NATIONAL COUNCIL OF ETHICS FOR THE LIFE SCIENCES

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OPINION ON COERCIVE FEEDING OF INMATES ON HUNGER STRIKE

(May 2013)

I. General context

1. The Directorate General of Prison Services, through the Deputy Director-General, asked the National Council of Ethics for the Life Sciences (CNECV) for an opinion on coercive feeding in cases of hunger strike in prisons.

The CNECV heard Rui Sá Gomes, Director-General of Prison Services, and Erica Cardoso, responsible for the Health Care of the National Prisons, who have said there is no record of cases in which 'coercive feeding' of an inmate on hunger strike was necessary, even though, in their view, the applicable law so provides. In the recorded cases of hunger strike, the inmates abandoned it after their transfer to the prison hospital, which occurs, according to the recommended procedures, a week after the strike began. However, in the event of an order from the Director of the prison that determines 'coercive feeding' under medical supervision, it is likely that there will be a conflict of duties since such an order is contrary to the content of the standards of the Code of Medical Ethics. The issue could arise in a situation of prolonged hunger strike whereby the loss of the inmate's life is imminent and he/she has lost discernment. Ethical guidelines are therefore necessary on the procedure to be followed in these extreme situations.

The CNECV also heard Dr. Isabel do Carmo, who shared her experience when, in the course of protective custody, she resorted to a hunger strike; and Dr. Pereira da Silva, who enlighted the constitutional framework of the issue.

2. Legal Framework

Paragraph 3 of article 35 of Law no. 115/2009, of 12 October (*Code of Execution of Sentences and Custodial Measures*), whose title is '*health care coercively imposed',* provides that medical-surgical treatments and interventions and feeding may be coercively imposed 'if there is danger to life or serious danger to the body or to the health of the inmate and if his/her condition removes the discernment required to evaluate the meaning and scope of refusal'. Such interventions, treatments and coercive feeding should be limited to 'the necessary', 'cannot create danger to life or serious harm to the body or the health of the inmate' (paragraph 4) and 'are ordered by decision of the director of the prison and executed or given under medical supervision, without prejudice to the provision of first aid when the doctor cannot arrive timely

and the delay would involve danger to life or serious harm to the body or health of the inmate' (paragraph 5). The interventions, medical-surgical treatments and coercive feeding are immediately reported to the Director-General of Prison Services (paragraph 6).

Articles 65 and 66 of Decree-Law no. 51/2011, of 11 April (*General Regulations of Prisons*), provide for the particular situation of an inmate on *hunger strike* and *the monitoring of the hunger strike*. In addition to information on the inmate's directive and his/her hearing by the services responsible for monitoring the execution of the sentence, the way to monitor the situation in terms of accommodation, meals and clinical services are provided for, as well as providing information about the possible harmful effects and risks arising from the strike. Article 65, in its paragraph 8, says that 'the meals are delivered to the inmate at the usual time in his/her accommodation and, if he/she expresses his/her intention to continue the hunger strike, they are immediately removed'. Although it refers to the possibility that the inmate's condition may require his/her admission to a health unit outside, there is no reference in this decree-law to the possibility of a decision determining 'coercive feeding' of the inmate on hunger strike.

In order to standardize the procedures of authorities at various prisons in relation to inmates that start a hunger strike, the General Directorate of Prison Services issued Circular no. 2/GDG/2002 and determined the completion of the forms attached therein - *Communication bulletin of start/end of hunger strike* and *Hunger strike – records* (record of daily monitoring of the clinical condition of the inmate on hunger strike).

Pursuant to paragraph 1 of article 75 of Regulation no. 14/2009, of 13 January 2009 (*Code of Medical Ethics*), 'The doctor cannot coercively impose medical examinations, treatments or feeding on prisoners or detainees that are able to exercise their autonomy'. In case of danger to life or serious danger to the health of prisoners or detainees, the refusal by the patient of the acts referred to in paragraph 1 of this article shall be confirmed by doctor that does not belong to the institution (paragraph 2).

It could be said that articles 65 and 66 of Decree-Law no. 51/2011 contain special rules, applicable to the case of hunger strike, in view of the general rules of Law no. 115/2009, which they will override, or that both laws complement each other. It is not for this Council to take a position on such issues. It has to be taken into account, in the light of article 75, paragraph 1, of Regulation no. 14/2009, that force-feeding of an inmate without medical assistance can easily be a violent assault to his/her personality.

3. *Declaration of Malta*

The Declaration of the World Medical Association on hunger strikes, approved by the 43rd World Medical Assembly in St. Julians, Malta, in November 1991 (*Declaration of Malta*), establishes principles and guidelines aimed at guiding the performance of doctors in situations of hunger strike of detainees.

The ethical dilemma is formulated as a conflict between the principle of beneficence, which determines the doctor's intervention to save a human life, and the respect for individual autonomy of the patient, which precludes that doctors act on his/her behalf if there has been a valid and informed refusal of this intervention. This conflict is stated as apparent when a hunger striker has issued instructions not to be revived ('resuscitated') if he/she is about to die.

From the principles and guidelines formulated in the Declaration of Malta, one understands that feeding under threat, coercion, force or through immobilization of the inmate is never ethically acceptable, because it is a form of inhuman and degrading treatment, even if the intention is beneficial. These situations aside, and also as a general guideline, force-feeding is unacceptable in the face of an informed and voluntary refusal.

Beneficence involves respect for autonomy, not necessarily implying the prolongation of life at all costs, in disregard of other values. However, one has to point out the need for the doctor to evaluate the degree of individual autonomy in each case and check daily if the patient wants to continue the hunger strike and what his/her wishes are regarding treatment should he/she become unable to make a conscious decision. The doctor should collect the clinical history of the striker and examine him/her in as much detail as possible. The information to be provided about the consequences of the hunger strike to the health of the striker must be complete and clear. The mental capacity of the striker must be evaluated and that he/she is not subject to any situation of pressure, and should be taken away from circumstances that could lead to this.

Any treatment administered to the patient should be done with his/her approval, and he/she may refuse certain forms of treatment or intervention. Should the striker be confused or unable to make a 'safe and sound' decision, or has gone into a coma, it is up to the doctor to make the decision to act in the best interest of the patient, taking into account the decision made by him/her during the hunger strike.

Doctors and other health professionals should not exert undue pressure on the hunger strike to stop the strike. The doctor who does not accept the patient's decision to refuse artificial feeding, risking death, can be replaced by another doctor in the patient's care. The hunger

striker must also be given the opportunity to have the opinion of a second doctor, as well as allowed to be assisted by the latter; but, the striker being imprisoned, this substitution can only take place after consultation and consent of the doctor appointed by the prison.

II. Explanation of ethical dilemmas

1. Issues

The ethical dilemmas arise in the event of persistent refusal to eat, and for a length of time, and are of special relevance when the inmate goes into a state of unconsciousness or lack of discernment capacity, so there is a strong risk of permanent health damage or death. The dilemmas emerge from conflict between respect for the autonomy of the inmate and the prison administration's intervention duty for the benefit of the life of the inmate entrusted to them; with regard to doctors and other health professionals, the dilemma arises from the conflict between the order received by the prison authority (if it is for force-feeding) and respect for their code of ethics and the autonomy of the inmate. Such dilemmas can be expressed in the following questions:

- Will force-feeding of the inmate on hunger strike for the benefit of his/her life be ethically acceptable?

- Will the order from the director of the prison ordering the coercive feeding of the inmate on hunger strike be ethically acceptable, when the inmate's life is in danger or there is serious danger to his/her health?

- Will compliance with the order from the director of the prison determining the coercive feeding of the inmate on hunger strike by the doctor be ethically acceptable, regardless of the doctor's personal evaluation or despite the free and informed refusal, expressed in advance by the inmate?

2. Articulation with the AHCD Law

An issue raised by the Declaration of Malta is the application in a prison context of the AHCD Law (Law no. 25/2012, of 16 July: *Regulates advance health care directives (AHCD), particularly in the form of living wills, the appointment of a health care attorney and creates the National Living Will Registry*), in particular with regard to respect for the inmate's decision to refuse 'artificial' feeding:

- in AHCD made before entering the prison, refusing medical treatment and 'artificial' feeding or appointing a health care attorney;

- in AHCD already made after entering the prison, even if still outside the context of hunger strike, but already in circumstances that may jeopardize expressing informed and free will;

- in AHCD made after the start of the hunger strike, in view of the situation itself and as a way for the inmate to insure that his/her wishes will be respected with regard to refusal of 'artificial' feeding in extreme situation.

Advance health care directive is understood to be the declaration in a document, of the will, conscious, free and informed of the grantor's likelihood of receiving, or not receiving, certain health care, 'if, for any reason, he/she is unable to express his/her personal will autonomously' (article 2, paragraph 1 of Law no. 25/2012), particularly with regard to being subjected to artificial support of vital functions (article 2, paragraph 2 *a)*). The law considers legally non-existent the advance health care directive whose compliance can deliberately cause the death, unnatural and preventable, of the declarant, 'as provided for in articles 134 and 135 of the Penal Code' (article 5, *b)*). The person must be over 18 and able and that the directive is signed in person before a notary or duly authorized official of the National Living Will Registry (article 2, paragraph 1, and article 3, paragraph 1). The advance health care directives should not be respected when it is proved that the declarant would not want to abide by it or when the circumstances calling for their application do not correspond to what he/she had provided for when making the directive (article 6, paragraph 2). The directive is revocable or modifiable at any time, by its author, even if by oral statement (article 8). An attorney may be appointed to decide on the health care to be received by the declarant, when the latter is unable to express his/her will personally and autonomously (article no. 1, paragraph 1).

As portuguese law regards the reasons why the author of the directive is unable to express his/her will as irrelevant debilitation due to hunger strike can be seen as an incapacity of expressing the author's will; as to the consideration that this debilitation stems from a deliberate act and that, to that extent, death could be avoided, the reference to articles 134 and 135 of the Penal Code shows that the 'legal non-existence' of AHCD only occurs when it implies active intervention of a third party (that kills, incites to suicide or helps for that purpose), which is not the case. On the applicability of Law no. 25/2012 in the particular context of inmate on hunger strike, there remain only some doubts as to what does 'artificial support of vital functions' mean: behind the concept do we consider only the method

(nasogastric tube, parenteral route or other similar one) or is there also the idea that this is a last means to prolong life when none other can result (which would exclude the direct application to the case of the system of advance health care directives)?

Not having to make legal interpretations, but only to express ethical considerations, having safeguarded respect for the standards and principles of the Constitution of the Portuguese Republic, where the right to life is enshrined as fundamental personal right and, as such, inviolable (article 24), the opinion of this Council is:

- That the autonomy of the human person, thought of in ethical terms and religious considerations aside, entails the development and the continued pursuit of individual projects and that these may include risk-taking that may ultimately undermine life itself;

- That, without prejudice to the solidarity and possible advice, it is not legitimate to deprive an autonomous person of the freedom to make decisions that only he/she can make; it may be his/her last act of freedom before a constraint judged unbearable;

- That, to this end, it is however necessary that his/her will is expressed in advance, consciously, freely and clearly, in conditions similar to those in which any other person can make, that provides for the possibility of a situation in which, involuntarily, vital functions can only be kept 'artificially'.

Thus, the inmate's directive, before the situation of imprisonment he/she finds him/herself in, that if he/she decides to go on hunger strike, he/she does not to wish to be fed coercively, even from the moment there is imminent risk of loss of his/her vital functions, should be as respected as any person's who, being free, expresses his/her will in the same direction.

The question is whether –and to what extent– the advance health care directive must be respected when it is made after the period of imprisonment has started, especially after, inside it, the hunger strike begins. It will always be an advance health directive, taking into account the anticipation regarding the moment the inmate is no longer able to express his/her will autonomously.

To what extent can the prison situation constitute or encourage means of pressure on the inmate? To what extent can the disturbance caused by severe limitation of physical freedom

distort the will of the inmate? To what extent should the health professional and/or the prison authority interfere with the comprehension of the manifestation of the will of the inmate?

On the other hand, whether the directive is produced before or after arrest, what are the circumstances which, occurring at a time when the inmate is unable to freely maintain his/her decision, should lead to non-compliance with the directive previously made, by changing the assumptions on which it is based? What is the margin of decision that will be left to the doctor and other health professionals, as well as prison authorities, from the time the inmate goes into a coma or a condition in which he/she can no longer validly express his/her will?

3. The specificity of the inmate's situation in the evaluation of his/her autonomy

The particular existential circumstances of the inmate should be considered, not only to appreciate the ethical legitimacy of any reasoned decision of the director of the prison to order his/her coercive feeding while on hunger strike, but also to assess the degree of his/her autonomy, in particular with regard to the ability to refuse such feeding.

The inmate retains all rights compatible with the situation of confinement and, therefore, autonomy with regard to decisions about his/her own person. The question is whether, assuming the consequences of the hunger strike, he/she does so with the same degree of autonomy with which he/she would if not in prison.

In addition, when assessing the freedom of his/her decision, it should be borne in mind that it is a different situation from other situations of refusal of medical treatment, since the inmate's purpose is to put pressure and manifest him/herself; it is not, first and foremost, to let him/herself die. From the records made available, it appears that the reasons commonly invoked for the beginning of a hunger strike are above all forms of pressure to obtain a change of prison or probation, the satisfaction of demands relating to food or the accommodation, or the removal of a certain guard. The 'artificial' feeding to save the life of an inmate, whose last claim of autonomy is the option for a hunger strike, well aware that this may result in the loss of his/her life, may constitute a serious violation of personal dignity; but one must take much care in checking that the assumption of that last risk is really the manifestation of a free and informed will. The recommendations of the Malta Convention are, on this point, in the opinion of this Council, entirely relevant: the daily checking by the doctor, of the real will of the inmate and, in the case of an unambiguous advance health care directive, that there is no change until such

time that there is the fatal loss of faculties that would allow him/her to reiterate it, is a fundamental assumption of effectiveness of continued refusal of food.

When in doubt, neither the prison authority nor the doctor should, in the opinion of this Council, have any decision-making power: artificial feeding, with minimal suffering to the inmate and respect for his/her dignity, must be done.

The law entrusts the inmates (convicted or in protective custody) to the prison authorities, who are in charge of watching them. The prison situation can generate risks for the inmate and there is the duty of supervision and performance by the prison administration to ward off the dangers to his/her life and safety. The constraints and restrictions imposed on the inmate simultaneously generate obligations on the part of the State related to health care, food, etc. These restrictions and obligations are different from those that involve citizens who are not in prison. The fact that the inmate makes the decision 'to starve to death' is usually connected to his/her prison situation and this may imply a reduced degree of self-determination. On the other hand, one must take into account the wide disparity between the value threatened (life) and the purposes that the inmate seeks to obtain with the hunger strike. When in doubt about the existence of free and informed will, the prison administration and officials have the duty to intervene to prevent the death.

In this context, the transfer of the inmate to the prison hospital, before reaching the critical moment of loss of mental faculties, is a good practical measure, as long as in the new prison the inmate's right to self-determination is not violated; the simple change of environment may cause the inmate to rethink his/her decision or, on the contrary, confirm it with more determination.

Having said that, the elements are there to answer the questions formulated before.

The statement, by an inmate, that under no circumstances will he/she wish to be fed if he/she goes on hunger strike, or, once this started, that his/her will is to refuse force-feeding, whatever the consequences, will have the same treatment as a statement of the same type before the detention itself.

But, regardless of the solemnity of this statement (before a notary, as an advance health care directive issued in legal terms; before the doctor and the prison authorities, in particular by filling in the form that has been used in the prison services), it will never exempt the doctor, once the strike has started, from a daily contact with the inmate, in which he/she will try to

make the inmate realize the plausible consequences of persisting with the strike. The doctor should also check the absence of pressures or conditions conducive to them taking place and find out if the previously expressed will is maintained, in particular in relation to the time when he/she will no longer be able to express it. These judgments may only be made specifically, by considering all circumstances which may assist the medical conclusion about the degree of the inmate's understanding of the consequences of the refusal to eat.

Should the refusal persist, so that there are no doubts about the lucid acceptance of all its effects, and there occurring the moment of loss of consciousness, the artificial feeding of the inmate is, in principle, ethically excluded.

But there may be a change in the assumptions on which the manifestation of the will took place. Imagine, for example, that during the strike a claim of the inmate is satisfied, albeit partially, even if it doesn't occur as a result of the strike. In this case, as he/she is unable to express her/his will, the artificial feeding is ethically advisable, and not feeding the inmate may even represents a serious lack of ethics in the duties of care incumbent on the prison authority.

Finally, the Council argues that, outside of the circumstances invoked (doubt or alteration of assumptions), it is unethical to start coercive feeding after the inmate's loss of consciousness, running the risk of, if he/she should recover his/her mental faculties, there being a recurrence of the strike, which in turn could be followed by another period of force-feeding when the inmate again lost consciousness, and so on from a theoretical point of view. The assessment of the situation should be, as a rule and as much as possible, prior to reaching this critical moment, under penalty of there occurring inhuman actions that, needless to say, must be vigorously condemned from an ethical point of view.

Regarding all the remaining issues, this Council agrees with the guidelines set out in the Declaration of Malta.

III. Conclusions

1. The CNECV examined the legal framework and practices in monitoring the inmate on hunger strike by the prison authorities and clinical services. In its opinion, the procedure for monitoring the inmate on hunger strike overall corresponds to ethical requirements in this situation, but it seems that the medical services must be more clearly instructed so that daily,

they not only verify the clinical state of the inmate (article 18 of Circular no. 2/GDG/2002), but also give him/her all the information about the respective evolution and, to do this, check the persistence of an informed will to continue the strike, whatever the consequences.

2. In any case, the monitoring should be carried out in respect for the rights of the inmate, in particular for the right to his/her privacy and the confidentiality of data, as well as in the performance of the doctor's confidentiality obligations.

3. Force-feeding by means of physical coercion or violence is not ethically acceptable, in particular through the immobilization of the inmate. When it is admissible, coercive feeding implies resorting to the so called 'artificial' feeding (for example, by nasogastric tube or parenteral route), within the framework of a medical decision and under medical supervision.

4. Inmates have the right to refuse medical treatment, even when life support is being refused, as long as they have the capacity to decide and are fully aware of the consequences of the refusal.

5. The doctor should take into account a possible Advance Health Care Directive, issued in accordance with Law No. 25/2012, of July 16, that expresses the clear and unequivocal will of the inmate not to be subjected to artificial support of vital functions, in particular checking if the declarant is capable of giving conscious, free and informed consent (article 4, *c)*). It should also take into account that, by law, the advance health care directives should not be respected when it is proved that the grantor would not want to abide by them, particularly if there were changes in the circumstances relating to the imprisonment.

6. It should also be possible that the inmate, after the beginning of the imprisonment and even after starting the hunger strike, declares, before the prison authorities and the doctor, that under no circumstance does he/she wish to be submitted to any treatment of artificial support of vital functions. The inmate being in full possession of his/her faculties and after verifying that his/her consent is conscious, free and informed, this directive must also be respected.

7. The doctor should check daily that the inmate's will is maintained, while the latter remains conscious, clarifying him/her on the evolution of his/her clinical conditions and its consequences.

8. Informing the inmate about the possible harmful effects of a hunger strike to his/her health should include the warning that a prolonged hunger strike can lead to unconsciousness

and death itself, in order to elucidate the inmate about the treatments and medical interventions that may be needed to save his/her life.

9. The inmate having unequivocally expressed his/her will, artificial feeding should be excluded when he/she is about to lose his/her mental faculties. Not so in case of doubt about his/her will or fundamental change of the circumstances on which it was based.

10. In the absence of an express refusal, it is not possible to conclude that the inmate is willing to go on hunger strike until death, that is, that death is included in his/her predictions, and seen as a consequence he/she wanted. The hunger strike should not be read as a refusal of the inmate to be fed 'artificially' in an extreme situation.

11. Without prejudice to the doctor's specific evaluation, in accordance with the procedure referred to, the execution of any order from the prison administration about 'artificial' feeding should not be imposed when the inmate, in possession of his/her capabilities and in accordance with his/her informed free will, has expressly refused it.

Lisbon, 10 May 2013

The President, *Miguel Oliveira da Silva*

The Rapporteurs, *Rita Lobo Xavier, José Lebre de Freitas.*

The present Opinion was approved at the plenary meeting of 10 May 2013. Besides the Chairman and rapporteurs, the following Counsellors were present:

Agostinho Almeida Santos; Ana Sofia Carvalho; Carolino Monteiro; Francisco Carvalho Guerra; Isabel Santos; João Ramalho-Santos; José Germano de Sousa; Lígia Amâncio; Maria do Céu Patrão Neves; Michel Renaud; Pedro Nunes; Rosalvo Almeida.

Hearings

Rui Sá Gomes, Director-General of Prison Services;
Erica Cardoso, responsible for the Health Care of the National Prisons;
Professor Isabel do Carmo, Santa Maria Hospital;
Jorge Pereira da Silva, Jurist.