PRZEGLĄD KONSTYTUCYJNY, 2/2022, s. 31–62
doi:10.4467/25442031PKO.22.011.16009
www.ejournals.eu/PrzeglądKonstytucyjny

FERNANDO REVIRIEGO PICÓN

The Rights of Prisoners in Spanish Constitutional Jurisprudence

1. The Legal Nature of the Prison Relationship

The second part of art. 25 in the Spanish Constitution (SC) states that punishments entailing imprisonment and security measures shall be aimed at re-education and social rehabilitation and cannot consist of forced labor. There are few constitutional texts in our neighboring regions that include provisions of this nature, but even less common—not to say strange—is the reference that immediately follows, about fundamental rights continuing to be enjoyed in this environment, albeit subject to certain technical limitations. This establishes the idea that an inmate has the fundamental rights laid out in Chapter II, Title I of the Constitution, arts. 14 to 38, subject to a triple limitation: the substance of the judgement made, the purpose of the punishment, and prison legislation. This is not the only determination in this regard, as prisoners will *in any case* have the right to paid work (although in practice this is becoming less common) and the corresponding social security benefits, as well as having the right to access culture and the right to comprehensive personal development. This would no doubt be, as Professor Alzaga—a member of the constitutional assembly—put it, one of the "most naïve declarations" found in our highest law, an "unhappy technical solution" that demonstrates the "preoccupation the constitutional assemblymen are

seized with for the situation of the prison population"[1], and which was at the point of being translated into a specific provision about the exercise of prisoners' sexuality as a fundamental right.

From its very beginnings, the Constitutional Court has declared that prisoners in prisons form part of a pre-existing institution that extended its authority over them, acquiring the specific status of individuals subject to a public power, which does not generally apply to ordinary citizens, and is a *special relationship of subjection*. The first time the Court did this was in judgement 74/1985, related to imposing a punishment on a prisoner, in which the Court indicated that "*it is clear* that the prisoner is in, with respect to the state, a special relationship of subjection which gives the state powers of disciplinary punishment", the exercise and limits of which are regulated by prison rules.

Criticism of this characterization focused on two points. On the one hand, at the time it was adopted by the Constitutional Court, it had already been in question for some time, including where it originated—an essential reference on this point is the judgement of the German *Bundesverfassungsgericht* of the 4th March 1972. The Court's decision and the subsequent approval of the Prisons Act [*Ley Orgánica General Penitenciaria*] "was not only revolutionary in so far as prison legal doctrine was introduced in a *language of the rights of prisoners* where it had not been the custom historically, it would also allow a reformulation of the meaning of prison sentences themselves"[2]. This was a decision which accelerated "the birth of the new prison legislation"[3]. The other criticism was that it was an unnecessary construction in our legislation outlining the penal relationship. This could be achieved solely by referring to nothing more than art. 25.2 SC, noted above, because following its first provision indicating that fundamental rights remain in effect at the heart of this relationship (beyond the technical ambiguities about its subjective reach, which we will not address), it immediately establishes that it is subject to the triple limitation noted above.

In view of the constitutional provisions and trends in this environment, it is curious that our highest court would have to resort to the concept of a relation of special subjection to outline this specific legal relationship. Moreover, it is clear that, as Martínez Escamilla put it, there is no doubt as to the usefulness of the concept given it is "a blank cheque made out to the

1 O. Alzaga Villaamil, *Comentario...*

2 B. Mapelli Caffarena, *El sistema...*, p. 19.

3 A. Tellez Aguilera, *Aproximación...*, p. 700.

administration, which could result in more effective management of its responsibilities. How could it be otherwise, if in its application, both dictating laws and applying them, we loosen the straitjacket of the principle of legality, of legal reservation, and of respecting the guaranteed rights of prisoners?"[4]. In any case, the truth is that after this sentence this concept has been used relatively frequently (the most recent being judgements 6 and 18/2020, about rejecting a prisoner's request to communicate with a journalist and about punishment for the content of a brief in which a prisoner made requests and complaints against the prison authorities—both appeals were granted, the first was due to infringement of the right to freely communicate true information in connection with freedom of expression, and the second due to infringement of the prisoner's right to free expression), foregoing this characterization in some appeals and using alternative terminology in others (such as "peculiarities of treatment"—judgement 83/1997). These silences and the use of this alternative terminology led some legal scholars to note at the time a certain cessation of the abuse of this classification[5]. Along these lines, starting with the judgement 57/2004, and its appeal to the fuzzy edges of this relationship, there is an indication that, although it is somewhat late to the party, this case law also connects to the invigorating rhetoric about rights in the German Constitutional Court judgement from March 1972, in which it was affirmed that a restriction to prisoners' fundamental rights could only be justified by the essential need to provide a public service, and not, therefore, by domestic interest, and must furthermore be backed by a rule that had a legal footing"[6].

It seems important to note that this terminology has been consciously avoided in primary legislation. A quarter of a century ago, during the drafting of the 1996 Prisons Act, it was excluded from the definitive text. In any case, what practice teaches us is that this group's constitutional rights can be the object of limitations which are not applied to ordinary citizens. However, it is clear that those restrictions must be justified, necessary, and proportional to the aim pursued: security and order in the prison. It must also be understood that these limits or restrictions will not be the norm, but rather the exception. Although we are unable to spend much time or space on it, the ongoing COVID-19 pandemic has had a particular impact in this environment.

4 M. Martínez Escamilla, *La suspensión...*, pp. 48–49.

5 A. Tellez Aguilera, *Seguridad...*, p. 33. See also, M.J. Ridaura Martínez, *El derecho...*

6 A. Pérez Cepeda, *Los derechos...* See also, I. Rivera Beiras, *La doctrina...*, p. 109.

All of the above must be understood bearing in mind that the supposed re-education and social rehabilitation of prisoners, that the constitution talks about, is not characterized—in conformance with Constitutional Court doctrine—as a fundamental right of the prisoner. In contrast, it is as a mandate to the legislator in order to guide criminal and penal policies, but which could serve as a parameter, in case of doubt, for resolving the constitutionality or otherwise of prison-related laws.

That said, we must emphasize that there have been many, varied judgements made by the Constitutional Court about the prison environment over the years, around two-hundred, starting with the now distant judgement 29/1981, about deadlines for filing briefs in the prison. In any case, as we have seen, we had to wait some time for the configuration of the prison relationship as a special relationship of subjection, with regard to a request for protection of rights raised in response to a punishment imposed by the Prison Administration Board (judgement 74/1985). A relationship that, as the Court itself has indicated, is fuzzy because it is imprecise in the distinction between general and special relationships of subjection.

2. The Focus of Prison Sentences

The focus of custodial punishment towards re-education and social rehabilitation does not allow one to speak of a prisoner's subjective rights, and less still of a fundamental right to which all of the aspects making up life in prison must be subordinate. It is instead a mandate to the legislator which guides prison and criminal policy, in line with this "fundamental goal" of prison, through treatment, retention, and custody, which entail "ensuring the security, safety, and order of the prison" (see, for all of those, judgement 57/1994). It should be added that social rehabilitation is not the only goal of prison sentences, there is also punishment, and both general and specific deterrence.

Leaving this question aside, we are faced with terms that are criticized by a broad swathe of legal scholars for various reasons such as vagueness and poor definition, something which has led to the search for alternatives such as resocialization or social rehabilitation. Whichever is chosen, "everyone agrees in assigning prison sentences a correctional function, even aiming for the improvement of the criminal"[7]. From criminology, which has addressed

[7] M.J. Aranda Carbonell, *Reeducación...*, p. 21.

these issues in detail, the idea is emphasized that the re-socializing ideal will no longer be a myth or an empty slogan when proper scientific debate manages to achieve a basic consensus on three fundamental questions. Those questions are, "What specific objectives can be pursued in relation to each group of criminals? What means and intervention techniques will be appropriate and effective in each case? And what must be the hard limits for each type of intervention?"[8]. This means it is essential to have a reciprocal process of interaction between the person, the state and its institutions, and society as a whole[9].

Within constitutional jurisprudence, which has addressed this question on many occasions, Delgado Rincón talks about a "guiding precept of prison and criminal policy, without prejudice to the slight drawback of having to fix the meaning of the verb *to guide*", which he equates in some ways to the verb "inform" from art. 53.3 SC[10], this "glorious error" in the words of Rubio Llorente[11]. A "basic rule, a provision prescribing a goal of general interest, a guiding precept for penal and criminal policy that binds all public powers equally"[12]. The "principal value" of this re-socializing mandate "may be", in the words of Urías, the fact that prison should "always be understood as an authentic exceptional state, characterized by its temporary nature. The mandate is the safety valve of temporariness; in prison, prisoners' rights may be restricted only because it is the temporary way of achieving better social harmony through re-socialization. This would, in his view, be "the ultimate constitutional justification for prison"[13].

Beyond the doubts raised by the re-educational/re-socializing effect of prison, it is somewhat of a paradox when the legislators who wanted to promote it did so by talking about the need to replace prison sentences with other alternatives. A good example of that is in the preamble to the criminal code passed more than twenty-five years ago. It indicates the paradox with the idea that "prison is not the ideal instrument for re-socialization, and it is essential, therefore, to find alternatives"[14]. One of the greatest obstacles to achieving this goal of social rehabilitation is the growth in the prison population, although it is true that in recent years, various issues (such as

8 A. García-Pablos, *Tratado...*, pp. 1120–1121.
9 Vid. T. González Collantes, *El concepto...*
10 L. Delgado Rincón, *El art. 25.2 CE...*, p. 353.
11 F. Rubio Llorente, *La Constitución...*, p. 90.
12 L. Delgado Rincón, *El art. 25.2 CE...*, p. 366.
13 J. Urías Martínez, *El valor...*, p. 78.
14 G. Landrove Díaz, *Prisión...*, p. 427; M. Poza Cisneros, *Formas...*

the reform to the criminal code which reduced sentencing guidelines for crimes against public health) have led to a substantial reduction. It was at its highest a little over ten years ago, at 76,000, whereas today there are twenty-thousand fewer prisoners, a little over 56,000.

Lastly, it is true that, as indicated in the preamble of Royal Decree RD100/2006, 3rd February, re-education and social rehabilitation requires "acting in a multitude of settings that go beyond the strict walls of the prison, needing to combine the traditional management of prisons with proper social, labor, educational, and health action towards the prison population. In other words, enacting heterogeneous, complex public policies all in permanent contact with civil society, acting in collaboration with special interest groups and charities".

3. Constitutional Case Law on Prison-Related Matters

We move now to analyzing prisoners' fundamental rights as delineated by the Constitutional Court in its extensive case law on the matter. Ever since judgement 29/1981, prisoners have claimed a variety of rights in their appeals, from the ever-present right to privacy and the right to life and physical integrity, to privacy of communications and ideological liberty, even the right to personal freedom. Due to the limitations of space, in this text we focus on those which provide the pattern of how these rights are affected in this environment.

3.1. The Right to Life and Physical and Moral Integrity

We can be confident that the most controversial judgements related to prisoners over the years have been those dealing with forced feeding of members of GRAPO (First of October Anti-Fascist Resistance Groups). At the end of the 1980s a large number of prisoners belonging to this terrorist group began a hunger strike in pursuit of various demands including bringing all of the group members together in a single prison. The question arose when the hunger strike continued, whether prison authorities could forcibly feed prisoners if it was determined that their lives were in danger, based on the authorities' obligation to safeguard prisoners' lives, integrity, and health. Would that be possible within the provisions of art. 15 SC?

To put it very succinctly, in the first of the judgements the Constitutional Court handed down (judgement 120/1990), they ruled that it was impossible

for art. 15 SC to guarantee "the right to one's own death". This meant that there was no constitutional support for the claim that forced medical treatment would infringe this non-existent constitutional right, as the right to life had "positive content of protection that prevents it from being configured as a right to liberty which would include the right to one's own death". The Court continued by stating that the right to life, "does not include the right to disregard one's own life, nor can prison authorities be constitutionally required to refrain from giving medical attention that is, to be precise, aimed at safeguarding the life that art. 15 SC protects". In terms of physical integrity, the Court indicated that "complying with this responsibility of the state does not violate prisoners' rights to physical and moral integrity because the restriction implied by obligatory medical attention is causally connected with protecting constitutionally protected rights, including the right to life which, objectively, has greater value in constitutional legal rules and ontologically, without which there would be no other rights". Nor did the Court consider that it was a situation of inhumane or degrading treatment, or that this medical treatment might be characterized as torture because the medical authorization was not aimed at "inflicting physical or psychological harm, nor at causing damage to the integrity of those who were subject to it, but rather it was aimed at avoiding, where medically possible, the irreversible effects of voluntary inaction, serving in this case as a palliative". In the judgement there were two interesting dissenting opinions in which, while emphasizing the "extreme situation" in question, noted the same level of free will in receiving medical treatment or healthcare for prisoners and for ordinary people. As the first of the two opinions stated, "the obligation of the prison authorities to safeguard prisoners' lives and health cannot be understood as a justification for establishing an additional limit to the rights of prisoners, who, in relation to their lives and health and as patients, enjoy the same rights and liberties as every other citizen, and therefore must be granted the same level of free will in relation to medical or health-related treatment". We find the same approach in judgements 137/1990, 11/1991, and 67/1991. Linked to this issue, we should not forget that, three decades after that first judgement, a law regulating euthanasia was passed (Organic Law 3/2021, 24th March) which regulated people's right (as long as they met the conditions laid out in the law: suffering from severe, chronic, or debilitating conditions, or a serious, untreatable illness producing unbearable physical or mental suffering) to request and receive help to die, as well as the procedure to follow and the safeguards to be observed. Although only a short time has passed since that law came into force, some requests from prisoners have been rejected for not meeting the stated requirements.

Along with that issue, the Constitutional Court has had to address issues related to progression of severity and the concession of conditional release in cases where prisoners have been suffering from incurable illnesses, as well as potential effects of security measures on prisoners' physical and moral integrity (x-rays and searches, for example). The Court has also had to deal with the implications of certain treatments, of refusing prisoners private visits, or of punishment by isolation.

In terms of the first of these issues, it is useful to bring together judgements 5/2002 and 25/2000, and particularly in judgement 48/1996, the only judgement in which a *recurso de amparo* request (protection of fundamental rights) was granted following a prisoner's appeal based on the right to life and physical integrity. In the first of these three judgements, where the underlying subject was the refusal to suspend the sentence of a prisoner who claimed to be suffering from a serious illness leading to incurable suffering, the Constitutional Court considered that there was no harm, as the resolutions that were being appealed against had produced a "solid foundation that was perfectly reasonable about there being no serious risk to the appellant's life or physical and moral integrity, properly identifying the content of the corresponding fundamental rights". In the second of the judgements, the request for *amparo* was granted. In this case, due to violation of the right to effective legal protection, as the reasons related to the enabling presuppositions for the suspension had not been expressed and nor had the relevance of the suspension in that individual case been considered or justified which would have allowed consideration of the need to prioritize collective security and safety over the appellant's physical integrity. Logically, the Constitutional Court cannot assess whether such an illness exists which produces incurable suffering, however they can demand, to the satisfaction of the right to effective legal protection, the reasoning behind the decision without being arbitrary or making a glaring error. The third of the judgements also granted the appeal, again addressing the implications of imprisonment with regard to the progression of a serious, incurable illness which, in this specific case, had a clear negative impact. For the Constitutional Court, the right to physical and moral integrity did not allow the imposition of medical treatment against the wishes of the prisoner. This was very reasonable in view of the medical specialists' differences of opinion about the operation involved and thus "the decision to permit an aggression of this scale, despite the aim being to cure, is extremely personal and entirely free, being an inseparable part of the protection of health as the expression of the right to life".

With regard to the use of certain security measures or instruments and their effects on prisoners' health, we must note judgement 35/1996, in which the appellant alleged harm to their physical integrity due to the number of x-ray images they had to have taken. The rejection of this appeal was due to the authorities having taken appropriate precautions and the necessity of this measure for the intended security aim.

The application of certain measures in pursuit of security can also be found underlying other situations addressed by the Constitutional Court. For example, judgement 57/1994, in which a prisoner had been punished with confinement to their cell after refusing to obey a prison officer's order to strip completely and bend over for a body search, following a social visit [visits with a family member or other person the inmate is close to]. The Court did not consider there to have been any inhumane or degrading treatment, either by the content or the means used, as it did not lead to suffering "of particular intensity or cause humiliation or degradation of the passive subject". This did not prevent the Court from granting the *amparo* request for violation of the prisoner's right to privacy, as we will see below.

The question has also been raised of whether the impossibility of maintaining sexual relations via private visits would mean being subject to inhumane or degrading treatment. As the court noted, rejecting the premise, deprivation of liberty is no doubt a hardship and part of that is being deprived of sex (judgement 89/1987).

It is also worth noting here some of the Court's opinions regarding punishment by isolated confinement (judgement 2/1987, among others), applied in cases where prisoners exhibit "clear aggression or violence" or when they repeatedly disrupt the normal harmony of the prison. This punishment can only be used in extreme cases, because it means being confined separately, limiting social time with other prisoners, in otherwise ordinary cells, allowing their usual prison life to continue. The Constitutional Court did not consider this punishment, in conformance with the strict safeguards laid out in prison legislation, to be inhumane or degrading punishment or treatment. It would be a different matter if it were solitary confinement to "black cells", absolute solitary isolation which would involve clearly outrageous, inhumane, degrading conditions.

3.2. The Right to Privacy

Judgement 89/1987 rightly pointed out that the effect on prisoners' privacy, reduced almost completely to their interior lives, is doubtless one of the

most painful consequences of imprisonment. Many of the activities which would ordinarily be considered private and intimate are not only on view, but may even need authorization. Prison legislation is no stranger to the consequences of imprisonment on this right. There is a clear connection between the humanization of punishments—a marker of modern prison treatment—and a necessary respect for privacy. The right to privacy firstly, and in general, means that prisoners will have the right to what preserves their privacy "without prejudicing measures required for orderly life in the prison". In addition, it addresses specific issues, including the provision of individual cells, ordinary and special communications (including visits), the protection of personal data, and the procedures for imprisonment.

That said, our analysis will begin with the physical space where the prisoner will have to spend much of their time, the cell. From there we will analyze other aspects that may be more significantly affected by this right.

The sensitivity that the provisions of the Prison Regulations seem to display with regard to prisoner privacy in relation to cells (one prisoner per cell) does not prevent more than one prisoner being housed in each cell, whether due to cell size or due to a temporary increase in the prison population. According to the Constitutional Court, this is not in and of itself a violation of prisoners' privacy. So on the basis of the provisions of the Prisons Act, one cannot speak of a subjective right to an individual cell (judgement 195/1995). Duque Villanueva noted that "in the same way that one cannot infer the right to possess or have a home in which ones private life occurs from the content of the right to privacy or the guarantee of the inviolability of the home, one cannot infer the right of prisoners to be housed in individual cells from the same fundamental right in the prison environment"[15]. Searches in cells are linked to this principle. This idea was covered by judgement 89/2006, which noted that prisoners' rights to privacy were affected "not only by cell searches, but also by the absence of information about the searches, which means that the occupant of the cell is unaware of what control they have over knowledge of their of affairs. This additional effect must also be justified—with attention to the purposes of the search or a lack of alternatives—in order to avoid excessive, albeit in principle justified, restriction of the fundamental right". Judgement 106/2012 is more recent, and it is interesting to note the rejection of a category A (high security) prisoner's request for *amparo*

[15] J.C. Duque Villanueva, *El derecho...*, p. 122.

related to searches of his cell, an issue that was somewhat distinctive due to the prisoner's classification.

Turning to the *security measures* in prisons, it is essential to analyze the extent to which they can affect prisoners' privacy. Although in the Prisons Act these issues are somewhat spread out and unsystematic, in the Prison Regulations (following the 1996 reform) they are dealt with meticulously. Some of the measures are particularly detailed in terms of what can trigger them and the procedures to follow. Many have appeared, for a variety of reasons, before the Constitutional Court. The only ones related to the right to privacy have been strip searches and body searches following special visits, the admission of a prisoner from another prison, or sometimes when urine samples are taken in the prison[16]. This is an issue of bodily privacy (see judgement 207/1996), which is part of personal privacy. As Díaz Revorio noted, "bodily privacy nowadays has one of the most specific profiles... compared to other systems where a broader content of rights protects against all types of interventions or bodily investigations, it is worth emphasizing that in our system, bodily privacy has much more limited content". He goes on to note, "we should welcome the work done, which has perfectly outlined this right of physical integrity, clearly indicating the requirements for legitimate interventions"[17]. It is well-known that these types of body searches are not addressed specifically in the Prisons Act, which only makes a very general overview of potential searches and body searches with regard to the dignity of the person.

It was not until the 1996 Prison Regulations that the doctrine established in judgement 57/1994 was put into writing. Up to that point, the generic provisions allowed these practices in prisons, which can be confirmed by examining the resolutions of the prison supervisory courts and (from another perspective) from the Secretary of State for Prisons' responses to the public prosecutor's recommendations. This refers to the general allegation that private visits are the usual route into the prison for intoxicants or dangerous objects, and while that may be the case, each measure should be due to a specific, individual need. The Constitutional Court has addressed the application of these measures on various occasions. The first was in the aforementioned

[16] In judgment 196/2006, the *amparo* filed by an inmate who had been sanctioned for refusing to perform a urine test after a full nude search was upheld (said practice was caused by a request for evidence from the inmate himself in some proceedings judicial in order to prove that he had overcome his consumption of toxic substances).

[17] F.J. Díaz Revorio, *La Intimidad...*

judgement 57/1994, and subsequent cases such as judgement 218/2002[18] (judgement 196/2006, noted above, was of a different nature). The leitmotif of the *ratio decidendi* was as follows, "even when in a relationship of special subjection, a person cannot be put in a situation of exposing their naked body against their will, as that would violate their bodily privacy, although it must be remembered that this is not an absolute right, but one which may be limited where there is the necessary justification, where this limitation is carried out in the proper circumstances, proportionate to the aim". See judgement 57/1994, which added that when, together with being told to strip naked, the prisoner is ordered to bend over in front of the prison officer, "it increases the violation of bodily privacy caused by nakedness by exhibiting or exposing the body in movement (and) that entails a situation that may cause greater dismay or psychological suffering to the subject".

A doctrine that is applicable to the various possible bodily search measures can be summarized as follows: they should be necessary on specific occasions; the objective of such measures is the protection of prison security, safety, and order, and they may be justified when prisoner behavior threatens the security or order of the prison; the mere invocation of protecting public interest is not sufficient, nor is a generic outline of the type of visit being the usual means of smuggling objects or substances into the prison; it must be proportional and there must be proper consideration between the measures and the privacy of the prisoners, with the measures that least violate prisoners' privacy being used, not limiting the right beyond what is strictly reasonable. This means that this type of measure, which directly affects prisoner privacy, should only be applied in specific cases, with proper reasoning, and should be exceptional and proportional. And logically, ancillary to that, for the case where it is not possible to apply other instruments that are less restrictive of the right to privacy, usually electronic in nature. This is without losing sight of the fact that applying these measures can, in most cases, affect other rights such as the prisoners' physical integrity. In practice, this measure has occasionally been used systematically, beyond what is prescribed by the requirements of security and order in prison. Many prisons have used almost any intervention as a panacea, with a general idea of protecting prison security. This was particularly the case a decade ago, when the continued increase in prisoner numbers was saturating prisons, aggravating the gaps in prison infrastructure and accentuating

[18] About this sentence, F. Reviriego Picón, *Intimidad...*

security problems. The exceptional and subsidiary nature of the measure was transformed by this lax invocation of security concerns into practically an everyday measure.

Staying with the idea of bodily privacy, it is also necessary to note the implications of *obligatory medical treatment*. Again, we come back to the controversial decisions regarding the GRAPO. In these judgements, the Constitutional Court was frugal with its thoughts about the right to privacy. It did not consider forced feeding as a threat to bodily privacy, characterizing the right as "immunity from any investigation of a person's body against their will", which the Court ruled as not being the case in this situation. Personal privacy was thus not affected either by the parts of the body which were being acted on, by the means being used, or by the purpose, which had nothing to do with acquiring knowledge about the body, a consideration that at the very least may be characterized as arguable.

The use of certain internal security measures, either before or after *special visits*, is not the only issue to have come before the Constitutional Court in relation to prisoners' personal and family privacy regarding these visits. The way they are configured has also been addressed. It is obvious that *face-to-face* or special visits (including conjugal visits) are important for prisoners, and very significantly those of a private nature. At the time they were introduced (RD 2273/1977, 29th July) they was hailed as "a revolutionary process in prisons". This issue was present during the drafting of the constitutional text, and prisoners' rights to exercise their sexuality was broached as potential content of what would be art. 25. Ultimately this was watered down to the broadest summary of comprehensive development of the personality. The main problem that has arisen since has been the subjective scope of that article[19]. In other words, people who may fit within the "limits of credibility" of the idea of intimate companions, as well as the possibility of requiring (or not) stable relationships that have lasted for specific times[20]. Starting with the fact that sexuality is part of the sphere of privacy, what would be the implications of that in terms of these visits? To what

[19] The Prison Act orders that the establishments must have adequate premises for visits by family members or close associates of inmates who cannot obtain exit permits.

[20] Recently, Instruction 5/2020 has eliminated the requirement of the six-month period that was generally required for the granting of intimate communications to inmates who cannot document the emotional relationship or who had previously entered into with a different person to the one requested. Before the amendment, various court decisions had influenced the fact that this requirement is not contained in either the Prison Act or the Penitentiary Regulations, and it is only possible to establish limitations for reasons of order and security.

extent should sexuality be classified as covered by the right to privacy. The Constitutional Court's response to these questions was clear. In judgement 89/1987, addressing the supposed infringement of rights to physical and moral integrity and privacy due to the restriction on special visits in certain circumstances—category A prisoners and inmates under special conditions outlined by law—the Constitutional Court noted that "what the law can protect, and what ours, fortunately, protects is privacy itself, not men's private or intimate actions. No doubt, one of the most painful consequences of imprisonment is the reduction of privacy almost to one's interior life, with many activities and actions that would normally be private being open to view or even needing authorization". The Court continued, "One might, occasionally, consider measures as illegitimate—violations of privacy and thus also degrading—if they go beyond what orderly prison life requires. However this condition does not apply in the restriction or temporary loss of intimate relations with non-imprisoned people, relations that according to the provisions of art. 18.1 SC, must occur, when authorized, in conditions that safeguard the dignity of those involved (*with the utmost respect for privacy*). Authorization for special visits is a particular circumstance of restoring provisional privacy, albeit at the surely painful price of having to ask for it. However, this occasional restoration is a concession of the legislator, not an imperative derived from the fundamental right to privacy".

To conclude this section, it is worth highlighting how the Prisons Act covers the regimen for prisoners' *communications* in prisons in a broad manner. This is unsurprising, given how important they are in this environment, and means that where they are restricted, there must be strict safeguards. In the first place, the Act states that it is possible for prisoners to be able to communicate—orally or in writing—periodically with family, friends, and accredited representatives from prison liaison organizations, except where they are under court orders preventing that. The Act specifies that these communications must be under conditions that show utmost respect for privacy, without additional restrictions to those required for good order in the prison, the purpose of treatment, or where there are reasons of security. Secondly, addressing communications with lawyers, the Act emphasizes that (beyond the requirements of appropriate units in which they take place) they cannot be suspended or monitored except by court order and in cases of terrorism. Finally, the Act enables communication with accredited professionals in relation to their professional activity, such as social workers, priests or religious ministers, when requested by the inmate. Despite there being much case law from the Constitutional Court from the perspective of

secret communication in the prison setting, and regardless of the close links between occasional restriction of communication and the right to privacy, we cannot lose sight of the formal nature of the concept of secrecy. This leads us to look at a single judgement in which, with this background of prisoner communications, the right which was actually infringed was the right to privacy, in this case the prisoner's right to family privacy. The case in question was judgement 201/1997, which was in response to an *amparo* request raised by a prisoner who was not allowed to use the Basque language in telephone calls to family members. The Court noted here that the limits laid down in the Prisons Act—reasons of security, the purpose of the treatment, and the good order of the prison—"are not applicable to an inmates' telephone calls with their family, in their own language, national or foreign, except where it is reasoned, when granting conditional authorization, that the use of a language that prison officers do not know may threaten some constitutionally protected interest". In this sense, the level of treatment the prisoner may find is not absolutely determined. This thinking emphasizes that, while family communication would never be an absolute right, it can only be limited or restricted via a process of careful deliberation respecting the specific requirements of appropriateness, need, and proportionality, which did not occur in that specific case[21]. Lastly, it is interesting to note the Constitutional Court's response following an appeal from a prisoner who alleged that the rejection of their request to be transferred to a prison which was closer to their family home infringed their right to private and family life (art. 18.1 SC, in relation to art. 8 ECHR). The Constitutional Court (ACT, 28th February 2017) rejected the appeal—with various dissenting opinions—noting that the Constitution "does not include the right to 'family life' from art. 8.1 ECHR in the fundamental right to personal and family privacy (art. 18.1 SC), as case law from the ECHR shows, but that also, starting from various premises, a solution consistent with ECHR doctrine on this matter has been arrived at".

[21] This ruling closely parallels the Judgement of the European Court of Human Rights "case Nusret Kaya et al. C Turkey" of April 22, 2014; In the specific case, the appeal was based on the prohibition of speaking the Kurdish language in family communications. Beyond these questions, we must not fail to cite the importance in recent years of the so-called pilot judgments of the European Court of Human Rights issued on the prison world; on this topic you can see the doctoral thesis of S. Turturro Pérez de los Cobos *El estado de las cárceles y las sentencias piloto del Tribunal Europeo de Derechos Humanos*.

3.3. The Right to Secrecy of Communications

We turn now to intervention in and suspension of communications in this environment, both general and ordinary, and specific or special. The first heading includes prisoners' communications with family and friends, as well as with accredited representatives of prison liaison organizations. The second includes communications with defense lawyers or calls made expressly related to criminal matters, or the prisoner's legal representatives. It also covers communications with accredited professionals, social workers, priests or religious ministers. On another level we find intimate or family communications in which the right protected is the right to privacy, as seen above.

These communications are important, as obviously prisoners need to maintain external family ties, which are no doubt connected with the objectives of re-education and social rehabilitation. Thus, inmates are not reduced to the world of the prison, they can maintain relationships with the outside world and prepare for their future lives within society. The consequences of the COVID-19 pandemic are particularly important, as it has encouraged online communications[22].

Restriction of communications (in general) is a question that has most often been the concern of prison supervisory courts. It has also been the subject of many judgements in our highest court, and has gained a notable body of case law. In this case, both from the perspective of secrecy of prisoner communications *stricto sensu* and from that of those they communicate with. In addition, other rights, such as the right to personal and family privacy, may be implied from a supposed right to a specific type of communications or from the implications of the method or access to certain communications (including the language used, as seen previously). We need to clearly distinguish between intervention in communications in general and intervention in specific communications, as well as the effect of the provisions of art. 25.2 SC on the rights enshrined by art. 18.3 SC, and clearly linked to that, on the right to personal and family privacy beyond the formal nature of the concept of secrecy. These are not the only rights that may be affected on this point. Prisoners' communications with religious ministers may be considered as the exercise of religious freedom guaranteed by the Constitution[23].

In general terms, prisoner communications (depending of course on the type of communication) may be affected in three ways. Court orders

[22] About this issue vid. C. Güerri, M. Martí, A. Pedrosa, *Abriendo...*

[23] M. Martínez Escamilla, *La suspensión...*, p. 42.

preventing communication (which we do not address now), suspension, or intervention. The latter two supposedly for reasons of security, for the purposes of treatment, and for the good order of the prison. The use of these general formulas makes it impossible to detail the circumstances each can produce beforehand.

The first and last of those reasons (security and order) should logically be addressed together. There seems to be no doubt that one or the other are sufficiently important to operate as external limits to the secrecy of prisoner communications. However, translating this idea to prison practice does not allow it to become a preventive instrument that enables communications to be monitored beyond the criteria of need or proportionality. To put it more specifically, the few examples one might imagine as affecting prison security or order "all have criminal characteristics: so in principle, it would seem to justify administrative restriction if there are reasons to think that the inmate would use their communications to prepare for escape, to smuggle drugs into the prison, or transmit information for the preparation of possible attacks on the prison organization or about prison officers' habits"[24]. The second reason, in the interests of treatment, has its own peculiarities, in as much as it seems logical to think that there is an element of prisoner willingness, beyond paternalist provisions.

In addition to the specific procedural requirements related to intervention in or suspension of communications, there must be, in addition to one of the enabling causes above, a properly reasoned agreement, which will be notified to the competent judicial authority and which the prisoner must be made aware of. There must also be a time limit to the measure, which does not prevent it from being linked, beyond strict time limits, to the existence or continuation of certain circumstances that will act as specifiable limits *a posteriori*.

Time limits for interventions is not an express requirement either of the Prisons Act or of the Prison Regulations. It was the Constitutional Court itself that shaped it as an unavoidable provision, although not as a specific, exact time limit. Instead, the Court considered in its defining element that measures such as this cannot be maintained "for longer than strictly necessary for the purposes that justify their use" (for all, see: judgement 170/1996 and 128/1997). An intervention measure of indefinite duration, in the sense expressed, would be completely disproportionate. Notification

[24] M. Martínez Escamilla, *La suspensión...*, p. 83.

to the prisoner would be a logical consequence of the purposes of interventions that are not aimed at criminal investigation, but rather at prevention (judgement 200/1997).

At this point, it is useful to go into a little more detail about certain types of communications: between prisoners, with lawyers, authorities, and professionals[25].

When it comes to *communications between prisoners*, the Prisons Act did not make any specific provisions, which does not stop it from being understood as included under the general regime, which would mean suspension or intervention would only be proper for reasons of security, in the interest of treatment, or prison order. Nonetheless, the Prison Regulations approved two years later did choose to specify these specifically. It did so restrictively for written communication, in the case of inmates in different prisons, by establishing that "*in every case*, correspondence between inmates in different prisons will be through the authorities and *will be monitored*". Justifications for this limitation were based on an attempt to avoid such communication from being used as an instrument for transferring directions from one prison to another to coordinate riots. Despite being able to imagine various possibilities for getting around these limitations, as they do not apply to external communications, we can do no more than reiterate our serious doubts in terms of constitutionality. Logically, the prison supervisory courts were no stranger to this conflict while this rule was in place. We find more than a few appeals based on the idea that these provisions did not effectively protect the right to secrecy in postal communications in the prison environment, with the reasoning behind the measure having to be clear in each case along with any extant reasons of security making them advisable. For other written communications, the Prison Regulations return to the general limitation rule in the Prisons Act, there may be interventions in communication for reasons of "security, in the interests of treatment, or good prison order". Surprisingly, it took until the reform of prison regulations in 1996 to end that provision which determined, without the need for any justification, an arbitrary and unnecessary restriction of this prisoners' right. That reform established that correspondence between inmates in different prisons could be monitored following justification from the prison director that would have to be notified to the prisoner and communicated to the prison supervisory court. A similar determination was established with regard to telephone calls between

[25] F. Reviriego Picón, J. Brage Camazano, *Relaciones...*

inmates in different prisons. The Constitutional Court has addressed this question on only a few occasions, such as in judgement 188/1999 and, for another type of communications, in judgement 193/2001. From another perspective, it is worth noting judgement 169/2003, which addressed communications between inmates within the same prison, previous to which there had been no judgements in the Constitutional Court beyond tangential pronouncements (judgement 27/2001).

Communications with lawyers also merit a mention as, along with the guarantee of secrecy, there is an overlap with the right to a legal defense and to legal counsel, which means extra rigor is needed when it comes to intervening in these communications. As underscored in judgement 58/1998, there is a particular instrumental importance in the exercise of this right for those who have been imprisoned and who are engaging in legal means to fight the situation or the conditions they are in. This is both because of the importance for "adequate design of a defense strategy" which requires the strictest safeguards if it is to be limited, and because the object of the communication may be the "attribution of criminal or administrative infractions to the prison authorities". Because of the singular nature of these communications, any intervention requires judicial authorization, and is only possible in cases of terrorism. As the second section of art. 51 states, prisoners' communications with defense lawyers or other lawyers expressly contacted in relation to prison matters, and their legal representatives "shall be carried out in appropriate locations, and *may not be suspended or interfered with except by court order and in cases of terrorism*". Although the question of whether these two requirements are accumulative (court order and terrorism) has already been resolved, we should note the doubts raised at the time, as well as the restricted interpretation (of the rights of the prisoner, not the limitation in and of itself) that the Constitutional Court soon made. The problem may be put in the following terms. Although the guarantee of prior court order is prescribed ordinarily for this type of communication, what happens in cases of terrorism? Is there an exception? Could there be interventions in communications because of a decision by prison authorities with a simple *a posteriori* accounting? This more limiting interpretation was adopted by the Constitutional Court very early on in an incidental, or *obiter dictum*, declaration in one of its first decisions on prison-related matters (judgement 73/1983). A decade later, when the Court—this time directly—addressed a specific case of intervention in the communications of an inmate who belonged to an armed gang, the Constitutional Court changed its interpretation radically, stating that the understanding that a prison director could

extend their ability to suspend communications with lawyers in cases of terrorism was not in line with "the strictest, rights-based sense that should be accorded to art. 51 of [the Prisons Act]", and that it, furthermore, was due to a "confusion" between two different classes of communications. The enabling conditions (court order and cases of terrorism) were cumulative, and the Court concluded that the second section of art. 51 of the Prisons Act authorized "only the courts with the authority to suspend or intervene, proportionally and with justification, in prisoners' communications with their legal representatives, and did not in any case authorize the prison authorities to interfere in these communications" (judgement 183/1994). The 1996 prison regulations gathered these provisions in the third section of art. 48, indicating in a general sense that "prisoners' communications with defense lawyers or with lawyers contacted expressly in connection with prison matters, as well as with their legal representatives, may not be suspended or interfered with in any case by administrative decision. The suspension of or intervention in these communications may only be done after obtaining express authority from the courts".

Written communication with lawyers are similarly protected, even though this was not initially a settled issue, in so far as a literal reading of the Prisons Act would seem to lead to the opposite interpretation. It states, addressing communications with lawyers, that they must be in appropriate locations, there is no other mention in this regard. So are written communications with lawyers subject to the general regime of suspension and intervention? Judgement 58/1998 clearly indicates that a restrictive interpretation of this point is not constitutionally acceptable, including for written communications, because "the mention of appropriate locations does not mean an exclusion of written communications but is instead simply a specification of how oral communication should be handled".

The last of the references is about communications with *authorities and professionals*. Remember that in the Prisons Act, along with the reference to accredited representatives of humanitarian organizations, the defense lawyers, and other specifically contacted lawyers, inmates can also be authorized to communicate with "professionals accredited in relation to their activity, with social workers and with priests or religious ministers, whose presence has been requested beforehand". This provision is accompanied by the possibility of occasional intervention. The Prison Regulations dedicate a substantial provision to these communications, making particular mention of court authorities, members of the public prosecutor's office, the Prisons Ombudsman [*Defensor del Pueblo*], and delegates and institutions analogous

to autonomous communities which cannot be suspended or be the object of intervention or restriction. It also covers communication for foreign inmates with diplomatic or consular representatives from their countries or with people indicated by the respective embassies or consulates (as well as covering refugees, the stateless, and citizens of countries who lack this kind of representation). The final reference in the regulations is to notaries, doctors, religious ministers and other professionals whose presence is legally requested by the inmate "for the realization of the functions of their respective professions". Regarding the first in the list and the impossibility of intervention, it has been noted that the reason for such a privileged regimen is clearly that it deals with "authorities whose responsibilities include, in large part, defense, representation, or management of the legitimate interests and rights of inmates who seek their help, rights and interests which are mostly exercised or intended to be exercised against the prison authorities, which demonstrates the need to reduce administrative interference in such contacts to a minimum"[26]. Communications with the Prisons Ombudsman were mentioned above in reference to prisoners' written communications. Communications with court authorities need a separate mention, in so far as, before the Prison Regulations were passed, there was a case of intervention in communications with a judge in the prison supervisory court (expressly prohibited in the regulations) which led to judgement 127/1996, granting an *amparo* request, recognizing the rights of the appellant to secrecy in communications and to the presumption of innocence.

3.4. The Right to Information and Freedom of Expression

The confiscation of magazines and books, the prohibition of having a television in the cell, and the refusal of communications (whether with media professionals, families, or friends) have produced allegations of violations of the right recognized in art.20.1.d in the Constitution "to freely communicate or receive truthful information by any means of dissemination whatsoever" (judgements 119/96, 2/2006, 11/2006, and 6/2020). Only in the last of these judgements was the allegation upheld. In the first of the judgements (in which the appeal was raised by prisoners who had specific rules applied—deprivation of communications and not being able to have a television in the cell—due to their level of imprisonment or being under the rules of art. 10

[26] M. Martínez Escamilla, *La suspensión...*, p. 154.

of the Prisons Act), the Constitutional Court rejected the appeal as the constitutionality of depriving prisoners of these specific communications had already been settled. It noted that because "limiting access to information generally is a consequence of imprisonment, it does not seem that it is this right that is at stake in depriving prisoners of special communications, as the connection between the right to information and special communications is very remote". It emphasized that "while it is true that there is a factual restriction to access to a particular public means of diffusion, it is nevertheless a restriction with proper legal coverage in the framework of restricting individual belongings as a security measure for inmates classed as dangerous, which is consistent with the idea of proportionality that must guide [such a measure]". The two judgements from 2006 are substantially different. Both involved the confiscation of certain publications, a book in the first case (judgement 2/2006) and a magazine in the second (judgement 11/2006), and both cases involved inmates who were members of terrorist groups. The difference between the two cases is that in the first, the confiscation was for reasons of security and the second was based on elements related to re-education and rehabilitation. In the case addressed by judgement 2/2006, the confiscation agreed by the prison governor was on the understanding that this publication, at that time seized by the Data Protection Agency, "may threaten the security and good order of the prison, in that it includes the names of prison officers and members of other state bodies". The Court did not address this allegation but granted an *amparo* request for violation of the right to legal protection. In judgement 11/2006, various issues of a magazine were confiscated from an inmate, who had been sent them by family members. The reason for confiscating them was nothing more than to prevent access to reading publications "whose reading may give the inmate a sense of justification or glorification of the criminal acts for which they were sentenced, or at least make it hard for them to disassociate themselves from those acts" (the appellant had been convicted of terrorism related offences). This intervention found legal cover in the provisions of the Prisons Act. The Court rejected the *recurso de amparo* request, finding that the intervention complied with the requirements of proportionality, noting that, as a consequence of the reasoning of what "individualization" refers to (belonging to a terrorist organization that had taken action against the security and good order in prisons), that "it does not justify, thus, intervention for the type of offence, nor for belonging to a criminal group, nor for belonging to a terrorist group, but rather because this group has carried out and continues to carry out specific actions that effectively endanger the security and order in

prisons. It therefore individualizes the circumstances common to members of the group that justifies the measure as it affects one of them". It was only in the most recent judgement, 6/2020, that the Court found that the prison authority's denial of communication had been a violation of the right to freely communicate true information, in connection with the broader freedom of expression—here the internal limit of truth does not operate[27].

3.5. The Right to Effective Legal Protection

The Constitutional Court has indicated that the guiding principles of the criminal order are applied "with certain nuances" to punitive administrative law, both being manifestations of the state's power of punishment, extending the procedural guarantees of art. 24 SC over the actions taken to exercise the punitive powers of prison authorities. This extension would not be by literal application, because of the clear differences between the two orders, but instead "to the extent necessary to preserve the essential values underlying the precept and the legal security guaranteed by art. 9 SC". There have been various judgements covering different aspects and rights of legal protection in the arena we are examining, with a variety of nuances and specifics.

We begin with the first section of the article, people's rights to effective protection from judges and courts in the exercise of their rights and legitimate interests, in no case without a defense, a right which, as has been stated repeatedly since judgement 37/1995, has its core in *access to jurisdiction*.

With regard to the aspect of *access to resources*, we note judgement 65/2002, in which an inmate appealed against a decision of the prison supervisory court which confirmed the prison's refusal to grant permission for a temporary release. In this specific case, in addition to the error of the decision in which there was a lack of any resources for disputing it, the inmate acted without legal counsel. Judgement 7/2006 was more recent, in which no answer was given to a brief requesting an express pronouncement, and subsequently not responding to the question of whether an appeal was possible or not. Issues have also been raised involving the *right to due process*. For example, the prohibition against using evidence obtained by

[27] Instruction 3/2020 ("Authorizations for journalists and the media to interview the prison population") has collected the doctrine established by this ruling, clearly highlighting the maintenance of the inmate's right to communicate with representatives of the media, which can only be denied for reasons of security, interest in the treatment or good order of the establishment, and where issues related to the security of prison workers or related to a possible secondary victimization of the passive subjects of the crime are singled out.

violating fundamental rights, which was addressed in judgement 169/2003, regarding a punishment given to an inmate based on a letter, the interception of which violated the secrecy of communications. We also find resolutions addressing the *finality of judicial decisions*, a consequence of the procedural guarantee against re-litigation. These include decisions from the prison supervisory courts, as in judgement 174/1989, on the issue of reduction of a sentence (regardless of the fact that the prisoner wrongly benefited from it, it was a resolution that had been handed down and could not be modified). Particular mention should be made here of the transfer of inmates from one prison to another, because, in the words of the Constitutional Court, if the potential transfer of a prisoner between prisons could mean changes to court rulings "referring to the status of the prisoners, the legal uncertainty would be absolutely intolerable" (judgement 140/2002). However, this would apply for decisions about the "status of the prisoners", but not to decisions "which apply to circumstances where once the ruling is complied with, it is no longer relevant" (permission for temporary release or similar authorizations). In relation to the closing clause, the *prohibition against not having a defense*, it must be noted that a "constitutionally relevant" lack of defense does not always occur where there is some infringement of procedural rules, but only when there are "practical consequences consistent with the deprivation of the right to a defense and in real, effective harm to the interests of the person affected". It is essential, therefore, to respect the principles of hearing both sides, adversarial procedure, and equality.

With regard to the right to *a public trial without undue delay* guaranteed by art. 24.2 SC, which cannot be identified with a strict compliance with procedural deadlines, it is worth citing judgement 37/1991, which addressed this due to the delay of the prison supervisory court in responding to a request for counsel and duty lawyer to defend and represent an inmate. In terms of timescales, judgement 29/1981 stands out, in which the question was raised of when and where an appeal brief was presented. The Court, starting from the factual impossibility that the brief could be presented in-person, considered that the brief must be understood to have been presented at the time the inmate delivered it to the prison authorities, otherwise the prisoner would be in a clearly unequal position by having shorter timescales that they would enjoy if they were not imprisoned. As the Constitutional Court has reiterated in numerous judgements, certain occasions where there is a lack of judicial response to questions raised by parties involved do constitute real "denial of justice" via art. 24.1 SC, stating "lack of legal protection of constitutional importance occurs, essentially, when a relevant claim, properly and

duly raised with a judicial body, finds no response, even tacit". It is worth citing here judgement 52/2005, which granted a request for *amparo* from an inmate who had been punished by isolation in their cell after returning to the prison outside of the dates allowed for a temporary release. The prisoner appealed claiming that the sanction was outside the time prescribed, something that the confirmatory decision did not address. Further back in time, judgement 104/2002 did the same in another instance of disciplinary action for disrespecting a prison officer, in this specific case, due to not responding to requests about the evidence offered or the alleged violation of the right to a defense in relation to the type of legal assistance requested. These instances are particularly interesting in so far as isolation means a severe restriction of the "already restricted liberty inherent in the prison sentence". A lack of reasoning has also determined violation of the right to legal protection in certain cases. In judgement 42/2005, in which an inmate appealed against a decision that went against them but had accepted the appellant's arguments in its reasoning, leading to a clear contradiction between that (in favor of the appellant) and the decision. In addition, we can consider judgements 112/1996 and 202/2004, which are interesting because of their connection with art. 17 SC—the right to personal liberty—which was considered to have been infringed by insufficient reasoning in denials of a request for temporary release and a request for delaying the beginning of a prison sentence. These, and other judgements, clearly note the idea that court decisions that affect the right to liberty or the mandates of art. 25 have more stringent guiding requirements. The *right to be informed of charges*, as guaranteed by art. 24.2 SC and applicable to the punishment process in the prison environment, was used to approve the request for *amparo* raised by an inmate who had been punished with isolation, but who had been provided with an inaccurate and incomplete picture of the allegations against them (judgement 297/1993). The constitutional *right to a defense* is provided, according to the Constitutional Court, through counsel, or to put it better, the "possibility" of legally required counsel—through a lawyer, prison official, or other person designated by the inmate, within the requirements of security, treatment, and good order of the prison[28]—(judgement 91/2004). The right was violated due to the hinderance or unjustified impediment of that possibility by the prison authorities. There have been many judgements,

[28] In the case prosecuted by judgement 27/2001, the recurring inmate requested to be advised by another inmate (both inmates were members of the terrorist organization ETA), responding affirmatively to said request as long as it was provided in writing and in Spanish.

starting with judgement 74/1985, noting that while the right to legal counsel, although not an absolute right, refers fundamentally to judicial processes, particularly in criminal justice, "prison authorities must allow inmates to have legal assistance in disciplinary proceedings to the extent that is proportional to the alleged infraction, to the punishment that may be meted out, and to the procedure to be followed to decide the matter" (judgement 104/2003). The *right to use evidence appropriate to the defense* within prison disciplinary proceedings is recognized and reinforced both during the processing of the disciplinary case—requests to use evidence may be refused if it is justified as not relevant or pertinent—and before the prison supervisory courts—who may decide to enter evidence that was previously denied in the disciplinary process (which should be requested at an appropriate time and in a proper manner, ideally in order to verify relevant facts and should be key in terms of the defense). As an example, we can cite judgement 81/2000, which dealt with a situation in which an inmate had been punished for disobedience, and had been denied the use of witness evidence from other inmates in both the disciplinary proceeding and in the prison supervisory court hearing, with the facts of the matter being accredited by the witness testimony of the prison officers involved (see also judgement 236/2002). From another perspective, judgement 76/1999 granted the *amparo* request from an inmate who had been prevented from contesting evidence that had not been presented beforehand. We can also cite judgement 297/1993, which addressed the question of the *ex novo* inclusion of new data to the procedural argument and the possibility of the inmate expressly contesting its evidentiary value. This right clearly addresses only the key evidence in defense terms, and evidence not being key to a defense is sufficient motive for rejection (see, for example, judgement 23/2006).

3.6. The Right to Work

Among the provisions in the second section of art. 25 SC is the surprising determination that the prisoner (constitutionally sentenced to imprisonment) will "in any case" have the right to paid work and the corresponding social security benefits. We do not need to dwell on the criticisms this provision provoked during its parliamentary debate, we noted them above and there is no need to reiterate them here. The Constitutional Court has stated that, on this question, we are not dealing with a "perfect subjective right of the prisoner versus the prison authorities", nor with "a mere declaration aimed at highlighting the positive obligation of the prison authorities to ensure

the prisoners' effective enjoyment of this right". What predominates in the prisoners' right to work is "its nature as a right to recompense which, to be effective, requires the organization of a system in which two aspects can be distinguished, as judgement 172/1989 stated: the obligation of creating a system to the extent necessary to provide all inmates with work and the right of those prisoners to paid work or a paid job within the possibilities of existing prison organization" (judgement 17/1993). The Court added that "it is the prison authorities, above all, who must comply with their obligations to the extent necessary to provide all inmates with work, and although this subjective right of prisoners can be recognized, it is limited by the material and economic possibilities of the prison, and for that reason, for the inmate it is a progressively applied right, and cannot be expected, given its nature, to apply fully immediately". It is a right which would be included "in purposes of re-education and social rehabilitation for those who have been constitutionally sentenced to imprisonment, and in that regard, they are progressively applied rights, the efficacy of which depend on the means available to the prison authorities at the time, and cannot be, therefore, fully required immediately in cases where it is materially impossible to do so" (ATC 256/1988 and ATC 95/1989). *Amparo* requests can only be approved if there is "appropriate work available in the prison", and the appellant has the right within an established order of precedence. In jurisprudence, the classification as a progressively applied right has been roundly criticized, with the consideration that this "curious transplant" to the prison environment has allowed the Constitutional Court to dodge the constitutional issue[29]. It has also been criticized from the opposite end of the spectrum, as infringing the constitutional principle of non-discrimination "by privileging, with no justification, the imprisoned citizen above the non-imprisoned citizen, granting a prevailing right to work that they can demand be respected in the courts"[30].

3.7. The Right to Education

Despite its clear link to the purposes of punishment, the right to education in prisons has received second-class treatment in jurisprudential studies. This is despite the fact that, as Martín Diz noted, this right is doubtless the most directly related to the purposes of imprisonment, and it is with

[29] J.L. De la Cuesta Arzamendi, *Diez años...*, p. 79.

[30] A. Téllez Aguilera, *Seguridad...*, p. 40.

good reason that one purpose is prisoner re-education[31]. This same idea was reflected in the preamble to the Reform of the Prisons Act (LO 6/2003, 30th June) sparked by the supposed irregularities found in the university courses being studied by members of ETA. This is not an orphaned issue in the Constitutional Court. In judgement 140/2002 the appellant inmate believed that the prison authorities decision to not accede to requests for a laptop to be installed in his cell (which he did have in his previous prison, authorized by a decision in the prison supervisory court) violated his right to education. The judgement in any case is not overly interesting, as we will see below, but what interest there is lies in the fact that it was the only time where there has been an allegation of this kind (violation of art. 27.1 SC in the prison environment). The limitation was not absolute, as the inmate had been offered use of the computer in a separate location, indicated as such in the internal prison rules, as the prison had authorized another inmate to use it in his own cell, which would have made it impossible for both to use. The Constitutional Court, after the obvious statement of the right being in existence in prisons, noted the need to consider it being subject to necessary "modifications and details" derived from the internal rules governing life in the prison. The remaining argument in the judgement turns on the finality of court rulings, as the inmate had alleged that the refusal in question led to a violation of this principle. The Constitutional Court also rejected this claim because the refusal in question did not affect the *status* of the prisoner, as it was a resolution about the use of a means of study that "due to particular reasons or circumstances is no longer in force once it has taken effect".

4. Epilogue

A quarter of a century ago, at the same time as the present Prison Regulations came into force, the Prisons Ombudsman, in their second report on the prison environment, indicated that, following the importance of the 1979 Prisons Act being passed in cementing the inclusion of Spain into the modern prison reform movement, it was time for a new challenge, "entering the next century with a project to harmonize time in custody, re-education, and effective management with the utmost respect for people's fundamental rights".

[31] F. Martín Diz, *El Juez...*, p. 158.

Our Constitutional Court has played a key role in this task which, beyond the discrepancies in the theoretical formulation for the shape of the prison relationship, has been an undoubtable motivating element in this area with its broad, consolidated case law in relation to prisoners' fundamental rights. This is not to ignore, obviously, the extremely important activity of the prison supervisory courts, created *ex novo* by the 1979 Act. Remember that the competencies of these courts include "safeguarding inmates' rights" and "correcting abuses or errors that may arise through compliance with the Prison Regulations". It is important to remember where the different petitions and complaints prisoners can make about their treatment in prison and the prison regime come from "in so far as it affects fundamental rights or their rights and prison privileges". And of course, we must not forget the Ombudsman's office, who, apart from the detailed studies of the situation in prisons (in one report they also addressed the situation of prisoners in foreign prisons), include a corresponding section in their annual reports. In addition, it is worth highlighting the reports from the National Mechanism for the Prevention of Torture. Its activity in Spain is following receipt of complaints (by prisoners, family members, lawyers, unions...) and through periodic visits to various prisons.

It goes without saying that the area of limitations to fundamental rights is already complex *per se*, and that this complexity is accentuated in this relation of special subjection. The content of sentences, the purpose of the punishment, and prison law are the elements that single out the possible limitations/actions/interventions which in every case must be subject to the principle of proportionality, shaped in our constitutional case law through the ideal triad of appropriateness, necessity, and subordination or proportionality *stricto sensu*. The activity of prisons, marked logically by the evident demands of security and order, must find a fair balance between that and respecting the fundamental rights of the prisoner, which must not be limited more than strictly necessary and only in the situations outlined above.

The COVID-19 pandemic which led to the declaration of a state of alarm in March 2020 via Royal decree 463/2020 (extended on subsequent occasions, including a declaration that was limited to a single autonomous community—Royal decrees 900/2020—and a second national-level state of—Royal decree 926/2020) have had an enormous impact on all areas of life, and prisons have been no exception. Inmates were one of the groups who suffered what was called "double confinement" and the suffering that went with it. As soon as the state of alarm was declared, and in order to prevent the spread of the virus (Order INT/227/2020), all ordinary communications and visits were suspended along with all temporary releases, as well as visits to prisons by

members of charities/NGOs and teaching staff, including staff from UNED (the National Distance Learning University) etc. The main measure to soften the blow of inmates lack of communications was to extend the amount of telephone communications, particularly with lawyers to ensure the right to a defense at all times. Some prisons encouraged the use of video calls for communication with families. Although it is clear that there was insufficient use of communication technologies and a lack of digitalization in prisons—a lack traditionally justified for security reasons—the pandemic seems to have opened a door that it will be difficult to close when the situation returns to normal, on the contrary it will open further. This consideration of the communication and training possibilities new technologies offer prisoners in relation to social rehabilitation have driven a proposal to modify the Prison Regulations with the aim of introducing the use of new technologies into prisons and regulating inmates' use of the internet. The proposal received a favorable response from the General Council of the Judiciary in July 2021. We should, lastly, indicate that the Prisons Ombudsman paid particular attention to prisons over this time, although focusing especially on changes to the prison classification of vulnerable people, the protection measures to adopt, and the protocols for communication with families. The Ombudsman's assessment of the actions by the Ministry of the Interior was very positive.

Abstract

The Rights of Prisoners in Spanish Constitutional Jurisprudence

This article analyzes the doctrine of the Spanish constitutional court on the rights of prisoners. In four decades, the constitutional court has issued a large number of judgments in this area, in matters related to the right to life, privacy, freedom of expression, education, judicial protection, secrecy of communications or the right to work of the prisoners. The impact of the COVID-19 pandemic in prisons during 2020 and 2021 is also addressed.

Keywords: Spanish constitutional court, rights of prisoners, right to life, right to privacy, freedom of expression, right to education, judicial protection, secrecy of communications, right to work

FERNANDO REVIRIEGO PICÓN
Constitutional Law Professor, National University of Distance Education, Spain.

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