commission considers that the authorities, in the present case, have acted in the best interest of the inmate by facing the decision of either respecting his will to fast and, therefore, undertaking the risk to see him suffer durable harm or even see him die or trying to ensure his survival knowing that such action could attempt against his human dignity".

The Spanish Constitutional Court (TC) established its doctrine on the matter by sentencing the case of hunger striking by inmates who were members of the terrorist band GRAPO in 1989-90. As mean to confront the governmental policy on the dispersion of detainees for terrorism, a large number of inmates,

members of the terrorist band, went on hunger strike. The strike lasted weeks and caused a lot of suffering and the death of one of the strikers. The TC then settled the legitimacy of the possibility to force feed inmates in its sentences 120/1990, 137/1990, 11/1991 and 67/1991. However, we will only refer to sentence 120/1990<sup>22</sup> for it is the first and the foundation for the arguments of the other sentences. Legal Ground 6 of the mentioned sentence establishes the subject of the sentence which is to “establish the constitutional legacy of the Court order to force feeding by parenteral nutrition when, agreeing with medical criteria, such nutrition is necessary to avoid the risk of death”. Such Court order laid out the conflict “...between the right of strikers to exercise their freedom to its ultimate consequences, even if provoking their own death, and the right-duty of prison administration to safeguard the inmates’ life and health established in Article 3.4 of the General Prisons Act (LOGP). This conflict impacts not only with the right to life but also with other rights (mentioned in Legal Ground 6). The Spanish Constitutional Court established four arguments to found force feeding in such cases: a) life is a superior asset that must prevail, even over the right to self-determination of persons; b) nor the right to die nor the right to make decisions on one’s own life exist; c) the Special Subjection Relation between inmates and the prison administration entitles the latter to establish limitations on the fundamental rights of inmates for it has to fulfil the obligation of safeguarding the inmates’ health and life. Therefore, the enforcement of coercive means is absolutely justified under Article 45.1.b of the General Prisons Act (LOGP) and d) the objectives of hunger striking in prisons go totally against the law and pretend to change a governmental policy.

However, the aforementioned sentence wasn’t agreed by all the members of the Court and there was discussion on it. Out of the twelve members of the Court, two judges Rodríguez-Piñero and Leguina Villa signed dissenting votes. These can be synthesized as follows:

a) The obligation of the Prison Administration to safeguard the inmates’ life and health cannot be understood as the power to impose additional limitations to the inmates’ fundamental rights. Inmates have the same rights to life and health as free people. Neither does the Special Subjection Relation justify the imposition of additional limitations to such rights. Therefore, everyone has “the right to reject the unwanted assistance or the assistance that has not been requested”.

b) The legitimacy of objectives pretended by strikers cannot condition the actions of the prison administration.

c) This sentence is binding and, therefore, affects the freedom to choose of those subject to the case in question. However the referred safeguard obligation of the prison administration ends when inmates’ reject medical healthcare.

In conclusion and in words of Judge Leguina in his dissenting vote “Inmates that with great risk to their own health and life, but not harming other’s health, reject food and medical healthcare are not incapable persons whose limitations have to be covered by public authorities. They are sick persons who still have their complete right to decide whether to give their consent or to reject medical treatment. I believe that if we were to approach the problem herein (in the sentence) discussed from such perspective —a sick person who is also an inmate— instead from the perspective herein established —an inmate who is as well a sick person— the requested protection (not to be force fed) would have been granted”.

The Court’s reasoning is simple: the prison administration has the obligation to safeguard the inmates’ life and health; inmates who go on hunger strike are attempting against their own life and, therefore, the prison administration is compelled to treat (to force feed) those inmates who put at risk their own lives because of a hunger strike. The Court justifies the prison administration’s safeguard obligation through three arguments: first, there is no such thing as a right to decide on one’s own life; second, hunger strikes in such cases have illegal aims and, third, the Special Subjection Relations entitle the prison administration to restrict inmates’ rights. However, none of such arguments suffices to justify force feeding. In reference to the right to decide on one’s own life, the same sentence recognizes that such right is embedded in the right to freedom of every person although it doesn’t include the right to request someone else’s (in this case, the authorities) help to die (Legal Ground 7). In reference to the illegality of hunger striking in prisons, it is dangerous to link this aim to the actions of public authorities, since it could attempt against human dignity and, finally, in reference to the Special Subjection Relations, since in such cases, inmates have or, should be granted, the same fundamental rights as those of free citizens, to the extent in which they are compatible to the complete serving of the sentence<sup>11</sup>. Furthermore, the interpretation of Article 3.4 of the General Prisons Act has been discussed. Such Article establishes that “the

Prison Administration shall safeguard the inmates' life, integrity and health". The Constitutional Court has understood that such text establishes the obligation of the Prison Administration to safeguard the inmates' life and health. However, if we were to understand the term "safeguard" as the "care provided upon request", the Administration's obligation to safeguard inmates' life and health is not such an obligation if its assistance has not been solicited by the inmate. Therefore the Administration's care of the inmates' life and health involves the settlement of the necessary and sufficient conditions (ventilation, occupation levels, healthcare, sports, cultural activities...) for the imprisonment not to be *per se* an additional risk to the inmates' lives. The Administration cannot compel anyone to live against their will<sup>23</sup> but it has to avoid any of the possible threats to the lives of those who depend on it (in this case, inmates) and tackle such threats in the most efficient way, as long as the threatened party doesn't reject such assistance. If the Administration was to forcefully intercede, it would entail an excessive limitation to the inmates' fundamental rights<sup>24</sup>. Moreover, such an interpretation would be inconsistent with Article 3.4 of the General Prisons Act.

Further to the jurisprudence of the Constitutional Court, the Law on Personal Autonomy (LAP) and the Convention of Oviedo were promulgated. Both texts establish that all medical intervention must be preceded by the consent of the interested party. However, the Constitutional Court has reviewed such criteria on other occasions but it has not established any jurisprudence on the matter. In addition, the judicial orders that following the aforementioned jurisprudence have sentenced for force feeding on persons whose life or health was at stake have not been appealed before the Constitutional Court. The new laws and the socio-political change occurred in Spain make us question whether the Court would change its criterion if it were to newly analyze the matter.

## COROLARY

— Hunger striking in prisons entails serious ethical problems. These problems derive on one hand, from the capacity or incapacity of imprisoned persons to make decisions that could involve risking their own lives and, on the other, on the physicians' attitude when treating such patients.

— From an ethical and deontology point of view, the will of persons must be respected when they are capable to make decisions, they act freely, they

understand the consequences of their acts and they don't harm third parties' interests.

— The constitutional doctrine makes the right to life and health prevail over the capacity to make decisions and the freely expressed will of imprisoned persons when rejecting medical assistance.

— The statutory Prison Rules (RP) are the only law in Spain today that grant the application of medical treatment against the freely expressed will of the affected. Such Rules contradict other superior legal rules as the Law on Personal Autonomy (LAP) and the Convention of Oviedo and enables a limitation on fundamental rights that can only be granted by law.

— Doctors may face a dilemma. Were they to follow their moral convictions and not to feed their patients against their will, they could fail to meet professional orders to feed inmates who go on hunger strike and, thus, be reprimanded. In such cases they can claim their right to conscientious objection.

## CORRESPONDENCE

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