

# Conscientious health objection in the prison environment

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## ABSTRACT

To be fully in accordance with constitutional doctrines, the notion of conscientious objection must be understood as a manifestation of the fundamental right to ideological freedom as contained in art. 16.1 CE (assuming of course that all objecting conduct is legitimate), but it must also be understood as a *principle*. That is to say, any conflict between the subject's fundamental right and legal duty that he rejects must be resolved by the judge who must make a careful judgment of values and property. This fundamental right still exists and may invoked and exercised by inmates and health personnel in the prison context in the face of predictions of the forcible imposition of medical treatment as stated in the LOGP and RP, with no more limit than public order itself.

**Key words:** Prisons, Prisoners, Spain, Attitude of Health Personnel, Liability, Legal, Ethics, Professional, Morals, Legislation.

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## 1. CONCEPTUAL SPECIFICATION OF CONSCIENTIOUS OBJECTION

The term "conscientious objection" was not originally born as a constitutional or legal concept, it is more usually found in the field of moral philosophy or legal ethics, from where it was taken by the legal jargon to designate a possible situation of disobedience to legal order. From this philosophical perspective, conscientious objection is understood as a refusal to comply with a certain behavior which could be legally demanded from an individual, due to conscience issues. This may occur either because the behavior demanded is mandatory by law or by the condition of the individual as a government employee, or either because it relates to a contract or to a legal or administrative resolution. Broadly speaking, conscientious objection can be defined as the pretention to disobey the law due to axiomatic reasons (not merely psychological), mainly religious or ideological, avoiding that way the legal punishment commonly applied to such disobedience.

Consequently, we are facing an individual and private action that demands an exception in the exercise of general law (whose validity is not questioned), and that emerges due to an existing conflict inside the individual's conscience (his moral convictions contradict the behavior which is legally expected from him). It would not be wise to go on about the theoretical or doctrinal differences between conscientious objection and civil disobedience (which is of a collective, public, vindicatory, political and law-questioning nature, and therefore does not pretend to avoid punishment but assumes it as an exponent of the legal injustice being condemned). Either way, it is convenient not to mistake these terms in the theoretical or the practical domain. Disobedient individuals do not acknowledge the validity, legitimacy or justice of a certain rule and confront it with disobedience, maintaining this public behavior despite the punitive consequences that it will entail. Conscientious objectors acknowledge the validity of the rule, but pretend to be individually exempted from the behavior the rule demands from them due to private issues of moral character.

Considering this, what criteria should a democratic system follow to acknowledge as justified disobedient behavior coming from an individual who alleges personal principles to break the law? On the one hand, we must always take into consideration the assertion stated by Gonzalez Viven, one of our most distinguished social philosophers: "There is never a moral reason to obey the Law, but there are always multiple moral reasons to disobey it". Taking this into consideration, and assuming that "actions determined by moral reasons always have some *prima facie* value", we can declare that conscientious objectors, strictly speaking (that is, objectors who do not pretend to change the law or alter a policy, but only to preserve their examination of conscience and coherent behavior), can always have on their favor a *presumption of moral righteousness*. This presumption will be subject to repeal, not due to formal political principles or to the assumption that obedience to democratic law is absolutely mandatory, but whenever the objector's behavior substantially damages legal values affecting other people's rights, autonomy or dignity. This entails that conscientious objection must not be considered *a priori* as a suspicious act of unlawfulness, but as a valuable and legitimate decision of an individual who must, in such cases, be subject to a subsequent comparative trial against other principles and values.

## 2. CONSCIENTIOUS OBJECTION: LEGAL ACKNOWLEDGEMENT AND COVERAGE

Conscientious objection demands the exemption of legal duties (to avoid their implementation while avoiding the corresponding punishment), but this can't be translated into a pure and simple non-fulfillment of such duties – that is, breaking the law- for this would imply that it would be processed as a crime, and we would be facing an assumption specified by Criminal Law. For this non-fulfillment or exemption of duties to be legally acknowledged, a legal rule that observes such situations must already exist. Therefore, the problem which lies under conscientious objection is finding the "legal justification" (legal coverage) that either authorizes the individual to avoid certain legal duties without committing a crime by doing so, or allows him to avoid the corresponding punishment.

Conscientious objection is not acknowledged, in any of its possible expressions, by international human rights bills. The right to conscientious objection "according to national laws which regulate its practice" is only acknowledged by the article II-70.2, in the Bill of Rights of the not yet born European

Constitution. Was this Constitution to be in force, it would imply a very weak observance of this right by the European Union's legal system. In addition to this, Case Law concerning the *European Human Rights Agreement* has always asserted that although demands made by conscientious objectors may find its place among the regulations of article 9 within the *Agreement* (right to free thought, conscience and religion), this does not guarantee, strictly speaking, the right to conscientious objection.

As far as Spanish Law is concerned, without taking into account article 30.2 of the Spanish Constitution, which observes conscientious objection strictly applied to military service (with the subsequent regulation of its practice and its replacement for community service), conscientious objection is not legally observed. Does this mean that, excluding the regulations concerning military service (which no longer exists today), there is no place for other objection assumptions inside our legal system? From a simplistic point of view we could say that such is the case: law is mandatory for all and whoever pretends to break it can put forward moral or political arguments, but cannot find legal coverage to such infringement. Conversely, the Spanish Constitution, which is mandatory and directly applied by the public power entities, declares in its article 10.1 that "the basis for political order and social peace (...) lies in individual rights and dignity". If we consider dignity to be "the spiritual and moral value corresponding to each person, which is expressed by conscious and responsible decision-taking individually done and entailing the search for respect from others" [Constitutional Court Sentence (STC in Spanish) no. 53/1985, Legal Basis (FJ in Spanish) 8°], it seems as if no one can be forced to act against one's most intimate convictions, which conform one's moral personality. This way, dignity implies, above all, the ability to take decisions freely in accordance to personal convictions, the essential and most meaningful actions of life.

Unfortunately, due to the fact that article 10.1 is found within the Constitution, dignity is therefore a principle in society, not a fundamental subjective right which can be put forward as such by individuals<sup>2</sup>. Therefore, to justify the conscientious objector's infringement it is indispensable to consider such behavior from the point of view of some fundamental right. In accordance to constitutional doctrine, a certain issue can only be considered as part of a fundamental right if it is observed by articles ranging from 14 to 29 of the Spanish Constitution.

Conscientious objection has been generally included by legal doctrine within the content of freedom of

conscience, acknowledged in article 16.1 of the Constitution as “ideological, religious freedom and freedom of worship”, that is, a practical freedom which allows, theoretically, and individuals to behave, both personally and socially, according to their own personal convictions. It is commonly believed that article 16.1 CE supports a general right to conscientiously object, that is, the right to refuse to abide by the legal duties which clash with one’s own moral or religious convictions.

The only legal step forward concerning the content of freedom of conscience as established in article 16.1 CE is the Religious Freedom Fundamental Law (5<sup>th</sup> July LO 5/1980). In its article 2.1 it stipulates that everyone has the right “to profess any freely chosen religious beliefs as well as to profess none; to change religion or abandon it; to freely display their own religious beliefs or their lack of them, and to abstain from displaying them (...)” This article does not specifically indicate that the right to profess and display religious beliefs entails the possibility of not fulfilling those legal duties which clash with conscience issues. Nevertheless, the concept of “displaying” has been interpreted as all those acts which manifest individual behavior in accordance with personal beliefs, therefore including conscientious objection. The only difference between ideological and religious freedom as established in article 16.1 CE and conscientious objection lies in their formal appearance: in fact, conscientious objection implies the use of freedom of conscience when facing a legal mandate incompatible with personal convictions. This way, we can assert that objection is truly a fundamental right.

In conclusion, the fundamental right to ideological and religious freedom not only includes the right to personally determine your own convictions (which, obviously, did not need to be acknowledged by Law), but also the right to externally behave in accordance with those convictions, whether or not such behavior is among those already observed by law. Either way, this does not entail the existence of an autonomous fundamental right to object; conscientious objection is a specification of the right to freedom of conscience, whenever the individual confronts legal duties contrary to his convictions.

This generates a double implication: on the one hand, the use of conscientious objection cannot be reduced to the specific categories observed and regulated by law (up till now, this only includes the obsolete objection to military service); on the other hand, conscientious objection must be presumed to have constitutional legitimacy (as long as it is a truthful conscientious objection). This second implication

comes along with the idea of divesting conscientious objection of the undertone conception of “allowed illegality”, and would therefore reverse the search for evidence. Conscientious objection’s legitimacy should be presumed *a priori*, and whoever questioned it would have to prove its illegality in a trial. Conscientious objection would therefore become a value in itself, occupying a central position in legislation, for the same reason it occupies a central position inside the individual, along with freedom of thought and religious freedom.

Along with these two implications, it is commonly believed that conscientious objection is nowhere near experiencing a legal regulation, for it implies, above all, putting into practice principles (not rules) to settle conflicts that might emerge in any field of Law, in any moment and affecting any sort of individuals (making it legally unpredictable). It must therefore be the responsibility of Case Law, as it has been till now. Some believe, while understanding that such a regulation could never be too detailed, that certain foresight plans could be implemented, at least concerning the following: people who could allege objection, acts included in such objection, procedure of statement and explicit or implicit repeal, and organization measures to provide for the objector.

When the Constitutional Court confronted the problem of acknowledging other situations of conscientious objection apart from the one already regulated, it firstly took the same approach as we have already mentioned: “conscientious objection is a specific case within the field of freedom of conscience, which entails the right to freely conform one’s own conscience as well as the right to act in accordance with its imperatives”. Consequently, “given the fact that freedom of conscience is, in turn, a specification of ideological freedom...it can be said that conscientious objection is a right acknowledged both in an explicit and implicit way by Spanish Constitutional Legislation” (23<sup>rd</sup> April STC 15/1982). Conscientious Objection is therefore acknowledged by the Constitutional Court as an explicit right observed by article 30.2 concerning military service, and as an implicit and general (not confirmed) one by article 16.1 of the Constitution.

The application of this doctrine can be seen in the Court’s decision regarding an action of unconstitutionality (allegation) proposed against a law which allowed practicing abortions under certain circumstances. Such action was rejected due to an issue of conscientious objection. The allegation of unconstitutionality reported the lack of a specific legal acknowledgement of conscientious objection coming from medical sta-

ff. The Court's decision concluded that the legislator could have regulated conscientious objection in particular (and maybe he should have done so), but his silence must not be interpreted as a denial of the right to object, because such right "exists and can be used regardless of whether or not a regulation has been established", for "conscientious objection is an essential part of ideological and religious freedom as described by article 16.1 of the Constitution" (STC 53/1985, FJ 14<sup>th</sup>). In other words, the Constitutional Court acknowledged the legitimacy of a form of conscientious objection not yet observed by the Constitution or by legislation, and whose only constitutional coverage was the fundamental right to ideological freedom and freedom of conscience.

Nevertheless, this new perspective (accepting the existence of a general right to objection) was contradicted by the Constitutional Court in two later sentences concerning the 1987 regulating law of conscientious objection to military service. The doctrine brought up regarding the former played a decisive role in giving form to the concept of conscientious objection and its connection to fundamental right to ideological freedom featured in article 16.1 of the Constitution. In the first warrant, the Constitutional Court asserts that conscientious objection is only legitimate in Spanish legislation as stated by article 30.2 of the Constitution: "such right cannot be put into practice without constitutional acknowledgment, not even under the protection of the right to ideological freedom or freedom of conscience, which would not be sufficient to exempt citizens from constitutional or sub constitutional duties due to conscience issues" (STC 169/1987, FJ 2<sup>nd</sup>). The second sentence was formulated in an even more categorical way, asserting that "a general right to conscientious objection, understood as the right to be exempted from fulfilling constitutional or legal duties if these oppose to personal convictions, is not acknowledged by our legislation and it is unbearable that it would be so by any legislation, for it would deny the idea of an existing Sovereign State" (STC 161/1987, FJ 3<sup>rd</sup>).

What conclusions can we derive from constitutional case law? The first and most important conclusion about our constitutional system (apart from it confirming its contradictory character) is that it allows conceiving conscientious objection in two different ways: either as rules or as principles, bringing into use terminology commonly used among law philosophers. The 1987 sentences state that objection must be a substantive law and therefore, they establish that a general right to object does not exist (no one can legislate on their own) for only a legislator can set

the scenarios featuring a conflict between issues and the way to solve it. Conversely, the Constitutional Court's first statements conceive objection as a principle: whenever there is a conflict between individual freedom of conscience and a rule seeking dispute, the comparative balance between both must be settled in court. Furthermore, any objector has the right to go to court in a comparative trial (carried out by a magistrate) to settle if constitutional settlements, as established by law, prevail upon individual convictions.

Taking into account this double perspective, some authors propose a synthesis which includes Constitutional Case Law. This implies starting from the STC (Constitutional Court Sentence) 161/1987 (dating from the 27 October) as a general rule (for it is exposed in such a way) and considering the rest of statements as only applicable for specific objection cases concerning two legal duties (military service and abortion). STC 161/1987 seems two intend to settle a permanent Court stance ruling out the fundamental nature of the right to object, which can only be described as an "autonomous constitutional right", which comes from the more ample right to ideological freedom and is necessarily connected to it, but must be acknowledged in each case (STC 161/1987, FJ 3<sup>rd</sup>). Being such the general rule, objection cases previously acknowledged as such by a legislator (either a regular or constitutional one) would be the only ones observed by law. Subsequently, the Constitutional Court's doctrine regarding military service and abortion should be interpreted, only concerning the legal duties related to doing military service and to taking part in abortion practices. The rest of possible objection cases, not previously acknowledged, would be illegal and therefore would imply the corresponding punishment.

Although this attempt to synthesize case law is commendable, it is also illogical and simplistic, for it ends up denying an express and unequivocal statement made by the Constitutional Court: "conscientious objection is part of the fundamental right to ideological and religious freedom acknowledged by article 16.1 in the Constitution and, as this Court has already established several times, the Constitution can be directly applied in the field of fundamental rights" (STC 53/1985, FJ 14<sup>th</sup>). Taking this into consideration, the most correct and coherent way to conceive conscientious objection, and also the one most in accordance with constitutional doctrine, is to approach it as what it is: it is an expression of the fundamental right to freedom of conscience (therefore assuming as legitimate all cases of objection), but must be interpreted as a principle, that is, not considering non

regulated cases of objection – all are, excepting those concerning military service—as legal offences. They are to be interpreted as cases of conflict between an individual fundamental right and the legal duty which the individual refuses to obey, and it must be settled in court by means of a comparative trial against other values and properties. This should be it, no more, no less. Objection is, therefore, a fundamental right which is not absolute or unconditional, but limited, and it can be defeated in a comparative trial.

### 3. CONSCIENTIOUS OBJECTION IN THE HEALTHCARE FIELD

Whenever religious, ideological, philosophical or humanitarian convictions of an individual generate a property conflict against a legal duty in the field of healthcare or medicine practice, we are encountering what we commonly designate as healthcare conscientious objection. In this field we can theoretically differentiate two types of conflicts concerning the individual objecting. On the one hand, the denial to carry out a medical intervention or to assist (which can be legally demanded), or the denial to participate directly or indirectly in such a practice considering it contrary to individual moral or religious convictions, or opposite to deontological principles which the individual cannot reject. On the other hand, the patient's refusal to a medical treatment incompatible with his moral, philosophical or religious convictions would be considered too.

The latter has provided us with a plentiful supply of Case Law and legal literature, although the patient's autonomy principle was not specifically acknowledged and guaranteed as a right until 2002, by means of *Basic Law 41/2002 regulating Patients' Autonomy and Obligations concerning Information and Clinical Data*. Up until that moment in time, the asset conflict between personal freedom and the lack of personal disposal of life had arose disagreement among those holding that one fundamental asset should prevail over the other in cases such as keeping hunger strikers alive or Jehovah's Witnesses refusing to receive blood transfusions, which were treated as conscientious objection cases. Constitutional Court Case Law issued statements concerning both cases asserting that "the right to one's own death does not exist" (sentences dating from the 27<sup>th</sup> July 1990 and the 17<sup>th</sup> January 1991) and that "the decision to dare personal death is not a fundamental right" but it can be considered "an expression of the general principle of freedom featured in our Legislation" (sentence dating from the 18<sup>th</sup>

July 2002). Taking this into consideration, personal disposal of life could be understood as an expression of freedom but not as a right (therefore excluding a third party from it). Consequently, the third scenario featured in article 10.9.c of the Healthcare General Law, which denied the right to refuse medical treatment "when emergency does not allow any delay due to an existing risk of irreversible damage or mortal peril" was finally conditioned by the patient's decision (informed consent), providing for his refusal.

Law 41/2002 ended with all controversy acknowledging the Autonomy of Will Principle in the field of healthcare (article 2), which had its basis in the right to medical and welfare information (articles 4 and 5) and the need for informed consent to carry out any intervention (article 8, along with conditions for representative's consent featured in article 9.3). In addition to this, Law 41/2002 settles the only two scenarios in which a physician might act without consent: in cases which put public health in danger or in extreme emergency cases without possible communication with the patient's relatives or close friends. Consequently, the current legal situation and Case Law, as far as the Constitutional Court is concerned, make it possible to say that any capable and adult patient can refuse to be treated, even if such treatment is vital for survival, and this behavior is legitimate and conforming to the law, both concerning Law 41/2002 as well as the fundamental right to freedom of conscience featured in article 16.1 of the Spanish Constitution. Carrying out such treatment without or against the patient's consent, leads to legal and public administration duties, and could lead to a criminal procedure for coercion. As a consequence of this, there is no reason to raise conscientious objection issues as far as patients are concerned. There is only one field in which it might be possible, the field of prison healthcare which we will research further on.

The practice of conscientious objection among physicians and the rest of healthcare professionals has never been free of controversy and debate, especially now, due to the imminent change in abortion regulations and the predictable (and inexplicable) disappearance of any reference to the right to object. Objection can lead the individual objector to face a conflict with the person requesting assistance, with his professional colleagues, or with his superior, and it can also cause a conflict between an objector in a high position and the healthcare facility board of directors, as well as problems with managing authorities or administrators in charge of political issues. This makes it necessary to move objection away of the ambiguous field in which it is now featured, by means of clari-

fying and legally acknowledging it as a fundamental right. In the meanwhile, there are only three healthcare conscientious objection scenarios expressly observed by Law: being part of abortion practices (accepted by Constitutional Court's Case Law); and two other scenarios featured in regional legislation: objecting to carry out previous instructions and pharmaceutical conscientious objection.

#### *a) Conscientious objection to abortion*

This scenario has become, as we have seen, a paradigm of conscientious objection because the same criteria applied to it can be translated (with few variations) to adapt to the rest of conscientious objection cases in the field of healthcare. In order to exempt them from punishment, the Criminal Code establishes in article 417 that abortion practices "must be carried out by a physician or under his/her supervision" and must require presenting medical reports previous to the abortion, issued by specialists, when facing a case of therapeutic or eugenic abortion. As a consequence of this, the right to conscientious objection can be put into practice by the physician and the medical team that has to carry out the abortion, by the participating staff - anesthesiologists, nurses, etc.-; and by the specialists responsible for the prescriptive medical reports required. The remaining staff members - medical, administrative, maintenance- that provide a service to abortion institutions are nevertheless unprotected by the right to object.

Conscientious objection can be alleged any time, putting it into practice must not be done inside a specific time period. Nevertheless, in case it had to obey a certain time regulation, it is the doctor's duty to communicate his refusal to practice and abortion to the woman requesting it immediately, in order to make it possible for her to turn to another physician with plenty of time. In addition to this, it might be convenient, although not mandatory, that the medical doctor objecting communicated his refusal to participate in abortion practices to the relevant healthcare authorities.

Pleading conscientious objection implies putting into practice the right to, strictly speaking, refuse to participate in an abortion, as well as the right to refuse to issue the previous medical records needed, and to carry out the previous and subsequent welfare operations: preparing the operating room, sorting out the surgical material needed, etc. Apart from being exempted from participating in abortion practices, conscientious objectors should be free of any discrimination issues. Relating to this, a balance must be

found among the conscientious objector's right to no discrimination issues and the Public Administration's duty of adopting the relevant measures which prevent objection issues from causing the impossibility of carrying out a legally permitted medical intervention in a public healthcare facility.

Finally, due to the fact that the Constitutional Court, at least in this scenario, has defined conscientious objection as a fundamental right, its only limitation is found in article 16.1 of the Spanish Constitution, that is, public order issues. This limitation refers to a serious threat to the patient's life or to her physical or psychological integrity. In other words: the constitutive supposition of therapeutic abortion. As far as therapeutic abortion is concerned, conscientious objection does not exempt medical staff from doing all they can to save the patient's life, having to carry out an abortion if, according to *lex artis*, it is absolutely necessary to save the patient and there are no available doctors without conscientious objection issues. Nevertheless, such an abortion will only be legitimate if the patient consents (or if she is unconscious and it is not possible to reach her family or friends). If she is conscious and has refused the abortion, this will not be carried out, as it features in article 9.2 of Law 41/2002 (art. 417 bis.1 of the Criminal Code), for she is within her rights to refuse, despite risking her own life.

#### *b) Conscientious objection to previous instructions*

Article 1.1 of Law 41/2002 regulates "precious instructions documentation". Most Regional Governments have regulated the right to formulate previous instructions and have created the relevant records. Some of these regional rules acknowledge healthcare professional's right to allege conscientious objection to carrying out clauses included in previous instructions. (Decree 168/2004 in the Valencia Autonomous Region, art 5.3, dating from the 10<sup>th</sup> September; Law 3/2005 in Madrid, dating from the 23<sup>rd</sup> May, art 3.3; Law 1/2006 in the Balearic Islands Autonomous Region, art.6). It is certainly inexplicable, as well as illogical, that some Autonomous Regions acknowledge this kind of conscientious objection while others do not. Consequently, it is necessary that conscientious objection is outlined as a fundamental right and can therefore be put into practice without any specific legal acknowledgement.

In accordance with the regulations previously mentioned (and in the locations in which they exist), people whose duty is to follow previous instructions can actually object. In other words, the doctor, heal-

thcare staff and all those attending a patient (art 3.1, Law 3/2005 from Madrid). Due to the fact that none of the regulations outline a certain procedure to put conscientious objection into practice, it can be alleged either verbally or through a written document given to the relevant healthcare authorities. Nevertheless, it must also be communicated to the patient, to his representatives in case they have been designated as such, and to his relatives. In addition to this, once conscientious objection has been put into words, it becomes valid without needing any recognition from an administrative organization.

Objection can be put into practice concerning clauses included in previous instructions and also against the patient's relatives' wishes if the medical treatment they demand is not recorded in the documentation. Conscientious objection can also be stated against demands done by the patient's representative, if one has already been appointed. There are obviously no conscientious objection issues against clauses included in previous instructions but which are contrary to the legislation, to *lex artis* or to those clauses which may cause damage to the patient, for they are already considered to be contrary to State Legislation.

The most frequent and controversial objection cases are, without any doubt, those related to palliative care. Among these we must highlight those in which the patient refuses to take sedatives despite suffering intense pain and also the opposite scenario, those cases in which the patient specifies that all sort of analgesics must be given to him, including those which might shorten his life. Nonetheless, cases regarding life support measures can also lead to particular issues, including the patient's refusal to his life being extended by artificial means or, conversely, the patient's will for his life to be supported by all means, even if it entails therapeutic obstinacy.

#### *c) Pharmaceutical conscientious objection*

In Spain, pharmaceutical staff's refusal to dispense certain medicines due to conscience issues is acknowledged by two Regional Governments (Law 8/1998 from La Rioja Autonomous Region, dating from the 16<sup>th</sup> June, art 5.10; Law 5/1999 from the Autonomous Region of Galicia, dating from the 21<sup>st</sup> May, article 6). Analyzing this prospect, the need to acknowledge conscientious objection as a fundamental right and to ensure its effectiveness becomes even more evident. The Constitutional Court has done so as far as chemists are concerned, asserting that conscientious objection's constitutional content "is part of ideological freedom, acknowledged by article 16.1

of the Spanish Constitution [...], closely related to human dignity, free development of one's own personality (article 10 in the SC) and to the right to physical and moral integrity (article 15 in the SC) (...and that is why) healthcare professionals in charge of dispensing and prescribing medicines can refuse to act in a certain way in accordance with this right" (sentence dating from the 23<sup>rd</sup> April 2005).

Regarding this case, it seems reasonable to assert that objection can be put into practice not only by the person in charge of the pharmacy, but also by any member of the staff responsible for dispensing medicines. Conscientious objection concerning this matter exempts objectors from the duty of dispensing medicines whose effects might be considered incompatible with their moral convictions, as long as it does not entail putting the patient's health at risk (art. 5.10, Law 8/1998 from La Rioja Autonomous Region; art. 6, Law 5/1999 from Galicia). This seems logical when looking at objection as a fundamental right, for the limit to all the kinds of freedom acknowledged by article 6.1 in the SC is public order, which also includes public health (as established by article 3.1 of Fundamental Law 7/1980, dating from the 5<sup>th</sup> July, concerning Religious Freedom).

#### **4. CONSCIENTIOUS OBJECTION'S CHARACTERISTICS IN THE PENITENTIARY DOMAIN**

Little thought has been put to the specific characteristics of conscientious objection in the context of penitentiary institutions. Almost all the doctrinal texts regarding the conscientious objection focus on the individual, considered to be adult and capable, and the whole debate about this subject is takes place assuming the individual's moral freedom and autonomy, which enables him/her to behave in accordance with his/her convictions when facing a legal duty which demands a behavior contrary to them. Nevertheless, what can be said about individuals who have been deprived from their freedom, whose moral and personal autonomy is constricted, as opposed to one of the basis of conscientious objection? Are they in possession of the full right to decide in accordance with ideological freedom and freedom of conscience, as featured in article 16.1 of the SC? What about healthcare staff in prisons? Can its members put conscientious objection into practice when facing certain legal duties set by the Legislation or by the Prison Regulations, as any other public employee working for the public healthcare system?

Constitutional Case Law only deals with issues raised by hunger strikers, settling the existing conflict between the use of freedom to put one's life at risk and the Public Administration's right and duty of watching over prisoners' health, imposed by article 3.4 of the Penitentiary General Law. The Constitutional Court's known sentence dating from the 27<sup>th</sup> June 1990 concerning a hunger strike carried out by a GRAPO prisoners (and later corroborated by sentences dating from the 19<sup>th</sup> July 1990 and the 17<sup>th</sup> January 1991), settled a questionable doctrine which had its basis in an existing "particular binding relationship" between the inmate and the Public Administration which, due to the Administration's duty of watching over prisoner's life, health and integrity, enables restricting the fundamental rights of those who voluntarily put their own life at risk. This would not be applicable to free citizens. This restriction of fundamental rights, according to article 25.2 of the Constitution, would affect what Penitentiary Law asserts and on the stipulations of the penitentiary condemnation sentence. Finally, the Constitutional Court stated that, regarding hunger strikers, their fundamental right to freedom of conscience had a limitation: *public order* (as all the other fundamental rights do): Public Administration cannot be blackmailed (to give in to any vindication). This would imply the legitimacy of imposing a medical treatment under this circumstance, although it would be unacceptable when dealing with a free citizen.

Nevertheless, Judge Leguina Villa's personal perspective differed from the main criteria. As far as he is concerned, Public Administration's duty of watching over prisoner's health should disappear whenever the inmate rejects medical care. This is the real core of the problem; the sentence admits that "it is the State's legal duty to protect by means of such coercion measures..., at least when confronting prisoners on a vindictive hunger strike, whose aim is not to perish" (sentence dating from the 27<sup>th</sup> June 1990, FJ 7<sup>th</sup>; from the 19<sup>th</sup> July 1990, FJ 5<sup>th</sup>; from the 17<sup>th</sup> January 1991, FJ 2<sup>nd</sup>). This way we are encountering a legal interpretive trick which makes a distinction between those who carry out the strike to coerce but do not intend to die and those who might use it as a way to put an end to their lives, putting into practice their legitimate freedom. As far as the latter is concerned, the Constitutional Court would implicitly accept that there is no reason for restricting, if we take public order into consideration, the fundamental right to ideological freedom (if the hunger strike is carried out because of religious, ideological or moral reasons) and the personal decision to die according to the right to dispose

of one's own life, dismissing any coercion medical treatment, would be considered respectable.

Regarding such a doctrine, several issues are brought up. Firstly, can an inmate legitimately refuse to receive medical treatment? Article 3.4 in the Penitentiary General Law (LOGP) postulates, as we have already seen, Public Administration's duty of watching over prisoner's health and the current Penitentiary Regulations, as featured in article 210.1, settle that any medical treatment cannot be carried out without the inmate's consent, although a medical treatment which goes against the prisoner's will can be implemented in cases of imminent risk for the patient's life. If we follow both regulations, we would conclude that if the patient's life is at risk, the relevant medical treatment can be forced on the prisoner. Nevertheless, Law 41/2002 regarding Patient's Autonomy asserts, in article 8.1, the need for free and voluntary consent coming from the patients to carry out any medical action, without any exception, not even when dealing with convict patients. Consequently, in accordance with this regulation, prisoners will be entitled to all those rights which are within included in it, and to the right to refuse medical treatment in particular. We can allege that the Penitentiary General Law is of a Fundamental nature, while Patient's Autonomy Law is of a regular character, but the connection between both regulations should depend on the matters they deal with, not on their hierarchical relationship, and therefore the existence of the Penitentiary General Law cannot entail any limitation to the inmate's right to decide upon the medical treatment that will affect him, while keeping limitations imposed by articles 9.2.a and 9.2.b of the same Law, which are applied to both prisoners and the general population.

What principles must prevail when facing this debate? We agree with J. García-Guerrero and others, but Case Law still alludes to the Penitentiary General Law and to RP(8). Moreover, we must specify that, although it might seem arguable (and therefore open to interpretation) that an inmate puts Law 41/2004 into practice demanding his/her right to refuse medical treatment (a judge in trial would legitimately be able to argue both in favor of and against this) it should not be open to discussion the fact that an inmate vindicates his right to ideological freedom (conscientious objection in his particular case) in order to reject a certain medical treatment. This must be respected, unless we can apply the limitation regarding public order (considering there is no vindictive behavior which might aggravate it), even if it leads to death, as it can be interpreted from constitutional doctrine. All this is only possible if the prisoner is capable and compe-

tent, for this must be thoroughly confirmed, taking into account that personality and mental disorders are common among inmates, specially cases of imprisonment pseudo-dementia, withdrawal, substance-induced psychosis, paranoid behavior (a main source of distress for medical staff), and examples of deceivers, those announcing their own suicide or faking depression or melancholy, always difficult to tell.

To sum up, the prisoner's will to refuse to be treated, even when this might entail his death, must be respected whenever he vindicates his fundamental right to freedom of conscience (The Constitution is above PGL and RP); but can be disregarded if he only vindicates his right to autonomy as a patient (GPL and RP prevail over Law 41/2004). Any case, involving an inmate who was a Jehovah's Witness and who rejected a blood transfusion, would become a paradigm regarding these regulations, but patients suffering AIDS or any other lethal disease with risk of imminent death would also be exempted of such limitation when vindicating their right to ideological freedom.

The role played by medical staff is closely linked to the implementation of this right by prisoners. For instance, can medical staff refuse to obey penal authorities who intend to impose a coercive medical treatment on an inmate in order to extend his life, by vindicating their right to conscientious objection? This particular scenario cannot be referred to putting into practice the fundamental right to freedom of conscience connected to the free disposal of one's own life (accepted by Case Law), it must allude to the fundamental character of the right to conscientious objection. According to our point of view, we believe that preserving prisoner's dignity (as a basis of medical staff's unlimited right to ideological freedom) would enable them to put into practice their right to object to impose such a medical treatment.

## 5. SUMMARY

Judging from the text, we might be able to conclude that, concerning the prison domain, both inmates and medical staff can vindicate and put into practice their fundamental right to ideological freedom (which includes the fundamental right to conscientious objection). As far as prisoner's are concerned, the only limitation to vindicating this right is whether it aggravates public order, and this might have to be settled by a judge in case prison authorities do not agree about the particular case (in such a way that prisoner's can decide about everything concerning their life and health,

in accordance with their convictions, if this does not aggravate public order). As far as medical staff is concerned, their right to conscientious objection in the prison domain is also subject to the same public order restriction, although it can always be vindicated to be exempted from participating in a medical act which goes against individual convictions, in the same conditions as any other healthcare professional bound by a temporary or permanent contract of employment to the Public Administration. Nonetheless, were a conflict to emerge, it would be the judge's duty consider and decide on the priority of confronted assets.

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## BIBLIOGRAPHY

1. González-Vicén F. La obediencia al Derecho. Una anticrítico. *Sistema* 1985; 65:101-5.
2. Escobar-Roca G. La objeción de conciencia del personal sanitario. En *Bioética, Derecho y Sociedad*. Trotta. Madrid. 1998: 135-6.
3. Sieira-Mucientes S. La objeción de conciencia sanitaria. Madrid: Dykinson; 2002.
4. Cebriá-García M. Objeciones de conciencia a intervenciones médicas. Pamplona: Thomson-Aranzadi; 2005.
5. Cebriá-García M. Las peculiaridades del consentimiento de menores o de incapaces, cuando se trata de negativa a terapias vitales. En *Objeciones de conciencia a intervenciones médicas*. Pamplona: Thomson- Aranzadi; 2005. p. 42-54.
7. García-Guerrero J, Bellver-Capella V, Blanco-Sueiro R, Galán-Cortés J.C, Mínguez-Gallego C, Serrat- Moré D. Autonomía y pacientes reclusos. *Rev Esp Sanid Penit* 2007; 9: 47-52.
8. Recurso de casación 182/2001. Sentencia de 18 de octubre de 2005. Sección Sexta. Sala de lo Contencioso-Administrativo. Tribunal Supremo. Madrid.
9. García-Andrade J.A. La medicina penitenciaria, una medicina de frontera. *Rev Esp Sanid Penit* 2008; 10: 33-4.