

## EDJ 2010/133511

Supreme Court Chamber 3, sec. 5, S 21-6-2010, rec. 3356/2006  
President: Calvo Rojas, Eduardo

### Summary

*The Supreme Court of Spain dismisses the appeal filed against the ruling which confirmed the decision of the Penitentiary Institutions General Directorate (Dirección General de Instituciones Penitenciarias), refusing the conscientious objection regarding a syringe exchange program. This chamber confirms the appealed ruling, as the appellants' dissatisfaction with the aforementioned health program is understandable from an ethical point of view. But this chamber can neither consider the ruling as unlawful, nor accept the recognition of the conscientious objection right, which would exonerate the appellants from taking part in the syringe exchange program and fulfilling their duties as government employees.*

### APPLIED LEGISLATION

CE 27 December 1978. Spanish Constitution  
art.9.1, art.10.2, art.16

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### KEY TERMS

#### MILITARY SERVICE

#### CONSCIENTIOUS OBJECTION

Fundamental right

Concession and dismissal

### Information

In favor of: State administration (executive functions); Against: Government employee

Procedure: Cassation appeal

#### Legislation

Applied art.9.1, art.10.2, art.16 de CE 27 December 1978. Spanish Constitution.

Quotes art.2 LO 1/2008 30 July 2008. Treaty of Lisbon, ratified by Spain, which modifies the EU Treaty and the European Community Constitution Treaty.

Quotes CE 27 December 1978. Spanish Constitution.

#### Jurisprudence

Rules out the appeal against the STSJ Castilla-La Mancha Litigation Chamber de 3 April 2006 (J2006/53215)

Quotes the resolution: resolution: SERVICIO MILITAR - OBJECIÓN DE CONCIENCIA – Fundamental right STS Chamber 3, 11 February 2009 (J2009/11209)

Quotes the resolution: SERVICIO MILITAR - OBJECIÓN DE CONCIENCIA – Fundamental right STS Chamber 3 11 February 2009 (J2009/10330)

Quotes the resolution: SERVICIO MILITAR - OBJECIÓN DE CONCIENCIA - Fundamental right STS Chamber 3, 11 February 2009 (J2009/10311)

Quotes the resolution: SERVICIO MILITAR - OBJECIÓN DE CONCIENCIA - Fundamental right STS Chamber 3, 11 February 2009 (J2009/10293)

Quotes the resolution: SERVICIO MILITAR - OBJECIÓN DE CONCIENCIA - Fundamental right STC Chamber 1, 2 June 2004 (J2004/40250)

Quotes the resolution: SERVICIO MILITAR - OBJECIÓN DE CONCIENCIA - Fundamental right STC 18 July 2002 (J2002/27345)

Quotes the resolution: SERVICIO MILITAR - OBJECIÓN DE CONCIENCIA - Fundamental right STC Chamber 2. 11 November 1996 (J1996/7028)

Quotes the resolution: SERVICIO MILITAR - OBJECIÓN DE CONCIENCIA - Fundamental right STC 11 April 1985 (J1985/53)

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RULING

In Madrid, June 21 2010

The Chamber constituted by the aforementioned Magistrates has admitted for resolution the appeal n. 3356/06 filed by Mrs. Ariadna and Mr. Eulalio, represented herein by attorney Mrs. Isabel Cañedo Vega, against the ruling, dated April 3 2006, of the Litigation Chamber of the Superior Court of Justice of Castilla-La Mancha, after the appeal number 789/02 EDJ 2006/53215. The appealed part is the STATE ADMINISTRATION, herein represented and assisted by the State Attorney.

## **FACTUAL BACKGROUND**

FIRST. - The Litigation Chamber of the Superior Court of Justice of Castilla-La Mancha ruled the herein appealed decision, dated April 3 2006 (appeal number 789/02) EDJ 2006/53215, in which the administrative appeal, herein filed by Mr. Eulalio and Mrs. Ariadna against the implied decision of the Penitentiary Health General Sub-Directorate (Subdirección General de Sanidad Penitenciaria), dated February 5 2002, in which their request was rejected, in the first instance, and against the Penitentiary Institutions General Directorate (Dirección General de Instituciones Penitenciarias) firm resolution in the second instance, dated June 26 2003, which rejected the recognition of the conscientious objection right, regarding the application of the Syringe Exchange Program, implemented in the Prison of Albacete.

SECOND. - The Chamber bases the dismissal of the appeal on the following reasons:

(...) Second. - As the State Attorney quotes, following the doctrine set by the Constitutional Court rulings, 15/82, dated April 23 and 161/1987, dated October 27, both the doctrine and comparative law assert the connection between conscientious objection and freedom of conscience. For doctrine, the conscientious objection constitutes a specification of freedom of conscience, which implies not only the right to shape conscience with freedom, but also to act in accordance with its obligations. That being said, differently to other conscience freedom manifestations, the right of conscientious objection does not consist fundamentally on the legal guarantee to not carry out a specific action, as conscientious objection provides an exceptional exemption for a generally imposed duty, required in the same way by the public authorities. The conscientious objection grants an exception to that right and must be granted for each case. Therefore, the

right of conscientious objection does not guarantee the right of abstention of the objector, but his or her right to be declared exempt of a duty that, were not it for the aforementioned right, it would be demandable under duress. Moreover, the principle of equality requires that the conscientious objector does not get a preferential treatment when carrying out the fundamental right of social solidarity.

Technically, the right of conscientious objection in this case is not the right to not take part in the Syringe Exchange Program, but the right to be declared exempt of the general duty of carrying it out. Furthermore, the conformity criteria to the dictates of conscience is extremely generic and is neither of use as a satisfactory narrower of the content of the aforementioned right, nor solves the potential conflicts originated by the existence of other constitutional assets.

The right of the objector is not subordinated to the field of action of the legislator. The fact that the conscientious objection is a right which, for its full development and efficacy requires the “*interpositio legislatoris*”, does not mean that it can only be demanded when the legislator develops it, so that its constitutional recognition would have no other consequence but the establishment of a mandate directed to the legislator, without any potential to preserve individual needs. As the Constitutional Court has pointed out repeatedly, the constitutional principles and fundamental rights and freedoms, link every single public power (art. 9.1 and 53.1 CE EDL 1978/3879) and are the immediate origin of rights and obligations, not mere pragmatic principles; our very own Constitution in its Article 53.2 foresees a special system of guardianship through the appeals for legal protection (*recurso de amparo*), which covers the conscientious objection is a confirmation of the immediate applicability principle. This general principle will not have any more exceptions, other than the cases the Constitution itself imposes or those in which the very own nature of the rule makes it impossible for it to be applied immediately, both of which do not occur in conscientious objection.

Third.— Under the aforementioned considerations, we have to address, firstly, the invocation of the principle of equality present in the claim, regarding health care personnel, infringed in the cases of voluntary termination of pregnancy, always based on the doctrine set by the Constitutional Court. It is well known that, for that unlawful infringement to be appreciated, it would be essential to attest the similarity between the compared facts. This similarity does not appear in the aforementioned case, since it is not the death of a living being we are dealing with, but health care regarding a specific problem, which does exist and cannot be completely eliminated though the supply of certain material in order to avoid specific health damage to the inmates. Therefore, we cannot talk about an infringement of the principle of equality.

Fourth.— There may still a doubt whether the Prison in Albacete carried out the aforementioned program, since the prison’s psychologist assured it did not, while official documents showed the opposite; the most evident consequence of which, is that if it was not carried out, a duty exemption would not be possible, since the duty itself did not take place. But, irrespective of this matter, it should be considered that both in the claim and the final pleadings, it is not possible to apply conscientious objection in this matter, as the reasons given do not show the inconveniences or mistakes of the controversial program regarding the participation of the employee’s, but focus mainly on the inmates point of view. Therefore, this reasoning already makes it impossible to consider conscientious objection, since it has not been demonstrated the arguments for which this program would be violent from a personal, ethical or religious point of view. Whether this program achieves its objectives or not, whether it is carried out in an efficient manner or not, are different issues, not related in any way to the appellants, which cannot find a reasonable defense to be exempted of carrying out a duty which was imposed at their work. Since there is no feasible reason to think that the implementation of this program would lead to a rise in inmate’s drug consumption, and considering that the desired aim is

plausible, there is no other option but to reject the conscientious objection petition. Therefore, the appeal must be dismissed.

THIRD.- Mr. Eulalio's and Mrs. Ariadna's attorney filed a legal protection appeal against the aforementioned ruling EDJ 2006/53215 on 19 July 2006, quoting Article 88.1/d, alleging an infringement Article 16 of the Constitution EDL 1978/3879, regarding the fundamental right to conscientious objection and Article 22 of the Spanish Nursery Code of Ethics (Código Deontológico de la Enfermería Española), Resolution 32/1998 of the General Council of Official Nursery Colleges (Consejo General de Colegios Oficiales de Enfermería), in which the following is said: In accordance with Article 16.1 of the Spanish Constitution EDL 1978/3879, the nurse has the right to conscientious objection, which will have to be considered individually for each case. The General Council and the Colleges shall ensure that no nurse suffers any discrimination or prejudice due to the use of this right.

This document ends by requesting a ruling quashing the appealed judgment EDJ 2006/53215 and give a new judgment, in which "...the right of the appellants to be exonerated from taking part in the execution, application and development of the Syringe Exchange Program of the Prison of Albacete is recognized."

FOURTH.- The State Administration formally notified its opposition to the appeal, by application lodged on 2 November 2007, stating the reasons for which the cassation appeal should be dismissed and the appealed ruling EJD 2006/53215 upheld, therefore imposing the costs originated from the cassation appeal.

FIFTH.- The voting was set for 15 June 2010.

## LEGAL RATIONALE

FIRST.- The cassation appeal number 3356/06, filed by Mrs. Ariadna and Mr. Eulalio against the ruling of the Litigation Chamber of the Superior Court of Justice of Castilla-La Mancha, dated 3 April 2006 (administrative appeal 789/02) EDJ 2006/53215 in which the administrative appeal filed against the dismissal, implicit in first instance, and explicitly in the second instance by the Penitentiary Institutions General Directorate, dated 26 June 2003, in which the appeal filed against the decision of the Penitentiary Health General Sub-Directorate, dated 5 February 2005, did not accept the recognition of the conscientious objection right regarding a program called Syringe Exchange program which would be implemented in the Prison of Albacete.

The reasoning to dismiss the administrative appeal has already been stated on the second point of the factual background. Therefore, we shall examine the argument for which the appellants have filed a cassation appeal.

SECOND.- The so called Syringe Exchange Program is a public health program developed by the Penitentiary Health General Sub-Directorate which, according to the ruling that dismissed the aforementioned appeal, has been launched experimentally with the objective of preventing the transmission of diseases between inmates. The disposal of syringes for drug addicted inmates is one of the provisions of the aforementioned program.

The appellants invoked the right to conscientious objection to the administration and the courts of appeal, hoping to be exonerated from taking part in the execution, application or development of the Syringe Exchange Program. The appealed ruling dismisses the administrative appeal filed against the administrative decision that rejected their petition.

The appellants claim on the cassation appeal that there were infringements both on Article 16 of the Constitution EDL 1978/3879 and Article 22 of the Spanish Nursery Code of Ethics, which, according to the appellants, would justify their right to object.

Being this the appellant's approach, we have to remind that this Chamber issued four rulings, dated 11 February 2009 regarding the cassation appeals 948/08 EDJ 2009/10293, 949/08 EDJ 2009/11209, 905/08 EDJ 2009/10311 and 1013/08 EDJ 2009/10330, in which it is examined whether there is a general recognition for conscientious objection in our legal system. We extract the following paragraphs from the ruling issued by this chamber on the cassation appeal 948/08:

(...) Apart from reminding that the only case in which the Spanish Constitution addresses conscientious objection is regarding public duties, as provided in Article 30.2, we have to restate that the doctrine set by the Constitutional Court has admitted exclusively, apart from that case, the right to object for personal conscience reasons in cases of medical abortion. Moreover, it should be noted that, neither international regulations, nor jurisprudence set by the European Court of Human Rights have recognized this right on the educational area.

Of course, the ordinary legislator can, as long as he respects the principle of equality, recognize the possibility of exoneration in specific duties for conscience reasons. But, this right would be a purely legislative right, not constitutional, and therefore, would be based on the freedom of definition of the law system that the democratic legislator has, who could create, modify or erase that right where appropriate.

To justify that the Constitution provides a conscientious objection of general range, beyond the aforementioned cases, which could not be ignored by the legislator, Article 16 of the Constitution 1978/3879 is usually invoked. The basic idea of whoever supports this idea is, that religion and ideological freedom implies not only believing in whatever one considers best, but also the right to act in accordance to those believes in every aspect of life. But this is a very problematic idea, at least, for two reasons:

Firstly, a systematic interpretation of the constitution does, in no way, lead to that conclusion. Even if we ignore that the aforementioned provision strictly foresees conscientious objection from a military point of view, article 30.2, a general conscientious objection right, based on article 16, would not make much sense, as the aforementioned provision does not say that religion and ideological freedom give us the right to act in every area of life by our own beliefs. Religious and ideological freedom are not only limited by the compatibility with all other constitutionally guaranteed rights and goods, which is applicable to every single fundamental right, but is also specifically and explicitly limited by Article 16.1 of the Constitution EDL 1978/3779: "maintenance of public order protected by law". The aforementioned quote is clearly directed to real and perceptible external conducts. Therefore, the constitution allows people to follow their own beliefs and act accordingly, but with a limit, which is established by public order.

Secondly, as opposed to the questionable existence in the Constitution of the right to act in every circumstance following our own beliefs, article 9.1, which does have a general scope, states the following: "Citizens and public powers are subject to the Constitution and law". Law developed not only by the Spanish Constitution EDL 1978/3879, but also by the own procedures of a modern democracy. Therefore, the recognition of a general scope conscientious objection would mean that the efficiency of law would depend on the conformity of each individual with those rules.

For this reason, we can conclude that the Constitution EDL 1978/3879 does not comprehend a general conscientious objection right, consequently, it is mandatory to see if jurisprudence or any international agreement does.

Jurisprudence is not lineal and clear. Ruling 53/1985 upheld by the Constitutional Court clearly establishes legalization towards abortion, therefore allowing conscientious objection for health personnel. But, apart from this specific case, it is very complicated to establish a general rule in order to set a limit.

Even more clear, as a precedent in conscientious objection cases, is ruling 154/2002 EDJ 2002/27345 of the Constitutional Court, regarding a criminal conviction, in which a child died because his parents did not authorize a blood transfusion due to religious beliefs. The Constitutional Court considered the aforementioned conviction as a violation of religious freedom, which, at least implicitly, shows that religious freedom can actually have an impact in our behavior. But, even here, it would be complicated to extract a general rule for various reasons: the judgment is exclusively a religious matter, not a general moral matter, it is a specific ruling and, especially, it is very linked to the material justice demand of this specific case.

Rulings upheld by the Constitutional Court 177/1996 EDJ 1996/7028 and 101/2004 EDJ 2004/40250, were cases in which a policeman and a soldier were forced to take part in religious acts. When someone is compelled to take part in a religious act, there is a clear violation of his or her religious freedom.

To sum up, we can say that there is no base in the Spanish Constitutional jurisprudence in order to establish the existence of a general scope conscientious right. And, regarding international agreements, only Article 10.2 of the Charter of Fundamental Rights of the European Union addresses conscientious objection, stating the following: "The conscientious objection right shall be regulated by national law".

It is true that this precept does not limit conscientious objection to a specific area. It is also likely, that after specific mention to the Chart in Article 2 of Organic Law 1/2008 EDL 2008/123453, in which the Treaty of Lisbon was ratified, the aforementioned Chart shall be used as an interpretative guideline, even if the Treaty of Lisbon has not come into force yet. That being said, the Chart itself circumscribes the efficiency to the cases in which the States apply the EU Law, which does not happen in the current case. Moreover, Article 10.2 of the Chart, calls for an “interpositio legislatoris” to be applied, which does not admit a right for conscientious objection in the absence of a specific legal statute that regulates it (...).

The rulings upheld by this Chamber in the cassation appeals 949/08 EDJ 2009/11209, 905/08 EDJ 2009/10311 and 1013/08 EDJ 2009/10330, dated 11 February 2009, follow the aforementioned doctrine.

THIRD.- By transferring this doctrine to this case, we can clearly say that the cassation appeal shall be dismissed, as the absence of a general scope conscientious objection right, means there a conscientious objection right circumscribed to this area cannot exist.

The fact that there is no applicable legal norm which recognizes and regulates the conscientious objection in the appellant’s activity, would be enough to dismiss their appeal. Article 22 of the Spanish Nursery Code of Ethics (judgment number 32/1998 of the General Council of Official Nursery Colleges) cannot be invoked, since it is not a regulation of legal scope. Moreover, the aforementioned article does not define the scope and content of conscientious objection, it acknowledges it in a general way, based on Article 16.1 of the Constitution 1978/3879, which, as we just pointed out, cannot affirm that conscientious objection is a general scope right.

The appellant’s dissatisfaction is understandable from an ethical point of view, just like questioning whether the program is efficient and functional as a disease infection prevention system. But they do not give rise to a conscientious objection right which would exonerate them from taking part in the aforementioned program and fulfilling their duties as government employees. Assuming the program has been launched, which, according to the trial court, might not be so in which the appealed judgment was uphold.

Fourth.- For the aforementioned reasons, the cassation appeal must be dismissed. With accordance with Article 139.2 of the Jurisdiction Law, the costs of the cassation appeal shall be paid by the appellants, but considering the case and point 3 of the aforementioned article, the costs will amount to € 1500.

## **WE DECIDE**

The cassation appeal filed by Mrs. Ariadna and Mr. Eulalio against the ruling of the Litigation Chamber of the Superior Court of Justice of Castilla-La Mancha, dated 3 April 2006, (administrative appeal 789/02) EDJ 2006/53215 is denied and the costs of the aforementioned appeal will have to be paid by the appellants. We so state order and sign.

PUBLICATION.- Read and published by H.E. Magistrate Eduardo Calvo Rojas, after public audience of this Chamber, herein certify.