Life-support treatment refusal as a fundamental right: the case of Inmaculada Echeverría*

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I.- Introduction.

The person’s self-determination concerning her life and death is a traditional topic of moral, philosophical and juridical debate which, probably as a consequence of the vast biomedical and technical advances and a progressive shift in the principles ruling the patient-doctor relationship, has become more sophisticated. Lawyers, and increasingly constitutional lawyers, not only discuss in broad terms whether there exists a right, even of constitutional nature, to end one’s life, but also more concrete issues such as the possibility of refusing a medical treatment even though this decision will inevitable lead to the person’s death or the legitimacy of rejecting the life-support treatment and demanding a positive duty of the authorities to switch it off. The perspective adopted to debate these matters is sometimes different too, as the arguments exceed the traditional language of the scope of the rights to life, to freedom of ideology and religion or to privacy, and focus, for example, on the requirements arising from the right to personal and psychological integrity.

Within this context, this paper examines the Spanish constitutional and legal framework of the case of Inmaculada Echeverría, a 51-year-old resident of Granada who had been bedridden and on a respirator for the last 20 years as a consequence of muscular dystrophy, a degenerative disease she had been suffering since she was 11, and who demanded to have her respirator turned off. In 2006, and under the Spanish legislation, she signed a living will in this sense and retained a lawyer to help her. Especially after the press conference she gave in October 2006, her case received strong media coverage and

* The decisions of the Spanish Constitutional Court are cited indicating STC (Spanish Constitutional Court Sentence) or ATC (Spanish Constitutional Court Edict)/the reference number of the decision/the number of the argument where the quotation has been taken from.
triggered, once again, the social debate on euthanasia. Though her petition did not finally reach the Courts, two different reports, a first one issued by the Ethics Committee of the Government of Andalucía and a second one by the High Consultative Body of the Government of Andalucía, supported Ms. Echeverría’s decision, who finally died on 14th March 2007 when her life support was switched off by the doctors.

The aim of this paper is to give a constitutional coherent answer to the dilemma posed by the petition of Ms. Echeverría: under the Spanish legislation, can a sound patient refuse the life-saving or the life-support treatment in a personal, free and express decision that does not compromise third party’s constitutionally protected rights or interest?

The following pages open with the analysis of the Spanish Constitutional Court’s doctrine on the fundamental rights to life and personal integrity, in order to identify the constitutional nature of the patient’s right to refuse a medical treatment recognised by the Spanish legislation. Then explores the Spanish legal regulation on the patient’s autonomy and its restrictions and, in the light of the conclusions achieved in the first part, proposes a

1 In May 2006 there was a similar case. Jorge León Escudero, a 53-year-old quadriplegic resident of Valladolid who lost the use of his arms and legs in an accident and was on a respirator, pleaded for help to “die with dignity” through his weblog. The 5th May 2006, he was found dead at his home disconnected from the respirator and with an empty glass that apparently contained a sedative. Due to the lack of evidence as to identify who helped him, no criminal charges were brought in his death. In January 2007, a 69-year-old woman known as Madeleine Z, resident of Alicante and who suffered from Lou Gehrig’s disease, committed suicide after apparently swallowing a drugs’ cocktail at her home with the help of two other members of the Association for the Right to a Dignified Death.

A similar case prompted the social debate in Italy. As well known, in September 2006 Piergiorgio Welby sent a videotape to Italy’s President asking to be granted the right to euthanasia. Welby, a 60-year-old man who suffered from progressive muscular dystrophy, was on a respirator, was fed by a feeding tube and communicated through a voice synthesizer. On 12th December, Judge Angela Salvio heard arguments on whether Welby’s request to be taken off a respirator should be granted on the ground that forcibly administered life-sustaining medical treatment violates Italy’s constitution. However, Welby’s request was rejected, ruling that Italian law did not permit a physician to grant his wish but urging lawmakers to deal with such issues as assisted suicide. Welby died on 20th December, physician Mario Riccio disconnected his respirator alleging that his action did not constitute illegal euthanasia, but rather carried out Welby’s constitutional right to refuse treatment. Though an investigation was opened, the doctor was cleared of wrongdoing. Similarly, a medical board disciplinary commission unanimously decided that he had not violated any rules. Following Welby’s appeal, Maddalena Nuvoli also wrote a letter to the Italian President asking for the legalization of euthanasia. Nuvoli’s 52-year-old husband, Giovanni Nuvoli, who had suffered from ALS for seven years and had been in bed for the past four years, was on a respirator and could only move his eyes.
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II. The Constitutional nature of the patient’s right to refuse the medical treatment.

A. Medical treatment refusal and the fundamental right to life.

The starting point of the Spanish Constitutional Court doctrine on the fundamental right to life, is the fact that article 15 of the Spanish Constitution protects the human life as a biological reality and, therefore, alien to any subjective consideration relating to its quality. From this perspective, the right is understood in negative terms as purely defensive and with no positive content.

The Court has constantly asserted that, along with the human dignity proclaimed in article 10.1 of the Constitution, the fundamental right to life possesses a very special nature and position in the constitutional system of fundamental rights as the expression of one of the “superior values of the Spanish legal order”: the human life. According to this doctrine, the fundamental right to life and the human dignity are conceived as “the logical and the ontological praxis” of the rest of the rights enunciated by the Constitution. This affirmation would be especially evident with regard to the right to life, understood as the “essential and coreless” fundamental right, “without which the other rights and freedoms constitutionally protected would simply not exist”. These arguments have led to the Court to consider the

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2 “Article 15: Everyone has the right to life and physical and moral integrity and in no case may be subjected to torture or inhuman or degrading punishment or treatment. The death penalty is abolished except in those cases which may be established by military penal law in times of war”.

3 STC 53/1985/3; in a similar way, the European Court of Human Rights has affirmed in Pretty vs. The United Kingdom (2002) that “The Court’s case-law accords pre-eminence to Article 2 as one of the most fundamental provisions of the Convention (…). It safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory” (§ 37). Even its considerations on the existing relationship between the refusal of a medical treatment and the rights guaranteed by article 8 of the Convention, depart from the assertion that in no way can be understood as contradictory with “the principle of sanctity of life protected under the Convention” (§ 65).

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fundamental right to life as enjoying “a peculiar expansive character” and, even, “an absolute nature which excludes any possible restriction”\(^4\).

In the Court’s view, the object of the fundamental right is the human life as a “biological process” which begins with the gestation and ends with the death\(^5\). These two moments would delimitate the scope of article 15 of the Constitution\(^6\), whose content would therefore overwhelm the proclamation of the fundamental rights to life and to physical and psychological integrity. Though only the born, not the \textit{nascituri} and the dead, enjoy the fundamental right to life, with regard to the stages previous to the birth, article 15 would autonomously protect the viable human life in formation, the \textit{nascituri}\(^7\). In other

\(^4\) ATC 304/1996/3 and STC 48/1996/2. However, and according to article 1.1 of the Spanish Constitution, only “liberty, justice, equality, and political pluralism” are the superior values of the Spanish legal order. Even more, not only the assertion that the fundamental right to life can not be restricted is contradicted by the Constitution and the Criminal Code, but also could it lead to the creation of a very dangerous hierarchy among the different constitutional norms. In this sense, though the Court constantly reminds that their judgements have to remain within the strict limits of the legal reasoning, the reader could have the impression that its arguments are sometimes guided by ethical and ideological prejudices. The dissenting opinions expressed by the judges Rubio Llorente and Díez-Picazo to the STC 53/1985 are specially critic in this sense. From a different point of view: “The Constitutional Court does not say what it can not say: it affirms that the fundamental right to life is a logical and ontological \textit{prior} and the essential and coreless fundamental right. But it does not assert that the fundamental right to life is superior to other fundamental rights, as there is no hierarchy among fundamental rights within the Constitution”, CHUECA RODRÍGUEZ, R., “Los derechos fundamentales a la vida y a la integridad física: el poder de disposición sobre el final de la vida propia”, \textit{Derecho y Salud}, Vol. 16, n. 1, 2008, p. 4.

\(^5\) STC 53/1985/5.

\(^6\) This is the reason why the human gametes or the dead body are not protected by article 15 of the Spanish Constitution (STC 166/1999/7, ATC 149/1999/2 and STC 3/2005/8). Within the framework of the assisted reproductive techniques, the question arising is whether the protection displayed by article 15 of the Constitution covers the \textit{in vitro} embryo before its implantation in the uterus; a doubt deriving from the Spanish Constitutional Court’s assertion that the \textit{in vitro} embryo is constitutionally less protected than the implanted embryo (STC 166/1999/12).

\(^7\) According to the Constitutional Court doctrine, only “the viable human life in formation”, in other words, capable of “living” and “to become a human being”, is protected by article 15 of the Spanish Constitution (STC 212/1996/5). The concept of “viability” was introduced in the Court’s doctrine in the light of the old legislation on assisted reproductive techniques, a term that has disappeared in the current Law 14/2006, 26th May, on \textit{Human Assisted Reproductive Techniques}. Originally, the constitutional protection of the \textit{nascituri ex} article 15 of the Constitution was simply assumed by the Court (STC 75/1984/6), who finally established that this guarantee was a consequence of the fact that the \textit{nascituri} incarnate the “superior value of
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As stated above, the main feature of the fundamental right to life as interpreted by the Constitutional Court, is the negative or defensive nature of its content: if article 15 of the Constitution protects the human life as a biological reality, the fundamental right safeguards the individual against any behaviour which, in strict sense, attacks or poses a threat to it. According to this doctrine, the fundamental right imposes two different obligations to the State. From a negative point of view, it proscribes any threat or attack to the life of the individuals, who are entitled to react against any violation coming from the public power. From a positive perspective, the State, especially the legislature, is obliged to adopt all the necessary measures to preserve the human life against any threat or attack coming from other individuals; in other words, the positive obligation prescribed by the fundamental right to the State, means the translation of the negative obligation described above to the relationship among individuals. It has to be underlined that in the Court’s opinion, this positive duty is absolutely independent of the individual’s will to preserve his own life. In this sense, the Court seems to exclude any possible conception of the

words, though every stage of the viable human vital process is protected by article 15 of the Constitution, the nature and the intensity of this constitutional protection is not the same throughout all the process.

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the legal order” human life (STC 53/1985/5). Even though the Court has constantly reiterated that the nasciturus is not holder of the fundamental right to life, it has to be highlighted that the doctrine on its constitutional protection presents some contradictions which sometimes suggest, if not clearly affirm, a different conception. It should be noted, in this sense, that the Court’s argumentation is elaborated departing from the “scope, meaning and function of the fundamental rights in the democratic constitutionalism”.

8 STC 53/1985/5.

9 This explains why, for example, to grant or to deny a widow’s pension is alien to the fundamental right to life as proclaimed in article 15 of the Constitution (ATC 241/1985/2); and this is the reason too of the distinction drawn by the Court between “the strict personal damage suffered in a traffic accident”, whose reparation lies within the scope of article 15, and “to recover the personal wealth prior to the death or the personal damage suffered in a traffic accident” (STC 181/2000/8). It is true, however, that sometimes the Court seems to suggest not such a strict interpretation of the threat or the attack to the human life against which the fundamental right protects the individual (ATC 24/1994).

10 STC 120/1990/7. The European Court of Human Rights has constantly derived from article 1 of the Convention positive duties of the member States inherent to the rights proclaimed by the Convention. Specifically with regard to articles 2 and 3: “It is common ground that the State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the
fundamental right in positive terms as a liberty, though even here his argumentation is sometimes ambiguous\textsuperscript{11}.

The Court expressly states that the fundamental right to life “has a positive protection content” which excludes its conception as a freedom conferring a right to die\textsuperscript{12}.

prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (…). In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”, Osman vs. The United Kingdom (1998) (§ 115 and 116). The Court has even applied this doctrine to those situations where the origin of the threat to the individual’s life is the own individual. In Keenan vs. The United Kingdom (2001) it examined “whether the authorities knew or ought to have known that” the person “posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk”, in the light of the two following parameters. In the first place, that a person in custody is in a vulnerable position and that the authorities are under a duty to protect her. In the second place, that the prison authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. In this sense, “there are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing on personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case” (§ 91). It has to be highlighted that the obligation of the authorities in relation to the individuals in custody, seems to be exclusively used to establish “whether the authorities knew or ought to have known” the risk that the person posed to herself, which would imply the general nature of that positive duty regardless the situation of the individual.

\textsuperscript{11} Interpreted in connection with the fundamental rights proclaimed by articles 15 (life and personal integrity), 16 (freedom of ideology) and 18 (privacy) of the Constitution, “one of the main expressions of the human dignity is the free and responsible self-determination which has to be respected by the other individuals”, STC 53/1985/8.

\textsuperscript{12} Similarly, the European Court of Human Rights has stated that “The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that ‘the right to life’ guaranteed in Article 2 can be interpreted as involving a negative aspect (…) It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the
However, and probably confronted with the evidence that sometimes the individuals take their own life, the Constitutional Court recognises that those kind of actions are a mere manifestation of *agere licere* as they are not forbidden by the law, but not the manifestation of a right, and even less of a fundamental right, as its recognition would violate the essential content of the fundamental right to life proclaimed by article 15 of the Constitution\(^{13}\).

According to this purely negative conception, the principle of the patient’s autonomy, and therefore his/her right to refuse a medical treatment, is alien to the content of the fundamental right to life. But, as it will be shown above, this does not mean that the right to life plays no role within this conceptual framework, as under certain circumstances, the preservation of the patient’s life can legitimate the imposition of a medical treatment regardless his/her will.

B.-Medical treatment refusal as a manifestation of the fundamental rights to physical and to psychological integrity.

The doctrine on the object and content of the fundamental right to physical and psychological integrity is parallel to the one on the fundamental right to life, to the extent that the Constitutional Court usually refers simultaneously and indistinctly to both of them. Being this true, the fundamental right to personal integrity has an additional dimension of the utmost importance in the medical context.

As with the fundamental right to life, the Spanish Constitutional Court has conceived physical and psychological integrity in strict terms; that is to say, the object of the fundamental right is the human body as a biological reality in its double physical and

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psychological scope\textsuperscript{14}. This theory excludes, again, any subjective qualitative consideration: analogous to the fundamental right to life, the right to personal integrity enjoys a purely negative or defensive nature but, in this case, with a double perspective. On the one hand, and similar to the right to life, it protects the individual from any attack or threat against his/her body conceived in physical and psychological terms. On the other, it proscribes any un-consented intervention in the person’s body in its double dimension.

In the first place, the fundamental right to physical and psychological integrity entitles the individual to react against any action which causes, or is intended to cause, any physical or psychological harm. This means that, likely to the fundamental right to life, there is no need of an effective harm to consider that the fundamental right has been violated\textsuperscript{15}: every active or omissive behaviour which creates a risk of harm transgresses the fundamental right too\textsuperscript{16}. However, and once accepted that not any risk poses a threat to the fundamental right, the question is to determine its intensity in order to consider that it has been infringed\textsuperscript{17}.

\textsuperscript{14} This understanding of the concept of “moral integrity” proclaimed in article 15 of the Constitution can be derived, among others, from SSTC 53/1985, 221/2002 and, more recently, 162/2007.

\textsuperscript{15} STC 120/1990/8.

\textsuperscript{16} “With regard to the fundamental right to physical and moral integrity, this Court has established that it protects the ‘person’s inviolability not only against any action intended to harm her body or spirit, but also against any un-consented intervention in them’ (…). As our Constitution does not proclaim illusory but real and affective rights (STC 12/1994, 17\textsuperscript{th} January, FJ 6) it is necessary to ensure the fundamental right against any possible risk in a technologically developed society”, STC 119/2001/5; “In order to consider that there has been a violation of the fundamental right to personal integrity, there is no need of an affective harm but a suitable risk of an effective harm to happen”; “It has to be noted that not every risk to the individual’s health is contrary to the fundamental right to personal integrity, but only a serious and real risk (…) This means that the fundamental right to physical integrity can be violated by the authorities’ actions and omissions, as for example the behaviour of the Health Service of the Autonomous Community of Andalucía once known that Ms. Hidalgo was pregnant and her duties posed a potential risk to her health”, SSTC 221/2002/4, 220/2005/4 and 62/2007/3, among others.

\textsuperscript{17} If the SSTC 35/1996/3 and 221/2002/4 use the terms “health risk” or “significant risk”, in other decisions the Constitutional Court speaks of a “serious risk”, “serious and real risk”, “evident and serious risk”, “confirmed and inevitable risk or potential and serious risk”, SSTC 7/1994/2, 119/2001/6, 5/2002/4, 220/2005/4 and 62/2007/3. With regard to the positive duties derived from article 2 of the Convention, the European Court of Human Rights demands the existence of a “real and immediate risk”, of
In the second place, the fundamental right to personal integrity proscribes any un-consented intervention in the person’s body in its double dimension. In the Court’s words, “the fundamental right protects the inviolability of the person not only against any action intended to harm her body or spirit, but also against any un-consented intervention in them”\(^{18}\). Within the medical framework, precisely here lies the constitutional nature of the patient’s informed consent, as when a patient gives his/her consent to any medical intervention he/she is exercising his/her fundamental right to physical and psychological integrity. This means, on the one hand, that any medical intervention carried out against or without the patient’s consent violates the fundamental right to personal integrity unless it has a constitutional justification; and, on the other hand, that the patient’s refusal to the medical treatment is a manifestation of the fundamental right itself, regardless whether it can be considered a manifestation of other fundamental rights too (especially the ones proclaimed in articles 16 and 18 of the Constitution). To sum up, the sole free patient’s refusal is protected under article 15 of the Spanish Constitution, no matter what his/her reasons are\(^{19}\).

\(^{18}\) STC 120/1990/8, mentioned above.

\(^{19}\) “The fundamental right is compromised when a medical treatment is imposed against the patient’s will, whose refusal can be based on many different motives”, STC 120/1990/8, mentioned above; “The fundamental right to personal integrity prohibits any medical intervention contrary to the patient’s will, regardless the reasons aduced”, STC 48/1996/2; this doctrine was reinforced by the STC 154/2002/9: “The relevant question is the sole treatment refusal regardless its causes. Beyond the religious beliefs which motivated the minor’s refusal to the medical treatment, and without denying their importance as manifestation of the fundamental right to freedom of religion, it has to be highlighted that the opposition to any intervention in his body was the expression of a self-determination right whose object is the human body in its double physical and psychological dimension; in other words, the fundamental right to personal integrity (article 15 of the Constitution)”. Specially from Pretty vs. The United Kingdom (2002) and Glass vs. The United Kingdom (2004), it is possible to deduce too that imposing a medical treatment against the free will of a sound patient interferes with the rights proclaimed by article 8.1 of the Convention. The legitimacy of such interference would have to be examined in the light of the requirements established in article 8.2: “In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person’s physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention”, Pretty vs. The United Kingdom (2002) (§ 63).
It has to be stressed that, though this second dimension of the content of the fundamental right, de facto implies certain self-determination capacity with relation to one’s own body, this is not the result of conceiving it in positive terms as a liberty, but a consequence of the prohibition of any interference with the object of the right without the individual’s consent; in other words, an outcome from the negative nature of its content. Therefore, the patient's autonomy it is not the result of a positive a self-determination right with regard to his/her life, but the effect of a purely defensive right which prescribes the previous person’s assent\textsuperscript{20}. It should be borne in mind that, if according to the Constitutional Court’s doctrine the recognition of a right to end one’s life would be a violation of the essential consent of the fundamental right to life, the same could apply to an absolute prerogative to refuse a medical treatment. As the Court has reiterated, the fundamental right to personal integrity is subject to restrictions in order to preserve other constitutional provisions; this means that under certain circumstances the individual’s consent becomes irrelevant\textsuperscript{21}. The scope of the fundamental right, which according to this doctrine would protect the individual versus any unconsented intervention in his/her body, is sometimes constrained by the Constitutional Court due to the interpretation of its second dimension in the light of the first one. This restriction has the immediate consequence of depriving the patient’s consent to some medical actions of the fundamental right to physical and psychological integrity’s protection. According to this line of reasoning, for those medical interventions which cause no harm it would be necessary to find a link with other fundamental rights, if possible\textsuperscript{22}. This causes different kind of problems. On the one hand,

\textsuperscript{20} The inexistence of this positive self-determination right is evident when reading the STC 215/1994/2 and the Spanish Criminal Code. On the contrary, the fundamental right to personal integrity has been recently characterized as a liberty by CANOSA USERA, R., \textit{El derecho a la integridad personal}, Lex Nova, Valladolid, 2006.

\textsuperscript{21} “It is true that there are no restrictive provisions in articles 15 and 18.1 of the Constitution (unlikely, for example, articles 18.2 and 18.3), but this does not mean that those fundamental rights are absolute”, STC 207/1996/4.

\textsuperscript{22} An example of this restricting doctrine can be found in the STC 214/1996/3. It has to be noted that, according to the Constitutional Court, the patient’s refusal of a medical treatment can also be, under certain circumstances, the expression of the exercise of the freedoms of ideology and religion and the fundamental right to privacy with regard to those parts of the body which, in accordance to cultural standards, are considered intimate.
it would be very difficult to identify the fundamental right covering some hypothesis of informed consent. On the other hand, it gives raise to a problematic heterogeneity in the constitutional protection of the patient’s autonomy due to the different nature of the potential fundamental rights involved. It seems therefore reasonable to defend the extensive scope of article 15 of the Spanish Constitution present in the majority of the Constitutional Court decisions.

III.-Possible restrictions to the patient’s right to refuse the medical treatment.

A.-The legal regulation of the patient’s right to refuse an intervention in his/her health and its limits.

According to the Constitutional doctrine described above, when a patient consents, chooses or refuses a medical treatment, is exercising his/her fundamental right to physical and psychological integrity as enunciated by article 15 of the Constitution, whose contents have been specified by the legislature in the medical context.

Due to the territorial structure of the Spanish State, the legal framework of the patient’s autonomy is constituted by a complex set of norms. The core regulation is contained in the Law 41/2002, Basic Law on the Autonomy of the Patient and the Rights and Obligations with Regard to Clinical Information and Documentation. This norm is applicable to the whole Spanish territory and was elaborated as a consequence of the obligations assumed by the Spanish State through the ratification of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. With regard to the case of Inmaculada Echeverría, its provisions have to be completed with the Law 2/1998, on the Health System of the

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23 According to the Spanish Constitution, and in the context of the distribution of competences between the State and the Autonomous Communities, the State has sometimes the competence to establish the core regulation of certain issues to guarantee the existence of a common basic legal framework applicable to the whole territory. The Autonomous Communities can assume in their Statutes of Autonomy the competence to legislative develop this basic regulation. In this sense, the approval of the Basic Law 41/2002 opened a process of development of its provisions by the Autonomous Communities through their own legal norms, a process that has not finished yet.

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Autonomous Community of Andalucía, modified by the Law 5/2003, on the Previously expressed wishes25.

One of the main principles inspiring the Law 41/2002 is the patient’s autonomy, a principle expressed, among others, in the general rule of the necessity to obtain the patient’s free and informed consent prior to any intervention in his/her health and, subsequently, his/her rights to withdraw his/her consent at any moment, to choose among the existing medical alternatives and to refuse the medical treatment26.

Once established that, as a general rule, the patient has the right to consent any intervention in the health field, the right to refuse a medical treatment and the right to withdraw at any moment the previously given consent; and once these rights have been identified as expression of, not only but mainly, the fundamental right to personal integrity proclaimed by article 15 Constitution, the question then arising is the determination of the eventual legitimate restrictions and exceptions of those rights, bearing always in mind that, as fundamental rights, those limits would be subject to very strict constitutional requirements27. In this sense, and despite of the recognition of the patient’s self-determination concerning his/her health, the law confronts the existence of situations where a medical treatment is provided in the absence or against the person’s will. The Spanish legislation basically provides two different situations where the principle of the patient’s autonomy is excepted: when public health is compromised and the so called “life emergency situations”.

25 Though not into force at that time, article 22 of the new Statute of the Autonomous Community of Andalucía, approved by the Organic Law 2/2007, contains some provisions relating to, among others, the patient’s informed consent and the right to palliative care.

26 “Article 2. Basic Principles. 1. The human dignity and the respect for the autonomy and privacy of the individual are the guiding principles with regard to the obtainment, the use, the custody and the transmission of all the clinical information and documentation. 2. As a general rule, every intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. The consent, which has to be obtained after the patient has been given the appropriate information, will be given in written form when prescribed by the Law. 3. After having received the appropriate information, the person has the right to freely choose among the different existing medical alternatives. 4. Every person has the right to refuse the medical treatment, except in the cases established by the Law. There will be written evidence of the refusal”.

27 Within this framework, and in order not to overwhelm the object of these pages, the following considerations will only focus on adult sound patients like Inmaculada Echeverría.
According to article 9.2 of the Law 41/2002, the strictly indispensable medical intervention can be carried out without the need to obtain the previous patient’s consent, when according to the law there is a risk for the public health28 and when “the physical or psychological integrity of the patient is at serious and immediate risk and it is not possible to obtain his authorisation. In this case, and if due to the circumstances it is possible, the doctors will consult the patient’s relatives or those emotionally tied to him”29.

Similar provisions are contained in the Law 2/1998, on the Health System of the Autonomous Community of Andalucía, as modified by the Law 5/2003. Its article 6 ñ) establishes the general rule that the previous free and informed consent of the patient, obtained in written form, will be necessary to carry out any intervention in his/her health. Among the four exceptions to this provision are the existence of a risk to the public health and “when due to a serious and immediate risk of suffering and irreversible and severe injury or even of dying, it is necessary to carry out an urgent intervention, except when contrary previously expressed wishes exist”30.

According to article 21 of the Law 41/2002, when the patient refuses the medical treatment, the doctors will propose him to sign the voluntary certificate of discharge. If the patient refuses too, the direction board of the hospital can decide his forced discharge at the request of the doctor responsible, unless alternative medical treatments exist, though of palliative nature, and the patient consents them. There will be written evidences of all these circumstances and, in case the patient does not accept the discharge, the direction board of the hospital will hear him and if his negative persists the final decision will be taken by the judge.

28 On this questions see the Organic Law 3/1986, on Special measures concerning the public health.

29 According to the Convention on Human Rights and Biomedicine, “when because of an emergency situation the appropriate consent cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the individual concerned” (article 8). The Convention also provides that “no restrictions shall be placed on the exercise of the rights and protective provisions contained in this Convention other than such as are prescribed by the Law and are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedoms of others” (article 26.1).

30 The other two exceptions refer to those situations where the patient is not capable of taking a decision and there are no previously expressed wishes.
B.-The scope of the so called “life emergency situations”.

As the Inmaculada Echeverría’s refusal to the life support treatment, a manifestation of her fundamental right to personal integrity regulated by the Spanish law, did not pose any threat to the public health nor to any third party’s rights or interests constitutionally protected, the controversy was to determine the scope of that right and its possible restrictions in the light of the so called “life emergency situations”.

To express it in constitutional terms, the question is whether it is possible to restrict the patient’s fundamental right to physical and psychological integrity imposing an intervention in his/her health against his/her will when his/her life is at stake and when no third constitutional interest or rights are compromised. In other words, under the Spanish legislation, can a patient, whether terminally ill or not, refuse a medical treatment (or withdraw the previous given consent) in a decision that only affects his/her personal sphere even though this rejection will inevitably lead to his/her death?

As the Spanish Constitutional Court has asserted, the imposition of a medical treatment regardless the patient’s will is prima facie a violation of the fundamental right to physical and psychological integrity unless it is constitutionally legitimated. When such a constitutional justification exists, there is no transgression of the fundamental right but the establishment of a legitimate restriction to it. According to reiterated Constitutional Court case law, the concrete imposition of a limit to a fundamental right is only legitimate when it satisfies different formal and substantive constitutional requirements. Concerning the former, the Court demands that, as a general rule, the restriction has to be imposed by a reasoned judicial decision in the light of a specific law. With regard to the latter, the aim of the restriction has to be the preservation of another constitutional right or constitutional interest, it has to be established fitting the requirements of the proportionality principle and, whatever the result of the limitation is, it can never be without regard for the dignity of the person as a human being.

31 An exception to this general rule, as a consequence of the peculiar circumstances surrounding the imprisonment context, can be found in the STC 37/1989/7.

32 STC 120/1990/4. In this field, the use of the concept “essential content” by the Constitutional Court is ambiguous and quite problematic (compare, in this sense, the STC 120/1990/8 and the STC 137/1990/6).
To date, the Constitutional Court has found two different constitutional justifications to the imposition of a medical treatment against the individual's will. While the first one has a contingent nature, as it only concurs under certain circumstances, the second one has a general or universal scope.

The contingency of the first argument is explained by the fact that this constitutional doctrine was established in a series of decisions on the forced feeding of a group of prisoners who had begun a hunger strike and whose lives and health were at serious and immediate risk\footnote{SSTC 120/1990, 137/1990, 11/1991 and 67/1991). It has to be noted that, though the Court reiterated that its arguments only focused on the specific circumstances of the case, so they could not be applied to other situations of forced medical assistance, the resulting doctrine inevitably had a universal and problematic range. This duality was highlighted by the first commentators of the Constitutional Courts decisions, \textit{vid.} RUIZ MIGUEL, A., “Autonomía individual y derecho a la propia vida (Un análisis filosófico jurídico)”, RCEC, n. 14, 1993, p. 140 and TOMÁS-VALIENTE LANUZA, C., \textit{La disponibilidad de la propia vida en el derecho penal}, op. cit., p. 329 and following.}. The Constitutional Court stated that, according to article 25.2 of the Constitution\footnote{“Article 25.2: Prison sentences and security measures shall be oriented towards re-education and social rehabilitation and may not consist of forced labour. The person sentenced to prison shall enjoy, during his imprisonment, the fundamental rights contained in this chapter, with the exception of those which are expressly restricted by the content of the prison sentence, the purpose of the sentence, and the penitentiary law. In any case, he shall have the right to remunerated work and the pertinent benefits of Social Security, as well as access to culture and the integral development of his personality”. Of course, the question arising is the determination of the fundamental rights which can be restricted and the scope of the limitation.}, the imprisonment gives birth to a complex of rights and duties between the State and the prisoners that legitimates the imposition of restrictions to the fundamental rights of the latter, not applicable to free citizens. Within this framework, the Court asserted that interpreted in the light of article 25.2 of the Constitution, the duty of the authorities to preserve the life, health and personal integrity of the convicts, imposed by article 3.4 of the Organic Law on the \textit{Penitentiary System}, legitimated the restriction of the fundamental right to personal integrity consisting in the coactive medical assistance to those prisoners whose lives were in serious and immediate risk\footnote{STC 120/1990/6 and 8.}. However, and at least with regard to the medical assistance, this doctrine clearly overwhelmed the consequences derived from the imprisonment and leaded to the establishment of a different \textit{status} concerning the patient's rights depending on his/her condition of convict or free citizen.
On the contrary, it seems reasonable to understand the possible fundamental rights’ restrictions arising from article 25.2 of the Constitution, without dissociating them from their natural context: the penitentiary framework and its peculiarities\textsuperscript{36}. In this sense, the rights of the patient should not be different depending on his/her situation of conviction or liberty\textsuperscript{37}.

The central universal argument to justify the imposition of a forced medical assistance was the preservation of the human life as one of the superior values of the Spanish legal order\textsuperscript{38}. In other words, the restriction of the fundamental right to personal integrity of the prisoners was constitutionally justified as it aimed to preserve their lives as expression of a constitutionally proclaimed value. Therefore, the constitutional legitimacy of the coactive medical assistance was understood within the framework of the Constitutional Court’s doctrine on the meaning and nature of the fundamental right to life: once characterised as expression of the above mentioned superior value of the Spanish legal order and once interpreted its content in strict negative terms, the Court legitimised the imposition of the medical treatment in terms of its preservation. This conclusion was consistent with the Court’s previous affirmation that the recognition of a right to die would contravene the essential content of the fundamental right to life\textsuperscript{39}.

\textsuperscript{36} As for example the STC 57/1994/6 did.

\textsuperscript{37} This is the reason why the fundamental right to life is one of those fundamental rights which can not be affected by the conviction (STC 48/1996/1). \textit{Vid.}, in this sense the dissenting opinions formulated by the judges Rodríguez-Piñero y Bravo-Ferrer y Leguina Villa to the STC 120/1990.

\textsuperscript{38} Though at first glance one might have the impression that the imprisonment and the alleged illegitimacy of the motives of the hunger strike, are core claims in the Court’s decision, the centrality of the argument of the preservation of the human life is absolutely clear when reading the Court’s conclusions, where there is no reference to those two reasons and the restriction of the physical integrity is justified exclusively in terms of the safeguard of the convicts’ lives (STC 120/1990/12). Even more, the duty imposed to the authorities by article 3.4 of the Organic Law on the Penitentiary System is understood by the Court as immediately linked to the protection of “constitutional values such as the individual’s life and health” (STC 120/1990/8).

\textsuperscript{39} However, it should be highlighted that as a consequence of the requirements deriving from the principle of proportionality, the Court’s doctrine suggests situations where, despite the immediate risk to the patient’s life, the imposition of a medical treatment would have no constitutional justification due to its severity (STC 48/1996/2).
Under this doctrine and its constitutional and legal framework, is it possible to restrict the right of a sound patient who freely and in a strictly personal decision refuses a medical treatment, alleging that his/her rejection poses a “serious and immediate risk” to his/her physical or psychological integrity as it will inevitable lead to his/her death? In my opinion the answer is no.

Though the wording of the diverse norms regulating the so called “life emergency situations” differs, posing many problems to their interpretation, as a general rule it can be established that they refer to those cases which demand an urgent intervention in the individual’s health due to a severe and immediate risk to his/her life or personal integrity. The crucial problem, especially in the light of the Spanish Constitutional Court’s doctrine, is to determine whether these situations are mere exceptions or real restrictions to the patient’s autonomy. In other words, if under those circumstances the law excludes the possibility of rejecting the medical treatment or simply authorises to carry out the strictly necessary medical intervention in the absence of the patient’s explicit and valid consent.

From my point of view, the Spanish Constitution offers many arguments to reject the legitimacy of the imposition of a medical treatment when no third party’s constitutional rights or interest are at stake. To defend this, there is even no need to conceive the fundamental rights proclaimed by article 15 of the Constitution as having a positive content as liberties, though in some situations and especially in the context of the biomedical advances, which constantly increase the choices available to the individual, such an interpretation increasingly seems more plausible. Regardless of the understanding of the

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40 In the context of this doctrinal discussion, to uphold that in the Spanish constitutional system the fundamental right to life includes a fundamental right to die, it is usual to allege the interpretation of article 15 of the Constitution in the light of liberty as one of the “superior values of the Spanish legal order” (article 1.1), the free development of the personality as the “foundation of political order and social peace” (article 10.1) or the fundamental rights to freedom of ideology and religion (article 16) and to personal privacy (article 18.1). These considerations would lead to the understanding of the fundamental rights to life and to personal integrity as guaranteeing a sphere of “conscious and responsible self-determination” (STC 53/1985/8) with no other restrictions than those arising from the preservation of third fundamental rights and interest constitutionally protected. Concerning the European Court of Human Rights Case-Law: “As the Court has had previous occasion to remark, the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (...) It can sometimes embrace aspects of an individual’s physical and social identity (...) Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (...) Article 8 also protects a right to personal development, and the right to establish and develop
fundamental rights to life and to personal integrity in positive or exclusively negative terms, as the Constitutional Court does, the crucial question is to determine whether the constitutional system of fundamental rights tolerates such a restriction of the individual’s rights when his/her decision does not impinge on third party’s constitutionally protected rights or interests. A question that would finally lead to the identification of a constitutionally guaranteed space of *agere licere* which, though having itself no fundamental right nature, would exclude any public interference.

Under these considerations, the way in which the Constitutional Court has ruled, that is to say, in terms of a conflict between fundamental rights of the own individual (for example his/her fundamental right to life and his/her fundamental rights to personal integrity and freedom of ideology) or between his/her fundamental rights and constitutional values or interests which belong to his/her own sphere (for example his/her fundamental rights to personal integrity and to freedom of ideology and his/her life as expression of a superior value of the Spanish legal order) has to be rejected. This line of reasoning, whose origins can be probably found in a misunderstanding of the double dimension of the fundamental rights, especially of their objective nature, not only disregards what the fundamental rights primarily are (subjective rights), but also leads to dangerously functionalise them to the values and principles which allegedly they incarnate and that, once inferred from them, are used to restrict their subjective dimension\(^41\). On the relationships with other human beings and the outside world (…) Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees”; “The Court would observe that the ability to conduct one’s life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. The extent to which a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle has long been a topic of moral and jurisprudential discussion, the fact that the interference is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate. However, even where the conduct poses a danger to health or, arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State’s imposition of compulsory or criminal measures as impinging on the private life of the applicant within the meaning of Article 8 § 1 and requiring justification in terms of the second paragraph”, *Pretty vs. The United Kingdom* (2002) (§ 61 and 62).

\(^{41}\) Relating to these questions is classical the quotation of BÖKENFÖRDE, E. W., *Escrítos sobre derechos fundamentales*, Baden-Baden, Nomos Verlagsgesellschaft, 1993. In the context of the Spanish constitutional doctrine: “there is no trace in the Spanish Constitution of the primacy of the institutional
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contrary, articles 1.1, 9.2, 10.1 or 53.1 of the Spanish Constitution are the expression of a constitutional compromise to ensure that the fundamental rights are real and effective but as what they primarily are, that is to say, rights. In the light of these arguments, and as article 10.1 expressly asserts, the Constitution excludes any restriction to the individual’s fundamental rights whose justification is the preservation of the own individuals rights or interests; in other words, when his/her actions or decisions do not compromise any other constitutional rights or interests alien to his/her sphere.

Under these circumstances, the imposition of a medical treatment against the express and free will of a sound patient is not a constitutionally legitimate limitation of his/her rights, but its simple transgression.

According to this line of reasoning, the so called “life emergency situations” would not be restrictions to the principle of the patient’s autonomy but, more properly, mere exceptions. These kind of legal provisions confront those situations where, due to the concurring factual and personal circumstances, it is necessary to carry out an intervention in the person’s health to preserve his/her personal integrity or even his/her life, but he/she can not express his/her assent or refusal. It has to be highlighted that, notwithstanding the confusion provoked by the norms’ different wording, in these cases the possibility of obtaining the patient’s informed consent is excluded by its own nature. This is the reason why some of the norms which have included a reference to the patient’s will, do not use the term consent but authorisation\textsuperscript{42}. To sum up, there are mainly three elements which identify these legal clauses: graveness, as the individual’s health or life are in a severe and immediate risk; emergency, as that risk demands and immediate medical intervention; and the impossibility of the individual to manifest his/her will with regard to the intervention. This last crucial element is present, for example, in the Law of the Autonomous dimension of the fundamental rights over their subjective nature and, even less, of its sacrifice, even where that institutional dimension is more prominent (art. 33 of the Spanish Constitution) (STC 37/1987, FJ. 2). Fundamental rights are not functionalised and are not regulated to serve certain goals or values, except the fundamental right to education (article 22). The institutions derived from the objective dimension of the fundamental rights can be used to determine their content as rights, but neither from the democratic principle or from the social principle of article 1.1, nor from the legal regulation of the fundamental rights it is possible to infer any subordination, any hierarchy or any prevalence”, BASTIDA FREIJEDOO, F. et alii, Teoría General de los Derechos Fundamentales, Madrid, Tecnos, 2004, p. 79.

\textsuperscript{42} As for example article 9.2.b) of the Law 41/2002.
Community of Andalucía, which excludes the medical assistance if “contrary previous expressed wishes exist”. Obviously, when there is no living will but a present and express patient’s refusal to the treatment, the consequence has to be the same.

In conclusion; these legal provisions do not authorise to carry out a medical intervention against the free will of a sound patient, but, precisely, in its absence. Consequently, they cannot be applied to a demand like the one formulated by Inmaculada Echeverría; a petition that, as described above, was a manifestation of her fundamental right to personal integrity and, under the expressed circumstances, excluded any restriction.


As said in the Introduction, the petition of Inmaculada Echeverría “rejecting the mechanical ventilation treatment that she had been receiving for the last ten years” was the object of a report from the High Consultative Body of the Government of the Autonomous Community of Andalucía at the request of the Head of the Health System of the Autonomous Community. The core questions were whether, “in the case of Inmaculada Echeverría, the right to refuse a medical treatment and the principle of the patient’s autonomy were subject to a restriction or exception due to a conflict with other values protected by the Spanish legal order and whether the doctors who disconnect the ventilator could be subject to criminal prosecution”⁴³. In both cases, and after examining the Spanish Constitutional Court doctrine on the fundamental right to life and the international, national and autonomous legislation on the patient’s rights, the answer was no.

Probably as a consequence of the nature of Ms. Echeverria’s demand, which would inevitably lead to her death, and despite the solid Constitutional Court’s interpretation of the fundamental right to physical and psychological integrity, the report paid almost exclusive attention to the fundamental right to life with virtually no mention to the fundamental right to personal integrity. The conclusion reached after examining both the doctrine of the Spanish Constitutional Court and of the European Court of Human Rights, is that under the Spanish Constitution and the European Convention on Human Rights there is no right to die guaranteed by the fundamental rights to life and personal integrity. This would mean that actions such as committing suicide are a mere manifestation of agere

⁴³ Report, p. 2.
licere as not forbidden by the law, but “not expression of a fundamental right to die whose recognition would impose positive duties to the public authorities”\textsuperscript{44}. Under this conviction, the Body considered that the answer to the questions arising from the petition had to be found in the specific legislation on the patient’s autonomy.

After analysing the above mentioned legal provisions of the Oviedo Convention, the Law 41/2002, the Law 2/1998 of the Autonomous Community of Andalucía and other Autonomous Communities legislation, the High Consultative Body reached the opinion that, always with regard to sound adults who express their free will, the broad scope with which the Spanish legislation has regulated the principle of the patient’s autonomy, “undoubtedly means the legitimacy of the rejection of a medical treatment or the withdrawal of the previously given consent even when these decisions seriously compromise the individual’s health or inevitably lead to his death”\textsuperscript{45}.

In this sense, the Body excludes the applicability of the two possible exceptions established by the law. Clearly, the public health clause plays no role in this case, but the provision of the so called “life saving treatment situations” is rejected too. Similarly to the interpretation proposed above, the conclusion is that “even in these emergency cases, the sole existence of a severe and immediate risk to the individual’s life and integrity does not legitimise the imposition of a medical treatment, as the law demands that it has to be impossible to obtain the person’s authorisation, in which case, and if feasible due to the circumstances, the doctors will consult the patient’s relatives or those emotionally tied to him”\textsuperscript{46}. The Body concluded that “the core idea of the Spanish legislation is the impossibility of imposing a medical treatment against the patient’s free and express will even in a situation where his life is at stake”\textsuperscript{47}. Consequently, “the legislation allows any terminally ill patient to take a decision such as the one adopted by Inmaculada Echeverría”; a decision consciously, seriously and freely reached, “covered by the right to refuse a

\textsuperscript{44} Ibidem, p.29.

\textsuperscript{45} Ibidem, p. 48.

\textsuperscript{46} Ibidem, p. 36.

\textsuperscript{47} Ibidem, p. 37.
medical treatment and the right to live with dignity (sic) and not limitable under the existing legal provisions48.

Being this established, the doctors were obliged to adopt all the necessary measures to ensure the patient’s right to refuse the life support treatment, as they had to respect her will, which meant that they were not subject to any liability or criminal prosecution49.

Two final remarks on the High Consultative Body’s report. On the one hand, its members were so worried to guarantee the “serious, conscious, express and undoubted” will of Inmaculada Echeverría, in a context of strong media coverage and social debate, that they considered that it was necessary to reiterate the petition under the “best possible circumstances and in the total absence of any interference alien to her will”. On the second hand, the disconnection of the life support treatment had to be carried out adopting all the possible measures, even deep sedation if needed, to avoid any physical or psychological suffering. The contrary would mean an “inhuman and degrading treatment” proscribed by article 15 of the Constitution and sanctioned by the Spanish Criminal Code50.

As described in the Introduction, Inmaculada Echeverría died on the 14th March 2007 when the doctors turned her ventilator off. The same day, she had been previously transferred from the Catholic hospital where she had been treated to a public hospital51. Following the recommendations from the reports issued by the Ethics Committee of the Government of Andalucía and by the High Consultative Body of the Government of Andalucía, Ms. Echeverría was sedated in order to avoid any suffering and, before the

48 Ibidem, p. 50. The existence of that problematic and confuse “right to live with dignity” is not supported by any juridical argumentation by the report, which mentions it only once.

49 It has to be noted that, though there seemed to be no need for it as the action of disconnecting the ventilator was the subsequent duty to Inmaculada Echeverría’s right to demand the suspension of the life-support treatment, the report dedicates its last part to a strict scrutiny of the Spanish criminal legislation on euthanasia (majority interpreted as only punishing direct active euthanasia) to exclude the possibility of sanctioning the medical staff action. A recent exam of these issues from the constitutional perspective in REY MARTÍNEZ, F., Eutanasia y derechos fundamentales, CEPC, Madrid, 2008.

50 Report, p. 56.

51 According to the President of the Government of Andalucía, the decision to transfer Ms. Echeverría to a public hospital was not a consequence of a decision of the religious order that run the hospital where she had been treated, but of the Vatican.
respirator was disconnected, the doctors and psychologists informed her of the process and confirmed, once again and for the last time, her desire to die.