



SPANISH CONSTITUTIONAL COURT
Cabinet of the President
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THE TC UPHOLDS THE RIGHT OF CONSCIENTIOUS OBJECTION OF A PHARMACIST WHO WAS SANCTIONED FOR NOT PROVIDING THE “MORNING-AFTER PILL”

The Plenary Meeting of the Constitutional Court (TC) has granted protection of a Seville pharmacist who was sanctioned by the Regional Government of Andalusia for not providing the so-called “morning-after pill”. In this specific case, the Court considers that the sanction imposed on the plaintiff infringed his right of conscientious objection as a manifestation of his ideological and religious freedom, acknowledged by the Constitution in Art. 16.1. However, the Plenary Meeting did not grant protection in relation to the plaintiff’s refusal to sell prophylactics, as in this case there is “*no conscientious conflict of constitutional relevance*”. The judgment, with Mr. Andrés Ollero acting as Reporting Judge, includes the particular dissenting vote of the Vice President, Adela Asúa, as well as that of Judge Fernando Valdés Dal-Ré, to which Juan Antonio Xiol subscribed. The reporting judge also issued a particular concurring vote.

There are two matters analysed by the Court to resolve the appeal: 1) whether the right of conscientious objection recognised by constitutional case-law in favour of doctors is also applicable to pharmacists; and 2) the effect of the right of conscientious objection on other rights, to particularly include a woman’s right to sexual and reproduction health, covering access to health services for a voluntary termination of pregnancy and access to contraception and contraceptive drugs authorised in Spain.

With respect the first matter, the Plenary Meeting reached the conclusion that “*the determining issues*” leading the Court to “*specifically recognise*” a doctor’s right of conscientious objection (Constitutional Court Judgment (STC) 53/1985) may also apply “*if the objection is deployed over a pharmacist’s duty to dispense the so-called “morning-after pill”*”.

Despite the “*quantitative and qualitative*” differences between a doctor’s involvement in a voluntary termination of pregnancy and a pharmacist’s dispensation of the so-called “*morning-after pill*”, the Plenary Meeting considers that there is a similarity between the plaintiff’s and doctors’ conflict of conscience. This is because, the judgment explains, in certain cases, the “*morning-after pill*” may have an effect on pregnant women that conflicts “*with the plaintiff’s interpretation of the right to live*”. From this point of view, in addition to this similarity, a pharmacist also acts “*as an authorised expender of the pill, which is particularly relevant*”.

As regards the second matter, the Court concludes that the plaintiff’s breach of his duty to make available at his pharmacy “*a minimum stock established by law*” did not “*endanger*” the woman’s right to “*access contraceptive drugs authorised by current law*”. In fact, explains the judgment, “*the plaintiff’s pharmacy is located in the city centre of Seville, suggesting that there are other pharmacies relatively nearby*”.

Furthermore, the judgment takes into account that the plaintiff was registered as a conscientious objector at the Official Association of Pharmacists of Seville. The Association’s

By-laws, “*definitively*” approved by the Department of Justice and Public Administration of the Regional Government of Andalusia on 8 May 2006, expressly recognise conscientious objection as a “*basic right of member pharmacists when exercising their profession*”. Consequently, “*the plaintiff legitimately relied upon a right, whose regulatory acknowledgement was not challenged by the Administration*”.

“*In light of our weighting of the rights and interests in conflict and the other considerations made*”, concludes the Plenary Meeting, “*the sanction imposed, due to not meeting the minimum stock levels of the so-called “morning-after pill”, infringes the plaintiff’s right to his ideological freedom, guaranteed in Art. 16.1 Spanish Constitution (CE) based on the special circumstances*” of this specific case.

The plaintiff was ordered to pay more than 3,000 euros for not having available at his pharmacy two of the product included in the mandatory list: the pill and prophylactics. However, on this point, the Court decided not to grant constitutional protection because “*there is no conflict of conscience with constitutional relevance in this case*”. “*It is clear*”, the judgment points out, “*that a breach of the obligation on stock levels of prophylactics is beyond the scope of the protection granted*” under Art. 16.1 CE.

Consequently, the granting of constitutional protection is limited to the sanction related to the plaintiff’s refusal to sell the drug known as the “*morning-after pill*”. However, the fine imposed by the Regional Government of Andalusia does not specify or itemize the sanction; this is why the Court has ordered that all proceedings retrospectively apply “*from the date immediately preceding*” delivery of the sanctioning resolution, in order for the Meeting to decide “*on the specific sanction to be imposed on the plaintiff, as regards the serious infringement of which he is accused, i.e. not making available (and, consequently, not dispensing) prophylactics at his jointly owned pharmacy*”.

In his particular vote, the Vice President, Adela Asúa, declared that the right of conscientious objection cannot be technically considered “*part of the content of the right of ideological freedom*”, as neither the Constitution nor any Parliamentary law recognise this. She considers that the judgment does not follow constitutional case-law and the decisions of the European Court of Human Rights, entailing “*a drastic change in the case-law*” which “*may have tragic consequences on Spain’s constitutional rule of law and, ultimately, on our co-existence*”; there may be many “*situations affected by a refusal to fulfil a legal duty by resorting to the right of conscientious objection, established at the applicant’s will, without requiring any legal provision on the matter*”. This is why she believes that constitutional protection should have been denied.

The Judges Fernando Valdés and Juan Antonio Xiol, in turn, consider that constitutional protection should have been dismissed “*given the absence of any constitutional conflict linking the fundamental right alleged to the sanction imposed on the appellant*”. According to them, the sanctioning proceedings “*did not arise from a refusal to expend drugs of this nature, but from the absence of product stocks as required by applicable regulations*” for pharmacies. Consequently, they state, “*if there was no refusal to dispense the so-called “morning-after pill” or a sanction for this reason, there was no personal conflict seeking constitutional protection as conscientious objection*”. “*The conflict underlying conscientious objection- they conclude- could only have materialised upon dispensation, as only by putting this drug in a customer’s hands could this alleged “abortive” risk have arisen, which the applicant is claiming and intends to avoid*”.

In his concurring vote, Judge Andrés Ollero considers that “*the sanction imposed on the pharmacist is a consequence of legally foreseen conduct: to not dispose of the drugs and products included in a list foreseen by law; without prejudice to whether there is only one or*

several of these". This is why he does not share the proposed retrospection. On the other hand, he points out that *"the requirements of Article 16 CE are based on the neutrality of public powers and their non-interference in a citizen's legal or moral conscience. Consequently, it is not compatible for the Court Judges to consider that they may act as a citizen's spiritual advisor, counselling as to what parts of one's conscience enjoy the protection of a fundamental right and which ones should be dismissed on the grounds of constituting vague scruples"*.

Madrid, 6 July 2015