

ARTICLE 25.2 OF SPANISH CONSTITUTION: A FUNDAMENTAL RIGHT OF PRISONERS?

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Summary: Even though our Constitutional Court and a section of the Spanish public law doctrine continue to support that Article 25.2 contains only an instruction directed to the legislator in criminal and penitentiary matters, we could affirm that this aforementioned precept contains a real fundamental right to the reintegration of the prisoner, which is subject to constitutional protection. In the same way, the true sense that should be granted to the re-socialization, avoiding the de-socialization of the prisoners, will be allowed to conclude that they have the same rights as men in freedom, with the exception of the triad of article 25.2: contents of condemnatory ruling, sense of punishment and penitentiary law.

Keywords: Prisoners, Fundamental Rights, Constitutional Court, Resocialization.

Summary: I. DOCTRINAL EXEGESIS OF ARTICLE 25.2 OF THE SPANISH CONSTITUTION; II. ARTICLE 25.2 IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT; III. PRINCIPLE OF RESOCIALIZATION AGAINST THE VOLUNTARIETY OF TREATMENT; IV. FINAL CONSIDERATIONS.

I. DOCTRINAL EXEGESIS OF ARTICLE 25.2 OF THE SPANISH CONSTITUTION

Before launching fully to the analysis of the only article dedicated specifically to the inmates by the Spanish constitution, it seems convenient and necessary to visualize, even briefly, the origin of the constitutional precept, that is, its parliamentary procedure until its definitive drafting and its inclusion in the terms in which it was published in our Constitution, in the BOE (Official Newsletter of the State) dated December 29, 1978.

Quite rightly, Professor Reviriego, before starting a detailed study on prisoners under constitutional jurisprudence, carries out, within the regulatory framework of the rights of those, a thorough review of the parliamentary procedure of Article 25.2 EC.

In its original version, specifically in the Draft Constitution in its article 24, fourth paragraph, it was arranged: "Prison sentences will have a purpose of reeducation and social reintegration and may not assume, in any case, forced labor"; not contemplating anything about the fundamental rights of prisoners.²

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² REVIRIEGO, F., (2008). p. 13.

For a more detailed study of the parliamentary origin of the current article 25, see Chapter II: "*El marco normativo regulador de los derechos de los reclusos*", at his work "*Los derechos fundamentales de los reclusos*", pg. 13-24.

This precept was subject to a large number of amendments (eight, specifically) among which will be highlighted, with Reviriego Picón, mainly three of them:

-No. 123, which came to coincide with the wording of the current article 25.2 when establishing the following:

"Jail sentences will have a purpose of reeducation and social reintegration, and may not assume, in any case, forced labor. Redemption of penalties in exchange for work will imply, in any case, the right to Social Security for the prisoner and the beneficiaries thereof. Those sentenced to prison who are complying with it shall enjoy all the fundamental rights guaranteed in this chapter, with the only exception of those that are expressly limited by the content of the sentence that condemns them, the purpose of the punishment and penitentiary law". (REVIRIEGO PICON.2008:13).

-On the other hand, amendment nº 604 had as an objective the inclusion of a concrete and interesting appeal to the dignity of the prisoner, as well as to his fundamental rights: "Jail sentences must respect the dignity of the prisoner and the rights thereof that are not affected by the sentence".

-Thirdly, it is worth mentioning amendment nº 451, which wanted to introduce a reference to the place where the sentence would be met, the prison, as a consequence of the precarious situation in which most of these were found, thus avoiding the compliance with the objectives of re-education and social reintegration: "*Penitentiary facilities will adapt their organization, structure and functioning to the fulfillment of the previous purposes*" (REVIRIEGO PICON.2008:13).

-After the amendments, article 24 came to collect, already in the Report of Presentation, the express reference to the predominance of fundamental rights of the prisoner included in the chapter, being this finally with the following wording: "Jail sentences can not consist in forced labor and they will be oriented towards re-education and social reintegration. The person condemned to prison who is fulfilling the same, will enjoy all the fundamental rights guaranteed in this chapter, with the only exception of those that are expressly limited by the content of the sentence that condemns them, the purpose of the sentence and penitentiary law. Sanctions of Civil Administration may not consist of jail sentences." (REVIRIEGO PICON. 2008:15).

Later, the verdict of the Committee on Constitutional Affairs and Freedoms collected all the circumstances described by a wording that practically did not suffer changes during the rest of the parliamentary procedure. Only a modification in the style was made to give more importance to the principles of reeducation and social reintegration and also to the inclusion of access to culture and personality development (REVIRIEGO PICON: 2008).

On the other hand, the text of the project approved by the Plenary of the Congress hardly underwent changes during this moment of processing. During the processing in the Upper Chamber, five amendments were made: related to administrative sanctions, the work of the prisoner, survival of the rights of prisoners and their guardianship, access to culture and the exercise of sexuality. However, when going through the commission's opinion, the one what was until then article 24.4 of the Project became article 25.2, generating three particular votes on said second section which were removed in a last instance.

Finally, the Mixed Commission Congress-Senate modified the wording of Article 25.2, advancing the provisions regarding the re-education and social reintegration of jail sentences and security measures, remaining as follows:

“Jail sentences and security measures will be oriented towards re-education and social reinsertion, and will not lead to forced labor. The person condemned to prison who is fulfilling the same, will enjoy all the fundamental rights guaranteed in this chapter, with the only exception of those that are expressly limited by the content of the sentence that condemns them, the purpose of the punishment and penitentiary law. In any case, it will have the right to a paid job and the benefits derived from Social Security, as well as access to culture and the integral development of personality.”

In short, REVIRIEGO PICON will conclude that the final result of the procedure is largely plausible, even though it is evident that it maintains some structural or coherence problems, with some deficiencies in its subjective configuration”; being in any case *“a singular precept, innovative and almost unprecedented in the comparative field”* (REVIRIEGO PICON 2008: 24).

Once the mandatory and interesting review of the origin in the legal field, in parliamentary session, of the constitutional precept of article 23 that occupies us, it is appropriate to proceed to address the various doctrinal positions on it. In this way, according to COBO DEL ROSAL and BOIX REIG (1983: 88), we are faced with a *“criticizable precept”* with a confusing content that can give rise to the most varied and unique interpretations, which are attributed to the successive modifications suffered by the text in its constituent process together with the introduction of broad formulations, and which is also the result of parliamentary controversies in the face of concrete pretensions with a difficult constitutional adaptation.

Article 25 of our Spanish Constitution, represents the inexcusable starting point for the study of the legal-penitentiary relationship, characterized as a relation of special subjection by the German dogmatic of the nineteenth century, (and by much of Spanish constitutional and penitentiary doctrine, as well as by the Constitutional Court until not long ago) and of the legal status of the prisoners. At the same time, that precept specified the limits to which prisoners would be subject, outside of which the remaining fundamental rights would be kept intact; an issue that, as we have been checking

throughout this work and that have also been systematically denounced by many of the authors who have dealt with the issue, has not been met in prison practice.

To such an extent the fundamental rights of inmates in penitentiaries in our country have not been respected, which has allowed some authors to make the following conclusion: "*in spite of normative declarations that indicate that prisoners should only be deprived of their freedom, each and every one of their fundamental rights (...) are devalued in comparison with the tutelage that those same rights have when they refer to those who live in freedom*" (RIVERA BEIRAS 1994: 47).

However, in my opinion, it is to praise the intention of the constituents to welcome, in our Constitution, the ideal of resocialization and the humanization of the Spanish prison system, as it had already been done by other international standards on the subject such as "*Minimum Rules for the Treatment of Prisoners*", adopted in 1955 within the United Nations. The latter emphasize that the purpose of the deprivation period of freedom is precisely the attainment of the rehabilitation ideal.³

It is praiseworthy, also, the systematic location of the aforementioned precept in the first section ("*Of the fundamental rights and public freedoms*") of the second chapter ("*Rights and Freedoms*"), of the first Title ("*Of the fundamental rights and duties*"), which gives it the maximum legal protection of those contemplated by the article 53 of the SC. And I refer to it as praiseworthy because this have allowed a patriotic sector of the country to maintain the fundamental right character of the re-socializing purpose of custodial sentences in our constitutional order, allowing application for "amparo" to our Constitutional Court.

As GARCIA MORILLO (1997: 27) points out, article 25.2 is not a precept nor is it a descriptive of the Spanish prison system, nor is it a purely programmatic norm, derived from simple objectives, but rather it establishes legal mandates of mandatory compliance, whose content can be cited directly to the respective judicial bodies.

For DELGADO RINCON (2007: 79), the constitutionalisation of these two issues (the purpose of the social reeducation of custodial sentences and the recognition of fundamental rights in favor of prisoners), means that we are in the presence of a original and innovative precept, since it is unparalleled in our historical constitutional texts, as well as those of most of our surrounding countries.

Likewise, for MAPELLI CAFFARENA (1983: 131) we are in the presence of an original precept, since this recognizes the validity of the fundamental rights of the

³ "Purpose and justification of jail sentences and custodial measures are, in short, protect the society against crime. This will only be achieved if the period of deprivation of liberty is used to get, as far as possible, that offender, once released, not only wants to respect the law and satisfy his needs, but also that he is capable of doing so."

condemned in the execution phase of the sentence, thus implying important limitations to the activity of the Penitentiary Administration, together with the objectives of re-socialization that are attributed to the sentence and which to date had not been included in a constitutional text.

According to the jurisprudence of the Constitutional Court the following deduction is made:

“we are facing a mandate that is directed to the legislator to guide the penal and penitentiary policy, through the treatment, which has to be coordinated with this essential purpose of the penitentiary institutions and that, as indicated in article 1 of the General Penitentiary Law, it is none other than the retention and custody of detainees, prisoners and condemned, which entails guaranteeing and ensuring the safety and proper conduct of the center”. And that “the orientation of custodial sentences towards re-education and social reinsertion that includes the constituent as an entry for the second section of article 25.2, does not allow to speak about the existence of a subjective right of the prisoner to which the totality of life of aspects of the stay in prison must be governed by that one”. (REVIRIEGO PICON 2008: 45).

As BOIX REIG review (1979: 11) 9, article 27 of the Italian Constitution provides that *“penalties may not consist of treatments contrary to the meaning of humanity and they should tend to reeducation of the prisoner”*. Although both precepts, Italian and Spanish, include special prevention as the purpose of punishment, there are three differential criteria:

- At Italian text, reference is made only to penalties, obviating the security measures;
- The constitutional requirement is not mandatory in any of the constitutional texts, although Italian is more permissive, thanks to the expression *“should tend”*.
- The objective in the Spanish Constitution is broader by admitting not only re-education but also social reinsertion.

II. ARTICLE 25.2 IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT

The second of the questions involves discerning whether, from this merited article, a fundamental right of prisoners is born or it is only a constitutional mandate to the legislator at the time of the regulation of custodial sentences.

According to CÓRDOBA RODA (1980: 153), our constitutional text has opted for a substantial notion of the function of penalties and security measures depriving freedom, instead of a formal notion, which would have been about the idea of abstention from the subject of committing other punishable acts in the future.

Constitutional Court has had the opportunity to state what would be, in our constitutional and criminal law, the objectives of the custodial sentence. In the same way we have included in the previous section the doctrinal positions on article 25.2 of our "*norma normarum*" and also on the objectives of the prison sentence.

Therefore, the reeducation and social reinsertion of the said constitutional precept, to which the doctrine also refers with the name of re-socialization, it will be part of the purpose of general prevention. The constitutionalisation of this purpose of jail sentences within our order is a manifestation of a tendency that had been found in the ordinances of Western countries to gradually abandon the criminal retribution in favor of prevention through the re-socialization of the prisoner, as maintained by CARCEDO GÓNZALEZ and REVIRIEGO PICÓN (2007: 81).

Before getting into the different doctrinal opinions on the purposes of custodial sentences that our "*lex superior*", could have collected, we have to ask ourselves a question: If the search for the rehabilitating purpose is applicable only to the prison sentence or on the contrary it would be predicable of all kinds of penalties.⁴

Some of the doctrinal sectors have understood that the Constitution rightly limits reintegration and social reeducation to custodial sentences, on the understanding that the rest of the penalties, due to being carried out in freedom, would not compromise social ties of the person and therefore would not affect their reintegration.⁵

I understand that the re-socializing purpose contained in the constitutional mandate and with the principle of humanization of penalties is more in line the position maintained by RODRÍGUEZ DEVESA and SERRANO GÓMEZ (1995: 883), which consider that reintegration and reeducation should be extended to the rest of the penalties, both those that are pecuniary and those that are of deprivation of rights.

For SERRANO ALBERCA (2001: 602), the introduction of reeducation and social reinsertion into the Constitution has the purpose of establishing the orientation that the legislation must follow, without this implying that the preventive purpose, both general and special of punishment is forgotten; so for who receives the constitutional norm is fundamentally the legislator.

On the contrary, COBO DEL ROSAL and BOIX REIG (1982) understand that the constitutional norm can not become a constitutional dilemma of the theory of

⁴ For a better understanding of jail sentences and their classes, we bring up the Article 35 of the current Penal Code, which states that: "*They are deprivation of liberty, permanent reviewable prison, prison, permanent location and subsidiary personal liability for non-payment of a fine. Its compliance, as well as the penitentiary benefits that suppose the shortening of the sentence, will be adjusted to the dispositions in the laws and in this Code*", in the wording given by the Law 1/2015, of March 30, by which it was modified the Law 10/1995, of November 23, of the Penal Code (B.O.E., March 31), previously, article 32 had already established that "*sentences that may be imposed under this Code, whether they are of a principal nature or as accessory are: deprivation of liberty, deprivation of other rights and fine.*"

⁵Cid Moliné, J., "*The right to social reintegration (considerations regarding the recent constitutional jurisprudence regarding permits)*", *Judges for Democracy*, No. 32, July 1998, p. 3.

punishment, but simply sets a criterion by which, in certain circumstances, it should be governed the execution phase of the penalty. Therefore the fact that the first paragraph of Article 25.2 SC is located only in the penitentiary area, that is, that this affects only one of the instances of the penal system, the one relative to the execution of certain sanctions such as penalties and measures deprived of freedom, makes that the addressee of the constitutional norm is exclusively the Penitentiary Administration.

In that order of ideas another patriotic constitutionalist author (DE OTTO 1988: 43) will come to say that in short, we are facing a "final programming norm" which, due to its indeterminacy, leaves a wide margin of action to the public powers, which may and must make this non-exclusive purpose compatible with other purposes that may arise.⁶

BUENO ARUS came to systematize, in the decade of eighties of the last century, the different doctrinal, patriotic and critical positions on re-socialization as the purpose of punishment:

-A classic stance: Contrary to this purpose and treatment, for believing that, with these, the penalty is stripped away of its essence: the need to be perceived as punishment.

-A liberal position: Dissatisfied with the same because there is a real risk of manipulating the personality and coerce the freedom, which is already limited by the penalty, to be imposed officially, in any case, certain values. Something that is contrary to a democratic society and, therefore, pluralistic. By assuming the risk also of violating the right to a fixed penalty (principle of legality), given, according to the affirmers of this position, the indeterminate character of the Treatment.

-A critical-anarchist position: By repudiating through it all kinds of penal sanctions, imprisonment, legality and state.

-A critical-marxist position: About this the aforementioned author, in the same study, commented: "The prison sentence is questioned as a bourgeois invention, aimed at the creation of a subjugated labor force, and as a procedure of criminalization and of labeling, but the penalties and measures of imprisonment in the socialist States are maintained. Treatment is attributed to being an illegal and undemocratic manipulation of the personality, but only in the bourgeois states or those of liberal democracy, because in the popular democracies it is attributed legislatively to the penalties and measures a predominantly educational purpose. It is considered that re-socialization in a liberal-capitalist society is the negation of human freedom, but re-socialization is practiced in a socialist society as the culmination of that freedom. A position that, of course, is consistent with an eminently politicized vision of Criminal Law, but surely not very respectful of the fundamental rights of the person when treatment and re-socialization are

⁶ We must remember briefly on this point, that, in the opinion of this author, our Constitution has been qualified as the "Constitution of concord", by allowing, as a consequence of the empire of commitment that this is fruit, can govern political options of diverse nature, without violating the constitutional text.

conceived in a maximum sense, that is, as a necessary assimilation of the values and attitudes that have been officially established”⁷.

It is now appropriate to make an examination of the jurisprudence established by our Constitutional Court on this purpose. For once it has been declared repeatedly that *"reeducational and re-socializing purposes are not the only admissible objectives of deprivation of freedom"*, and that, due to this, it can not be considered contrary to the Constitution *"the application of a penalty that may not respond exclusively to that point of view."*⁸

And this is so, because it is understood that there is another second and more valuable purpose of the penitentiary institutions, the retention and custody of detainees, prisoners and condemned: "(Article. 25.2 CE) does not create a subjective right that every aspect of the organization of life in prison be governed exclusively by it, regardless of the primary purpose of the institutions of *"retention and custody of detainees, prisoners and condemned"* (article 1 LOGP) that involves *"guarantee and ensure safety, good order of the center's regiment"*.⁹

All this being said, the relative significance of the importance of principle of re-socialization in the interests of the enhancement of retention and custody as main objectives of punishment, is not only a consolidated line of jurisprudence, but is also positively pre-eminent in the Articles 1 LOGP and 2 of the Penitentiary Regulation, by mentioning in the first place the assurance or custodial objectives before those of re-education or social reintegration.

Some authors, such as CARCEDO GONZÁLEZ (2007: 105) share the position of the Constitutional Court, attributing to custodial sentences together with re-socializing purposes, others of a preventive or retributive nature, as in the case of substitute detentions for non-payment of fines (STC 19/1988) or in the case of minor house detention (STC 120/2000), although they maintain doubts about the constitutionality of the reform implemented in the Penal Code by Organic Law 7/2003, which introduced tougher penalties for certain offenders and a considerable restriction of the conditions for access to prison benefits.

In line with this issue regarding the duration of sentences and their relation to the principle of re-socialization, it has been stated by criminal lawyers (MIR PUIG.1997: 679) that the imposition of excessively long prison sentences contradicts frontally the ideal of the re-socialization, because it eliminates any possibility of hope in the condemned.

According to CÓRDOBA RODA (1980: 158) it could be interpreted that Article 25.2 SC establishes that reeducation and social reinsertion are the sole purpose of

⁷ Bueno Arús, F., "La legitimidad jurídica de los métodos de la criminología clínica aplicada al tratamiento penitenciario", *Bulletin of Information of the Ministry of Justice*, nº 1215 (1980), section III.

⁸ Actions TC 985/1986, of November 19 and 1112/1988, of October 10; and STC 19/1988 of February 16.

⁹ STC 119/1996, of July 8, FJ, 4th.

custodial sentences, in which case no custodial sentence could be imposed in all those cases. In which, having committed a crime that leads to a custodial sentence, it does not need reeducation or social reinsertion. At the same time, a principle of humanization of penalties that prohibits the imposition of useless sanctions is being accepted, when these are not clearly harmful to the condemned or inspired by a simple objective of punishment.

The other issue that the Maximum Interpreter of the Magna Carta had to deal with was precisely to determine whether the content of article 25.2 contained a true fundamental right or, on the contrary, it only meant a mandate addressed to the legislator in criminal and penitentiary matters.

Our "*Court of Constitutional Guarantees*" started by claiming that it is not possible, therefore, "*to transform in a fundamental right of the person what is not but a mandate of the constituent to the legislator to guide the penal and penitentiary policy, mandate that does not derive subjective rights.*"¹⁰

In case it had not been sufficiently clear, our Constitutional Court will reiterate (in outstanding resolutions relapsing on amparo motivated by the enjoyment of penitentiary benefits): "*Reintegration is not a fundamental right, but a mandate to the legislator to guide the penal and penitentiary policy: it is intended that in the penitentiary dimension of the punishment, an orientation directed to these objectives be followed, without these being its sole purpose.*"¹¹ Or as has just been recognized in the STC of this Chamber of March 31, 1998, (refers to STC 75/1988, of March 31 in its FJ 2º) although such a rule may serve as a parameter of the constitutionality of laws, is not in itself a source of subjective rights in favor of those sentenced to custodial sentences, and still less of fundamental rights subject to constitutional protection (STC 88/1988, of April 21, FJ 2º).

The Constitutional Court has maintained in constant and reiterated jurisprudence that can not be spoken in purity of a fundamental right susceptible of "amparo", despite the constitutionalization of the objectives of reeducation and social reinsertion of penalties within the catalog of fundamental rights. It is rather a mandate from the constituent to the legislator to guide the penal and penitentiary policy from which no subjective right will be derived, without prejudice that it can serve as a parameter of the constitutionality of the laws (SSTC 91/2000 and 8/2001).¹²

The Spanish constitutionalists and criminalists hold divergent opinions in this regard. For a doctrinal sector article 25.2 EC does not contain a fundamental right, so we

¹⁰Actions TC 15/1984, of January 11, 739/1986 of September 24 and 112/1988 of October 10; SSTC 2/1987 of January 21, 119/1996, of June 24, 119/1996, of July 8, 167/2003, of September 29, 2/2006, of January 16, 196/2006 of 3 of July, 160/2012 of September 20,

¹¹SSTC 2/1987, 29/1988, and 112/1996.

¹²The consequence, as appreciated by CARCEDO GONZÁLEZ (2007: 106), is profound, since the protection of individuals against the actions of the prison administration or decisions of the courts that are contrary to the constitutional principle of the article 25.2 CE, will be carried out through the ordinary judicial way, and not through the constitutional protection, since the reeducation and the social reinsertion do not constitute a fundamental right of the convicts, according to the constitutional jurisprudence.

could only speak of a guiding principle of criminal and penitentiary policy, serving as a parameter of constitutionality of legislative rules that will be set apart from such constitutional guidance. On the other hand, we find a group of authors who consider that it maintains, straightforwardly, that article 25.2 EC constitutes a fundamental right of the prisoner. Let's see in more detail the aforementioned positions and their respective arguments.

Among those who support the denial of Article 25.2 SC as a fundamental right we find ÁLVAREZ GARCÍA (2001: 37), considering that this is not a fundamental right, among other reasons because the State is not in a position, objectively, to ensure such purposes with the only instrument of custodial sentence. The aforementioned author, based on these considerations, believes it more appropriate that the article should have been included in Chapter III of Title I of the SC, instead of in Chapter II.

In the opinion of CARCEDO GONZÁLEZ (2007: 106), it is not possible to talk about a fundamental right of the prisoner to reeducation and social reinsertion, among other reasons, because from that formal perspective, it must be admitted that not all the norms included in the first section of chapter two of the Title I of the Constitution are declarative of fundamental rights. Consequently we are in the presence of a guiding precept of criminal and penitentiary policy that binds all public authorities equally: legislative, executive and judicial.

In this line of thought we find prominent constitutionalists who understand that only the fact that article 25.2 is included in the first section of the second chapter of Title I is not enough to consider reeducation or social reintegration of the condemned a fundamental right, due to:

“in that section there are fundamental rights, from which a whole sequel of subjective ownership derives; but there are also many other things ... constitutional rules, constitutional principles or general principles of law, norms of action or organization, organizational criteria or principles of order, institutional guarantees, procedural guarantees; different elements, which ultimately must be distinguished from fundamental rights” (MARTÍN RETORTILLO et al.1998: 85-86).

On the contrary, SEGOVIA BERNABÉ (2006: 7-8), has pronounced itself critically against this line of jurisprudence, on the understanding that the Constitutional Court has made a short-lived interpretation, a light interpretation, by considerably reducing its essential content and to conceive what is expressed in said precept as a guiding principle of a generic nature and not as something more concrete that can generate subjective rights.

At the same time there is a sector of Spanish criminal doctrine that has been insisting on the need for the conceptualization of article 25.2 SC as a fundamental right and that maintains that the incardination of the aforementioned article in chapter two of Title I, and not in the Third one, obeys an express intention of the constituent to grant the

same article an extra, elevating it to the category of fundamental right of the prisoner, extending this consideration to the rights to a remunerated work and social security. So that otherwise, that is, denying the condition of fundamental right to the aforementioned article, "far from being an element of invigoration, it becomes a mere declaration of good will elevated to constitutional rank, a legal utopia is degraded to a legal absurdity" (MAPELLI CAFFARENA 1983: 154-157).

There are even authors who distance themselves from the antagonistic positions enunciated to understand that we are in the presence of a kind of supra-guarantee. This is highlighted by NAVARRO VILLANUEVA (2002: 391), who understands that reintegration and reeducation should be characterized as "supra-guarantees" because it is one of the guarantees specifically provided for the execution of custodial sentences, because such guarantee should be the delimiting parameter to determine the scope of effective judicial protection in the process of execution of the sentence and, ultimately, because reintegration and reeducation can justify in a broad sense the possible alteration of the original executive title, either by suspending it or either modifying it.

The Constitutional Court denies that in these cases the sentence should not be executed, but the reason should not be that there is no fundamental right to re-socialization but because, as we have said previously, the specific and exclusive purpose of the penalty of deprivation of freedom is not the re-socialization, on the contrary, we can not forget the purposes of special and general prevention of punishment and even for some, the retribution, which would still be latent despite the re-socialization of the prisoner or even the lack of need for it.

However, despite not being considered the reintegration and reeducation as a fundamental right of the person sentenced to a jail sentence, on some occasion it has been affirmed that this reinsertion purpose does give rise to fundable fundamental rights. In this sense, it has sometimes been deduced from the purpose of reinsertion a special jurisdictional guarantee of the prisoners in the penitentiary precincts or even, a "right to social reintegration once it is achieved".

In no way we are facing a doctrinal discussion without relevance. Whether or not to consider reintegration and re-socialization as a fundamental right of the person deprived of freedom has a series of consequences of greater significance than its mere characterization as a constitutional mandate or even as a constitutional principle.

In the opinion of URÍAS MARÍNEZ, the Court's doctrine comes to distinguish three moments in the legal effectiveness of custodial sentences, applying the mandate of art. 25.2 SC in general, to only one of them. It can be differentiated in this way between creation, application and fulfillment of the penalty. At the time of the application of the penalty, the Constitutional Court understands that there is no right on the part of the convicted that the penalties that are applied are appropriate for its specific case for the purpose of re-socializing. As for the creation of custodial sentences, it has already been seen how the jurisprudence progressively denies that it is possible to control the adequacy of criminal norms to this objective; either because of the respect for harmonizing freedom

on the part of the legislator, or because of the impossibility of controlling the constitutionally necessary degree of reinsertion and the way of achieving it. However, with regard to penitentiary legislation, at the time of carrying out the sentence, it seems that the trend is more favorable for the rehabilitation purpose serves as a parameter of constitutionality.¹³

III. PRINCIPLE OF RESOCIALIZATION AGAINST THE VOLUNTARIETY OF TREATMENT

The word 'resocialization' appears for the first time in the edition of 1927 of the Lehrbuch of Von Listz. The scourge and, at the same time, the greatness of the term "resozialisierung", re-socialization, begins with its own denomination. In principle it seems to be conceded to the action of re-educating and inserting a certain mechanistic character that can be seen transcended by the socializing imprint, as creation of optimal conditions, of which the word re-socialization enjoys.¹⁴

The terms used by the constituent in the wording of article 25.2, points REVIRIEGO PICÓN (2008: 49), have been criticized by the doctrine, for different reasons, but especially because of its vagueness and its lack of definition, which has determined the search for other alternatives such as re-socialization or reintegration.

For the penitentiary author GARCÍA-PABLOS (1986: 28-30) the term reeducation is unfortunate and a "lamentable nonsense", which conflicts with the current knowledge of criminology, prison science, behavioral sciences and the criminal policy itself. He will add that the reeducation function deserves some additional reparation, from the prism of its legitimacy in a plural and democratic society under the postulates of a social and law state.

Reeducate could mean, in this sense, indoctrinate, domesticate, standardize, something which exceeds the border of anachronistic paternalism to become an attack on the rights of the individual, something inadmissible no matter how much it is executed, paradoxically, in the name of the prisoner's own benefit (GARCÍA VALDÉS .1995: 32).

For ÁLVAREZ GARCÍA (2001: 41), and continuing with the terminological issue, reeducation-reintegration should be understood as re-socialization or social recovery, as opposed to the concept of reeducation or amendment. The objective of this, continues the aforementioned author, is none other than to get the subject to acquire the ability to live in society with respect for criminal law, conditioning it to the dominant values in a certain community but only in its external appearance.

¹³ Urías Martínez, J., "El valor constitucional del mandato resocialización", *Revista española de Derecho Constitucional*, nº 63, September-December 2001.

¹⁴ PEÑAS ROLDÁN, L., "Resocialización: un problema de todos", *Anales de Derecho*, nº 14, 1996.

On the other hand, to reeducate, according to MAPELLI CAFFARENA (1983: 150-151), consists of compensating the lacks of the prisoner in front of the free man offering him possibilities so that he has an access to the culture and an integral development of his personality.

For BUENO ARÚS (1987: 233-235), social reintegration implies the "second socialization", however, he understands that reintegration is not the only objective, not being incompatible with social retribution or protection.

On the other hand ARANDA CARBONELL (2009: 23) talks about an adaptation to the norms and juridical goods belonging to the community, differentiating between moral resocialization or maximum programs that consist in the subject internalizing and adopting social norms.

MAPELLI CAFFARENA (1983: 151) defines reinsertion as "putting one thing back into another: in this sense, reinsertion is a process of introducing the individual into society, it is no longer treated as in the case of reeducation, where it is facilitated the learning so that he knows how to react properly at the moment of release."

MAPELLI CAFFARENA (1983: 150) however, although he points out that reeducation lends itself to being understood as manipulation, domination or imposition of values, it interprets the term as the compensation for the lacks of the prisoner in comparison to the free man, offering possibilities to have an access to culture and an integral development of the personality, while reintegration refers to directly favoring active contact between the prisoner and the community, even this one goes so far as to affirm that the non-use of the term 're-socialization' is due to the lack of legislative precedents.

GARCÍA-PABLOS DE MOLINA (1986: 34) refuses to consider reeducation as a prior and obligatory step to achieve such reintegration, since "*the term social reinsertion refers to the opportune reunion and adaptation of the individual to the community once the sentence has been served, which does not presuppose qualitative changes in the personality of the same, but functional and welfare adjustments by others to make possible the return to the habitat of coexistence of man. Affirms that this supposes more the need of positive benefits on the part of the community in favor of the former prisoner, that of changes in the personality or alteration of the axiological code of this one*". For this author, reintegration involves adapting the prisoner back to the social order and the primary purpose of punishment is not the social reintegration of the prisoner, since the deprivation of liberty destroys and annihilates, separates man from the community, negatively affects the factors and mechanisms of socialization, the primary groups themselves, although he admits that this is an inspiring principle of the penitentiary institutions.

Once the reference to the constitutional terminology embodied in Article 25.2 is finalized, we will now focus on the evolution suffered in recent decades by the principle of resocialization as well as its connection to the treatment regime. From the last third of

the last century, the classic criminal law or law of punishment, repressive, gives way to a right, still incipient, of treatment. *“However, the idea of resocialization has passed in a relatively short time since it was the constitution of a future alternative to classic Criminal Law to enter into a serious crisis”* (MIR PUIG 1989: 35).

As it has happened with so many other institutions that have been taken from European law, our country, in the middle of the crisis of the rehabilitation ideal in the seventies in those countries that pioneered the principle of re-socialization, approves the first organic law of democracy, the General Penitentiary Law (LOGP: Spanish acronym), in which by constitutional mandate, it was established that the primary objective of the penitentiary institutions was the reeducation and social reintegration of those sentenced to penalties and penal measures depriving them of freedom.

The different international instruments in the field of human rights have already been reviewing the importance of treatment in the re-socializing purpose of prisoners. This was reflected in art. 10.3. of the "International Covenant on Civil and Political Rights" (December 19, 1966) by providing that: *“The penitentiary regime will consist of a treatment whose main objective will be the reform and the social re-acquisition of the prisoners. Minor offenders will be separated from adults and will be subjected to a treatment that is appropriate to their age and legal status”*.

Previously, the United Nations Minimum Rules of 1955, had already embodied it in the Rule No. 59, recognizing, 'expressis verbis', the need for treatment to achieve the reintegration of the prisoner in civil society: *“To achieve this purpose, the prison system must use, trying to apply them according to the needs of the individual treatment of offenders, all healing means, educational, moral, spiritual, and of any other nature, and all forms of assistance that can have available”*.

This line has been maintained by the United Nations in the "12th Congress of the United Nations on Crime Prevention and Criminal Justice", held in Salvador (Brazil), from April 12 to 19, 2010.

The treatment in prison should be understood as a program of socializing actions that intend to make the inmate a person with the intention and ability to live respecting the criminal law, meet their needs and develop an attitude of self-respect and responsibility with respect to family, neighbor and society in general (article 59 LOGP), so that it supposes a progress in the education and the coexistence, a modification of the personality (article 65.2 LOGP) and a change of values (BUENO ARÚS 2005: 153-154).

To that possible modification of the values or of the personality of the prisoner as a consequence of the treatment, offers a response GARCÍA-PABLOS DE MOLINA (2005: 295), pointing out that it is: *“the society that must offer the necessary means but not impose them”*, because it could constitute an interference in the individual sphere of the prisoners, absolutely inadmissible in a Social and Democratic State of Law, respectful of their fundamental rights. In addition, *“it is not only the prisoner who needs to be re-socialized, but society itself”*, adds the aforementioned author.

Likewise, the legitimacy of re-socialization is also questioned from critical conceptions, such as the approach labeling theory or labeling theory, psychoanalysis and critical criminology. In common it is considered that it is the society and not the offender that needs to be changed. It is society that generates crime, so it is not necessary to treat the criminal but the criminogenic society¹⁵.

I must inexcusably emphasize now the voluntariness of the treatment and its free acceptance by the prisoner, so that its imposition would be an attack against human dignity, proclaimed in Article 10 CE without any exception, and of the fundamental rights of the condemned.

In order to guarantee a minimum of effectiveness in its application according to the requirements of the behavioral sciences, and especially for reasons of due respect to the prisoner's rights are not affected by the conviction, the treatment can not be imposed coercively, but it is necessary that the prisoner freely accept to submit to it, because it requires the voluntary cooperation of the subject treated. The treatment, as well as the different methods and activities that it entails, must necessarily be voluntary and, consequently, the prisoner must be able to reject them in a valid manner. *“The imposition of the treatment, apart from undermining the principle of respect for the personality of the prisoners enshrined in art. 3 of LOGP, already means its own failure”*. (MANZANARES SAMANIEGO 1986: 933).

In fact, imprisonment in penitentiary enclosures is characterized by the appearance of a specific subculture, the prison society. Therefore I can conclude that the prisoner is de-socialized in prison, because it has to socialize for life in prison, which requires new rules of conduct. In this way:

“Two different and even contradictory systems of life coexist in the prison: the official system, represented by the legal and regulatory norms that control life in prison, and an unofficial system, that is what really governs the lives of prisoners. The first thing that makes the prisoner is, if wants to survive, adapt to the way of life and the rules imposed by other inmates. The prisoner has no choice but to adapt to the uses of life and customs that other inmates impose on the prison. Adopt a new language, develop new habits in eating, dress, shape its life to new hours, try drugs that until then had never tried, assume leadership or secondary roles in the group of inmates in which it is integrated ... and although this process is more or less long and affects different inmates unequally, everyone agrees that this negatively affects the treatment”. (HASSEMER and MUÑOZ CONDE 1989: 156-157).

¹⁵Mir Puig, S. (1989: 38), who recalls the convergent purpose, even with important differences, of the theories of approach labeling, psychoanalysis and critical criminology. Thus the theory of labeling defends that crime does not come from an intrinsic quality of the action of the offender, but is the product of social labeling, a label that certain criminalizing sectors assign through the criminalization processes granted to conducts that are neutral by themselves. On the other hand, psychoanalysis affirms that the offender is only the scapegoat in which the faults of society are projected.

This imprisonment of the inmates, to which Clemmer referred in the decade of the 1940s, takes place in the opposite direction to the re-socialization treatment, not only preventing it, but also producing a greater de-socialization, and this is possible in the current prisons (for the one that most convicts bring with them from their criminal social environment). *“In prison, the inmate generally continues and even improves his criminal career with contact and relations with other prisoners, loses social sensitivity to live then in freedom and acquires a rejection attitude towards society. The prison certainly changes the one who has entered it, but generally this is done to make it worse”* (HASSEMER AND MUÑOZ CONDE.1989: 157).

To this it would be necessary to add a recurring problem in prison practice, such as the lack of resources and the shortage of trained personnel who adequately carry out rehabilitative treatment in penitentiary institutions. Checking the real situation of our prisons “it is a real obstacle to try the re-socialization in the prison environment” (MIR PUIG 1994:145).

In this sense, the doctrine reminds us (GARCÍA-PABLOS DE MOLINA 2005: 296-297) that with regard to concrete treatments, they are in crisis, considering the results that occurred in the Nordic countries. And this, among other reasons, because we lack the necessary material and economic means to provide timely individualizing therapy, as well as the insufficiency of current scientific knowledge to prescribe and implement in each case, or group of cases, the appropriate resocialization program.

Penitentiary practice states that:

“Utopia of the absolute or relative resocialization of each and every prisoner deprived of freedom seems untenable, in similar terms to what Roxin proposed, from the dogmatic field, using as a technique the one that is contrary to the intended objective, the paradox more evident, the preparation of freedom from its most radical absence. And even we do not admit, without sinning of extremists, the argument that the prison treatment considers as reinsertion ways, both the technique of the penitentiary permits, as the most advanced of the conditional freedom and that therefore, the preparation of freedom contains gradual approaches to it. Since these realities of prison treatment are undeniable, perhaps the obstacles are found more in the social mentality or in the behavior of the inmate than in the re-socializing end itself” (MARTÍN DIZ 2002:29).

It will then be necessary to conclude with GARCÍA-PABLOS DE MOLINA (1984: 243), that the most powerful argument against the rehabilitation ideal could be the panorama offered by the penal and penitentiary reality in many countries (...). From that point we accept a re-socialization concept aimed only at procuring the prisoner the material resources that facilitate their return to life in freedom.

For the rest, the rehabilitative ideal is not only in crisis, but has fallen under policies of innocuization and social segregation (GARLAND 2006: 239), which, having given absolute primacy to the preventive-special effectiveness of punishment, in the

search that the offender does not return to commit crimes, they separate him from society to avoid its danger.

That is to say, the crisis of the re-socializing ideology has had as effects (HASSEMER and MUÑOZ CONDE 1989:152):

- Reinforce the success of neoclassical criminal theories, especially in the United States of America, since after many years and intensive and costly treatment policy followed in prisons, which has not only involved large expenses to the Administration, but also more taxes for those involved in the criminal conflict, has returned to a conception of punishment according to the guilt, given the limited success obtained with this policy.
- Place under suspicion of idealism the prison treatment, because it facilitates the State to perform all kinds of coercive therapeutic interventions on the prisoner, without knowing very well what the conclusions are.
- Strengthen the search for non-coercive re-socializing pathways, at least for certain types of offenders, for example, the theories of resocialization in freedom through emancipatory social therapy, or the "Non Intervention": treatment and coercion are contradictory terms if with the treatment the internal reconversion of the individual subjected to it is pursued.

As SERRANO MAILLO, (I) and SERRANO MAILLO, (A) (2007: 164-165) remember, the criticisms of the treatment and the evaluations of the rehabilitation and resocialization efforts were not far from unknown in the seventies, although they converged in the work of Martinson *et al*, who published an important and extensive review of correctional treatment experience, which encompassed diverse approaches. Their findings were rather pessimistic about their usefulness. A year earlier, in 1974¹⁶ Martinson published a kind of summary of his collective work called "*What Works? questions and answers about prison reform*", in which the author intended to answer the question "*what works?*" and that lacked an answer until then valid, because until the publication of the voluminous work of Martinson, Lipton and Wilks, there was not any complete study on the subject. The article reached a devastating conclusion: "*With few and isolated exceptions, the rehabilitative efforts reported so far they have not had any appreciable effect on recidivism.*" In this regard, MARTÍN DIZ (2002: 29) says that sixty-two percent of the prison population, in our country, is a recidivist, which makes clear for much of the doctrine the failure of rehabilitative treatment.

The article by MARTINSON, in addition to several criticisms and disqualifications, has given rise to the so-called "*doctrine that nothing works*", but by failing to heed the call of the North American author, credibility is put at risk, and therefore the acceptance of the scientific community, one of the most noble ideas and aspirations of all human and social sciences, such as the rehabilitation and re-socialization

¹⁶ Lipton, D., R. Martinson, and J. Wilks, *The effectiveness of correctional treatment. A survey of treatment evaluation studies*, Praeger publishers, New York, 1975, pp. 184-189, 207-211, 223-228, 523-526.

of criminals. Such a noble idea must also be defended scientifically. (SERRANO MAILLO and SERRANO MAILLO 2007:166).

Returning to our country, the country's criminal doctrine¹⁷ has condensed the objections that can be objected to the principle of re-socialization, as a consequence of its crisis:

- The coercive nature of resocialization through a prison treatment that the prisoner can not oppose, and that for this reason, could attempt against certain constitutional principles.
- The foundation of the re-socialization in a reductionist and even classist vision of criminality, which would prevent the imposition of the prison sentence on the prisoners with certain crimes, such as the so-called occasional, passionate, economic or conviction criminals, those who do not want reeducation and who needs a social integration.
- From a practical point of view, the poor expectations of the development of treatment that has to be performed in a penitentiary institution have also been objected, since the nature of the prison as a total institution ends up imposing its own logic, according to which the individual has to get adapted to a different environment from the outside world, a fact that often supposes an authentic de-socialization with respect to the environment to which it will have to return later.

Regarding the first of the objections mentioned above, it has been maintained with a greater precision that "*re-socialization or reeducation must not consist of a moralization of the prisoner, but of giving him the appropriate tools to develop personally within his personal choices*". (TERRADILLOS BASOCO 1981: 22)

As MUÑOZ CONDE objects with respect to the possible coercive nature (or even that violates fundamental rights) of the treatment, the problem posed by many of the treatment methods is not, therefore, that of its efficacy in modifying the behavior or the personality of the inmate, but his own legality or compatibility with fundamental rights, because what seems innocuous in conditions of freedom, can be extremely dangerous in conditions of no freedom, in a penitentiary (HASSEMER and MUÑOZ CONDE 1989: 156).

Although the current prison regulations imperatively, in its article 112, first paragraph, expressly order that the prisoner's participation in the planning and execution of his treatment be encouraged, and allow, in his third paragraph, the prisoner to freely reject or not collaborate in the realization of any technique of study of his personality, without it having disciplinary, regimental or degree consequences; and yet, the progression or revision of the degree depends on it; so "*the prisoner is being induced to accept the treatment and with that it is being deprived to provide one of its fundamental characteristics: the voluntariness of the affected by it*" (HASSEMER and MUÑOZ CONDE 1989:155).

¹⁷ Tamarit Sumalla, J.M., García Alberó, R., Sapena Grau, F., Rodríguez Puerta, M. (2001: 33-34).

The repealed regulation of 1981, in its article 239 third paragraph, came to establish that the prisoner could freely refuse the treatment or decide not to collaborate in the realization of any technique of study of his personality, or method of treatment¹⁸, without it having disciplinary, regimental, or grade regression consequences. In the current penitentiary regulation of 1996, in its article 112, third paragraph (*ut supra cited*), any reference to the expression "*treatment method*" has been omitted, which may lead one to think that the prisoner can not refuse the application of a treatment method. If we add to it what article 5 of the current RP determines, among the duties of the prisoner to participate in training, educational and work activities, defined according to their shortcomings for the preparation of life in freedom, the prisoner's existence could be inferred to submit to this kind of "*right-duty*", which generates, given its bilateral nature, not only obligations in the penitentiary administration but in the condemned.

According to this dominant approach in the doctrine and partly also in comparative law, the treatment is a right of the prisoner that prison administration has to offer and encourage, but never impose, so the first rule that should govern the prison intervention is to achieve the awareness of their need and the acceptance by the prisoner, because all the design of processing program will be useless if finally the prisoner does not have the consent, since the treatment is a right of the inmate, but not a duty to which he must submit (FERNÁNDEZ ARÉVALO and NISTAL BURÓN 2012: 557-558). In the same sense, MUÑOZ CONDE understands that the duty to submit treatment implies a kind of manipulation of the person.

In my opinion, any hypothesis of this nature that allows the application of any method of treatment or study technique on the prisoner should be ruled out, since the prisoner's consent must necessarily be counted, in any case, under penalty of their most basic rights are violated. Moreover, I consider that the expression contained in article 59, second paragraph, of the LOGP is not very fortunate, when after affirming that the treatment intends to make the inmate a person with the intention and ability to live respecting the criminal law, a person able to meet their needs. It is added: "*it will seek to develop in them, an attitude of self-respect and responsibility, individual and social, with respect to their families, their neighbor, and society in general as far as possible*", that is why I can conclude that we could be in the presence of an intrusion in the inner sphere

¹⁸ As regards the treatment methods, and the medical or clinical concept of the treatment at LOGP, MUÑOZ CONDE is also critical, as he resides, to a great extent, in our society (which is not treated without clutter) the etiology of criminality: "The prisoner is considered, in any case, as a pathological being that there is needed "to treat" and the result of that treatment must be the reinsertion into the social system of which one day, due to his bad head, he dared to leave. Crime as labeling and the social, economic or political causes thereof, are not subject to the same treatment. It is therefore based on a "Manichaeism" of good and bad, in which the offender, who is the only one to be treated, is clearly described as bad, leaving everything else intact. All this with a lavish clinical or medical vision of the treatment that remembers the best times of the Lombrose theory of criminology and of his thesis of the "born delinquent": The delinquent is a sick being that is to treat; this is, then, the image and almost the stereotype of the drug ideology of treatment, from which more and more modern penitentiary specialists are moving away" (HASSEMER and MUÑOZ CONDE 1989: 155).

of the subject-prisoner, that approach our criminal law from the fact to a criminal law of the author (arising from the Kiel School), and inadmissible with the postulates of a rule of law.

In this point, in the perspective of its legitimacy, where the principle of resocialization has suffered the most consistent consequences, especially from the classical liberal conception of the criminal law, when it is postulated that it is not a function of the latter to punish personalities or ways of being, but only acts, behaviors that the law can typify as accurately as possible (MIR PUIG 1989: 37).

Towards which values the inmate has to be "redirected" through the treatment? to those of the dominant society? Would not be the treatment presented as a possible violation of the political pluralism proclaimed, as a superior value of the Spanish legal system, in article 1 of our Constitution, as well as the free development of the personality of the article 9, as the foundation of the political order and social peace?. In this way it will be pointed out by MUÑOZ CONDE that it does not seem consistent with the principle of re-socialization, nor with the basic postulates of a democratic State, a penitentiary system that tries to replace the values of the prisoner with those of the prevailing society, for which he will affirm, answering the questions raised, that:

“in a pluralistic society but also for that reason ideologically divided on fundamental issues: in reference to which models or value system should be treated the offender?. The ideological problem raised once again here allows us to see, at the level of principles, how many are the reservations raised by the concept of treatment ... But whatever the center where the treatment is carried out, a system aimed at modifying value systems or imposing different ones does not look good either” (HASSEMER and MUÑOZ CONDE 1989: 158).

It is likely that for this reason the Minimum Rules for the Treatment of Prisoners, adopted within the United Nations in 1955, already prescribed, in its rule No. 66, that the treatment should be intended to inculcate in them the will to live in accordance with the Law and to maintain themselves with the product of their work.

The LOGP, which “participates in an unlimited belief in the treatment by dedicating a complete title, the Third” (MIR PUIG 1989: 153) starts, in its article 61, the need to make the prisoner participant in planning and execution of its treatment, giving rise to a concept of medical or clinical treatment¹⁹, against the broad concept of treatment under the regulation, including not only therapeutic-assistance activities, but training, educational, labor, sociocultural, recreational and sports, conceiving the reintegration of the prisoner as a process of integral formation of the personality, granting him efficient instruments for his own emancipation. As a result of this more social orientation of treatment, the prison regulation in its article 110, at the moment of defining the elements of the treatment, establishes that for the attainment of the re-socializing purpose of the prison sentence, the penitentiary administration will design training programs oriented at

¹⁹ Article 62 LOGP enshrines the so-called scientific principles of treatment.

developing the skills of prisoners, enrich their knowledge, improve their technical or professional skills and compensate for their shortcomings. Likewise, it will strengthen and facilitate contacts with the outside world, taking into account, whenever possible the resources of the community as fundamental instruments in the reintegration tasks. It is therefore a question of involving society in general in the tasks of reinsertion of the prisoner, giving continuity to the interventions carried out in prison.

On the other hand, in the same context, article 61, first paragraph of LOGP establishes that “the prisoner will be encouraged to participate in the planning and execution of his treatment and will collaborate to, in the future, be able to carry, with social conscience, a life without crimes”. While it is true that this collaboration can be voluntary or mandatory, the second section provides a powerful argument in favor of voluntariness by stating that “the interest and collaboration of prisoners on their own treatment will be stimulated as much as possible treatment. The satisfaction of their personal interests will be taken into account to the extent that they are compatible with the purposes thereof”.

On the contrary, in the opinion of MANZANARES SAMANIEGO (1986: 938-939) we are faced with a superfluous precept, because nothing new is contributed to the declaration of section 1. According to this author, his justification can only come through the distinction, more or less subtle and unnecessary, between the voluntariness of the subject to treatment and the freedom of collaboration in its concrete manifestations. In this way the same principle would be proclaimed at two different levels. In both, voluntariness is an indispensable requirement, but admits “promotion” (number 1) or “stimulus” (number 2).

But in any case, Article 61 of the L.O.G.P. constitutes:

“an unfortunate rule, both in its wording and in its content, which has arisen as a result of an amendment that sought to avoid the character of mandatory rule towards the prisoner contained in the draft, but without achieving the legal consecration of the idea of voluntariness, to the point that, as will be seen below, some authors have been allowed to affirm the existence of a duty of collaboration on the part of the condemned” (TAMARIT SUMALLA 2005: 259).

As stated by MANZANARES SAMANIEGO (1986: 934), *“the same form used in article 61 LOGP (“will collaborate”) contains some coercive connotations that can only be eliminated through a joint interpretation of all the legal precepts related to treatment”*. And even this same author asks himself whether voluntariness in the treatment will not be constrained, even indirectly, by the promotion and stimulation techniques established by law.

Presence in our prison system of these manifestations, contrary to the principle of voluntariness of treatment, has led some authors to consider that the prisoner's collaboration in the treatment constitutes a duty for him. For ALARCÓN BRAVO (1978: 30-31) and GARRIDO GUZMAN (1983: 295-296), it is a legal duty without sanction,

unlike what happens with the regime where there will be corresponding disciplinary penalties.

For GOOD ARUS it is, instead, a duty with legal consequences. This author maintains, from the term collaboration (“will collaborate”) referred to in article 61.1 LOGP that there is a certain obligation of the prisoner to participate in the treatment, since his rejection will imply, if not, either disciplinary sanctions or the loss of certain penitentiary benefits (classification of degrees, open prison, conditional release...), with the consequence that the prison could represent for him a mere retention during the time established in the judiciary.²⁰

For MAPELLI CAFFARENA this approach can not be accepted in any way, in the first place, because the treaty, by depriving it of benefits, can not be punished more than that which is not in need of treatment. Secondly, the execution of the sentence by the one who does not need treatment is also affected by resocialization so that it can not become a mere retention. Third, because the judicial sentence understood as a sanction covers both the prisoners who reject the treatment and those who accept it. And, fourth, due to the promotion of consent understood in the terms established by BUENO ARUS would not cease to be a fallacy responsible for concealing the imposed treatment. *“In the penitentiary area where there is a situation of no freedom, any benefit not received has the same nature as a penalty. Whether the treatment is accepted or not determines the transfer to an open regime center, we can not understand in what terms the freedom to accept it is conceived. From these reflections it is deduced that if the law has opted for the formula “will be promoted” it is necessary that this precept be complemented with another one in which the limits of this promotion are established, in order to find out if it really exists or not free collaboration of the prisoner”* (MAPELLI CAFFARENA, 268).

Upon entry of a convict in a prison, either as a preventive or as a prisoner, once identified the deprivation areas, needs and interests of the convict, as established in Article 20 of the PR, the technical team will develop the Individualized Program of Intervention (PDI) in the case of preventive or treatment (PIT) in the case of condemned.²¹ The elaboration of this program, according to the activities catalog of the center, will be carried out by the technical team, which will determine, in turn, the proposal for internal classification. When it comes to compliance with a custodial security measure (internment in a psychiatric center, internment in habits control center, or in a special educational center) in a “polyvalent prison”²² will be formulated, in accordance with the provisions of Instruction 19/2011 (regarding compliance with the security measures of the prison administration), the so-called Individual recovery program, which will include the different points contained in article 20 of the PR. The aforementioned

²⁰ Bueno Arús, F., “Notas sobre la Ley General Penitenciaria”, *Revista de Estudios Penitenciarios*, nº 220-223, 1978, pp. 115-116.

²¹ V. Articles 9.1, 10.2, 16, 36, 69.1 of the General Penitentiary Organic Law.

²² Penitentiary regulation thus defines polyvalent establishments: “one. Multipurpose establishment is understood to be that one fulfills the various purposes provided for in articles 7 to 11 of the General Penitentiary Organic Law”.

Instruction regulates this possibility, allowing the fulfillment in a polyvalent prison of any of the custodial security measures.

The Individualized Program for Intervention or Treatment will be approved by the treatment board, under Article 273 of the PR, within two months of the prisoner's admission. Instruction 12/2006, which establishes the protocol of action for the programming, evaluation and incentive of activities and treatment programs for prisoners, provides us with its specific format, which is as follows: Analysis of deficiencies, requirements and interests; specific objectives; priority activities; complementary activities; and observations. For this purpose, the educator will inform the prisoner about the catalog of activities in the initial interview he has upon entering prison. The program will be communicated to the prisoner in order to address the complaints or requests raised by his treatment, and a copy of the PIT will be delivered to him at that moment. And what represents the greatest importance that the acceptance of the programming made will have a voluntary nature, leaving a record of the same to the signature of the prisoner in the PIT.²³

Returning with the systematized objections above to the re-socializing work, and taking into account that the essence of reintegration lies in enabling the person deprived of liberty to contact the outside world (CID MOLINÉ 1998: 47), it is easily concluded that *“It is contradictory to reintegrate a subject into the social framework whose structural inequalities have played a decisive role in the generation of criminality: it would be to put him back in criminogenic circuits. Equally contradictory would be talking about resocialization of individuals that were never integrated. And finally, it seems problematic to try to prepare individuals to live in freedom, through the use of a criminal system that moves substantially around the deprivation of liberty”* (TERRADILLOS BASOCO 1981:22).

The conclusion is that there is no sense in re-socializing the offender to integrate him/her into a society that is itself criminogenic, as highlighted by SILVA SÁNCHEZ (1992.29), stating that if the re-socialization treatment wants to be successful it must be addressed not only to a modification of the behavior but of the internal attitude, which would suppose an unjustifiable interference in the rights of the individual.

In short, it is an illusion, an unattainable chimera, because you can not educate for life in freedom depriving that freedom (NEUMANN 2001: 191). In this context that I have been exposing, it is difficult to counteract the assertion that an execution of the prison sentence, although guided by a constitutional mandate to social reintegration, may lead to a true re-socialization of the prisoner. *“Educating for freedom in conditions of no freedom is a kind of squaring of the circle of difficult solution”* (HASSEMER y MUÑOZ CONDE 1989: 154).

²³ The merited instruction states that the overall assessment of the prisoners participation in his/her treatment project will be carried out every six months, coinciding with the revision of the degree; which has earned him important doctrinal criticism by linking the result of treatment to grade progression, attributing to the treatment a certain "coercive" character.

It will be understood that one can not be very optimistic about the possibilities of treatment in the current Spanish penitentiary system, even admitting all the honorable and surely very few exceptions that under this generic statement need to be made. (HASSEMER and MUÑOZ CONDE.1989: 157).

“Does it mean then that we have to abandon the ideal of socialization?” MIR PUIG asks. (1989.39). According to the opinion of this author, one should begin by rejecting any attempt of treatment imposed against the will of the affected party. Then re-socialization should not be abandoned radically, but should be understood as the achievement of fundamental social goods in a Social and Democratic State of Law. On the other hand, it is advisable to warn about the dangers of the maximum programs (which are not limited to the subject being able to respect the law externally, but also aspire to achieve the ethical conviction of the individual and their internal adherence to values). Then they are preferable minimum programs (away from a possible indoctrination) that only seek to facilitate a future life without crime: criminal law must not invade the field of conscience, the aforementioned author pronounces.

DE LA CUESTA ARAZMENDI (1993: 19) warns about the danger of abandoning the re-socializing ideal, as it will lead to an exclusive focus on the prison intervention in custodial and repressive aspects, with a serious risk of converting prisons into mere deposits of humans.

If the deprivation of liberty should be geared towards re-education and social reinsertion, re-socialization can not only be the goal of treatment, but must affect the prison intervention as a whole, or what is the same: the prison system must also be a re-socializing penitentiary regime (DE LA CUESTA ARAZMENDI 1989: 59).

This means running away from the cemetery-prisons (BERISTAIN 1986: 194), and resolutely fighting for the humanization of the penitentiary institution, a condition that is necessary for resocialization work. A presupposition for this humanization is undoubtedly, in addition to the modification of the current environment in prisons characterized by overpopulation and lack of resources (DE LA CUESTA ARAZMENDI.1988: 115), the consolidation and legal and jurisdictional strengthening of individual guarantees in the interior of the prison, through a more transparent regulation of the rights of the prisoners and prison procedures, as well as by strengthening the figure of the prison supervision judge, not without problems, but of elementary importance.

In his striking work “What is left of the re-socialization?”, MIR PUIG (1989: 41) concludes that exhausted the rehabilitating idea to stop the commission of crimes, only remains to attribute to this a minimum sense, offering the inmate voluntary acceptance of the treatment, all the methods that it offers to allow its return to the society, and to avoid to a greater extent its de-socialization:

“Having verified the incapacity of re-socialization to offer a global response to the problem of criminality, it is necessary to facilitate, as far as it is lawful,

everything necessary and possible for the reincorporation of the offender into society, by means of a strictly limited version of the re-socialization: because it does not have to pretend to hide the afflictive and negative character of the punishment for the prisoner, avoiding the euphemism and recognizing that it is not the good of the prisoner, but the need for social protection that really justifies the penitentiary intervention. Re-socialization can not claim to justify punishment as a necessary good for the offender. The only thing that can claim to justify re-socialization is the help that the prisoner voluntarily admits in order to his subsequent social reintegration”.

Recently RIVERA BEIRAS (2017: 41), based on the work of Ferrajoli, starting from the premise of the “*contradictory nature*” and the “*total institution*” of the jail, likewise that education to be free from the bars, that is to say, from inside prison, it is a contradiction.

I must share the cited criteria of the Spanish author when he says, that the few or no rehabilitative results offered the prison, it is necessary to proceed to a “*decarcation*” through a “*public policy of reduction of prison*”, designing a program based on a series of master lines, among which it is important to “*take seriously*” the protection and absolute respect (radical guarantee) of the fundamental rights of prisoners, to fully prosecute the execution of custodial sentences (in respect of those criminals from which the decarceration). I must clarify that the theory of Rivera Beiras proposes the abolition of jail, no criminal.

IV. FINAL CONSIDERATIONS

Even though our Constitutional Court has been maintaining for decades, insistently, that we are not in the presence of a fundamental right in the strict sense, because not all rights, located within the first section, the second chapter of the Title I, have that condition (as for example, in ATC 360/1990, of October 5, where it was stated that the fact that the normal content of the precepts located in the first section, the second chapter, of Title I are rights and freedoms, does not mean that each and every one of its extremes constitutes this type of legal institutions), I can not but express, in the face of this jurisprudential line, my surprise and stupor for the lack of courage of the Constitutional Court in this matter, by the way, with the utmost respect inspired by our Tribunal of Constitutional Guarantees.

It considers that among articles 14 to 29 CE, there are also constitutional principles, general principles of law, organizational criteria, principles of order, institutional guarantees, procedural guarantees... which has been the argument put forward by other authors (which we have cited in the previous epigraphs of this chapter) and by the CC itself, to consider it a mere guiding and informative norm of penal and penitentiary policy. In any case, while it is true that in the first section are included, not only fundamental rights, but other guarantees and constitutional principles, it seems that in this case, due to the concurrence of the reasons set out below, its location expressed by

the fathers of the Constitution in the chapter of fundamental rights is decisive for its consideration as a fundamental right.

In my humble opinion, if the constituent had intended that the purpose of the reintegration and social reeducation be mere guiding principles of penal and penitentiary policy, they would have been placed in the third chapter that takes as its rubric "Guiding principles of social and economic policy ", instead of including it in the second chapter, relative to "*Rights and freedoms*", it has been that, therefore, the constituent will. Moreover, I argue that the jurisprudential line maintained is contrary to a systematic interpretation of article 25.2 SC, in relation to the principle of material equality, essence of the social state (article 9.2 SC²⁴), to recognized human dignity, as a fundamental value of our ordering, in the frontispiece of the Title I, in its article 10 (that impregnates the entire Title as an indispensable presupposition of the rest of rights and duties), to the will of the constituent to grant the maximum level of protection that our *norma normarum* grants to the rights contemplated in articles 14 to 29, and ultimately, to the rule of law (which ensures the imposition of the Law as an expression of the popular will, as proclaimed in the Preamble) by welcoming the theory of relations of special subjection that, as our constitutionalist doctrine has shown, it violates fundamental rights of the prisoners and is contrary to the principle of legality.

I must acknowledge that the conception of the purpose of reinsertion of custodial sentences by the Court as a mandate to the penal and penitentiary legislator, and the possibility that they have other purposes, including remuneration, have devalued the legal status of prisoners, until turning them into a second category of citizens. The reason why the maximum interpreter of the Constitution does not configure as a fundamental right article 25.2, lies in the assumption by the former of the theory of relations of special subjection or special supremacy, whose primary purpose was to ensure security and the good order of the prison, and not the rehabilitating purpose.

I must add that it has not contributed to an adequate characterization of article 25.2 as a fundamental right of inmates, the LOGP with its vague and generic expressions, as security criteria, interest in treatment and good order of establishment (excerpt 51 LOGP), that far of the resocialization mandate of article 25.2 SC, they grant a discretion, if not arbitrariness²⁵, to the penitentiary administration, which is incompatible with the scrupulous respect to the fundamental rights of the prisoners.

In summary, I believe that the proclamation in our article 1 SC, on Spain as a Social and Democratic State of Law, and the constitutional mandate of article 25.2, make

²⁴ *The significance of "Existential Procurement", in the terminology of E. Forsthoff, which falls on all public authorities, for the benefit of all citizens, including prisoners who have not lost that quality as a result of internment, obliges them to facilitate the participation of those in political, economic, social and cultural life.*

²⁵ Constitution guarantees, among other principles, the interdiction of the arbitrariness of public powers in its Article 9.3.

the principle of re-socialization an unavoidable requirement to achieve, through it, a minimum humanitarian and penitentiary law, material equality (essence of the Social State, Welfare State) of the rights of prisoners with respect to free men, with the only exception of the limitations arising from the triad set forth in article 25.2.

I finish with a reflection made several decades ago, but which not for this reason has lost a whit about its consistency and credibility. MUÑOZ CONDE (et al 1989: 159) recognizes:

“that one can not be optimistic about the future of prison treatment. But this does not mean that the improvements and the humanization of the penitentiary system must be abandoned, not only for strictly humanitarian reasons, but because we live in a society oriented towards consequences, in which none of its institutions can be based on its new symbolic value, without contributing anything positive to society. And prisons are one of those institutions that nobody knows what they are for, but rather to increase the pain and despair of the most disadvantaged. The final destination must be the disappearance. But while this is not achieved, and it seems that there are still many years left for this to happen, something must be done. And that something can not be anything other than to avoid as much as possible a greater harm than the deprivation of liberty itself means, but above all to avoid a greater de-socialization (which does not mean re-socialization) of the delinquent, already in itself sometimes quite de-socialized. This is, then, the only meaning that penitentiary treatment can have today. Procure the non de-socialization of the offender, avoiding the de-socializing defects that are inherent in any deprivation of liberty”.

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