

**PRAGMATICS OF THE INTERACTION
PATTERNS IN A SPANISH COURT:
A CASE STUDY**

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*"No conozco esa ley", dijo K.
"Mira, Willem, admite que no conoce la ley,
y a la vez afirma ser inocente".*

"I don't know this law", K. said.
"Look, Willem, he concedes that he doesn't know the law
and at the same time claims to be innocent".

F. Kafka, *El proceso*

1. INTRODUCTION¹

K.'s warden joke, as T. Ziolkowski (1997) outlines, is in fact a direct reformulation of one fundamental legal principle according to which "No one can claim innocence on the basis of ignorance of the existing criminal law" (§ 3 Austrian Criminal Code of 1852). In the words of the Spanish civil code, the general statement is that "*La ignorancia de las leyes no exime de su cumplimiento*". ["Ignorance of law does not exempt from its fulfilment"] (art. 6 CC). Positive legal systems have pervasively tried to guarantee the efficacy of their norms against any alleged claim of "ignorance" or "unawareness" of law. This general provision, as many other legal principles, results from a historical process of codification of law. After long-lasting nineteenth-century codification controversies, twentieth century law emerges in the European States as an autonomous and coherent system of norms which is claimed to be "self-contained"². In the last decades of the twentieth century, however, the so-called crisis of "normative models" seems to have run parallel with the crisis of the State and the crisis of the representative democracy.

The contention of this paper is not to review the reflections of these crises in the recent works of both legal and social scholars. Rather, the aim is to offer some empirical data about the emergence of new patterns of interaction in legal settings, in order to give an account of the transformation of our contemporary Spanish law system. If new patterns of interaction are taking form in contemporary Spanish law, they must happen to occur in situated contexts (in both legal organizations and institutions) and in particular situations where actual people -some of them being aware or partially aware of certain changes- interact (legal professionals, paralegal professionals, lay people). The steps towards a new model must be then carefully described by means of a situated micro-analysis.

The main purpose of this paper is to offer some clues of this legal transition, focusing the analysis on a topic that has been (and still is) very controversial in the contemporary Spanish society: the conscientious objection to the military service. The analysis will largely rely on ethnographic data obtained in a criminal case recording³. Nevertheless, as far as the information needed to frame the analysis in a legal transition context is not entirely contained in this particular event, a broader ethnographic work was carried out⁴. One main assumption here is that the legal decision to be reconstructed must be framed into an interpretative

context where different dimensions of knowledge are to be considered: (i) the participants' background (their professional status, membership, affiliations, etc.); (ii) the organizational background (practices, instructions, rules); (iii) the legal background (legal procedures, norms, jurisprudence); (iv) the political background (criminal policies, institutional conflict, public discussions, etc.). The retrieval of a multidimensional frame of ethnographic knowledge allows the interpretation of the empirical data in order to provide further insight into the main hypothesis entertained: (i) the crisis of the Spanish judicial system is partly related to the inner disfunctions and inefficiencies inherited from the recent non-democratic past; (ii) despite legal professionals' awareness of these inconsistencies, the effort to overcome the current problems of the judicial system clashes with the absence of alternative devices to render justice more accessible to the citizens (or to put in words of the 1978 Spanish Constitution, to open "the citizens' participation in the Justice Administration").

Let us conclude this brief introduction with the words of a Spanish judge expressing this sort of "K.'s malaise" about our own *fin de siècle* law paradigm.

El artículo 6 del Código Civil establece que la ignorancia de la ley no excusa de su cumplimiento, algo bastante significativo de hasta qué punto se ha minusvalorado la necesidad de hacer comprensible la conducta que se pretende a través del Derecho. (...) Así, el Derecho, cuyo único objeto es regular las conductas sociales de los seres humanos, vive tan de espaldas a los comportamientos que no es extraño que resulten estériles los esfuerzos por salir de la crisis en la que, desde hace mucho tiempo, la sociedad moderna ha hundido a la Justicia (M. Carmena, 1998)⁵.

2. CONSCIENTIOUS OBJECTION: A CONTROVERSIAL CRUX

2.1 Conscientious objection in late Francoism

In 1971, the European Council (Resolution 22-1-71) exhorted the Spanish Government to modify the extreme severity of laws towards the increasing number of conscientious objectors, coming from a wide spectrum of political tendencies:

La objeción de conciencia en este país comenzó siendo un fenómeno fundamentalmente urbano en el que confluían ideas marxistas, libertarias o cristianas y que agrupaba inicialmente tanto a partidarios de las guerras de liberación como de las comunas rurales. Teniendo como referencia la lucha por la objeción de conciencia en Francia y los ejemplos de otras grandes campañas de desobediencia civil, estos primeros objetores al servicio militar se empiezan a organizar a principios de los años setenta para exigir que se reconozca el derecho a la objeción de conciencia y la alternativa de un servicio social sustitutorio (P. Ibarra, 1992)⁶.

The Military Justice Code of 1945 charged conscientious objectors with prison penalties ranging from six to twenty years⁷. Furthermore, as the exemption to the military service was not subsequently accorded, they could be prosecuted if the rejection persisted. That legal regulation was attenuated in 1973

with the lowering of prison penalties -from three to eight years- and the consideration of the exemption of military duties. However, laws introduced a life inhabilitation to act political rights and to access public jobs. With the exception of Rumania and Albania, Spain reached the new democracy with the most severe punitive system to repress conscientious objectors (V. Sampedro Blanco, 1997).

2.2. Conscientious objection after the 1978 Spanish Constitution

The new political frame inaugurated by the 1978 Spanish Constitution opens the way for a full exercise of conscientious objection. Two years earlier, while imprisoned conscientious objectors benefited from a general amnesty (L.D. 30-7-76), the recently created Conscientious Objectors Movement⁸ (MOC) and other pressure groups started their vast campaign to achieve a regulation of conscientious objection similar to the rest of the European countries⁹.

The 1978 Spanish Constitution acknowledges conscientious objection not as a fundamental right but as a cause of exception to the compulsory military service (art. 30 EC). It also makes a provision for a further legal development of its exercise, as well as for the setting-up of an eventual social service. In 1984, after the parliamentary discussion of several law projects, two norms were enacted to fulfil the constitutional requirement¹⁰. Beyond the traditional delay that usually features legal development of constitutional rights in Spain, this six-year gap seems to confirm a contrasted correlation: European countries with compulsory military services have restricted and delayed conscientious objection policies, whereas the most ancient and tolerant policies belong to those countries with more professional armies (V. Sampedro Blanco, 1997). Thus, it becomes clear that conscientious objection policies are deeply intertwined with defence policies concerning the overall transformation of the army models themselves:

Para comprender las tendencias al cambio de la organización militar hay que tener en consideración las presentes transformaciones derivadas tanto del nuevo entorno de las relaciones internacionales como de la propia sociedad nacional. De especial relevancia es el debilitamiento relativo de las formas centrales de la organización social que han sido características de la modernidad: el Estado-Nación, los mercados nacionales, la ciudadanía democrática y las fuerzas armadas de masas. Dicho de otra manera, se está produciendo un crecimiento sustancial de organizaciones sociales globales que han alterado las condiciones bajo las cuales los Estados-Nación pueden esperar ejercer un poder, mantener la lealtad de los ciudadanos o levantar y desplegar su poderío militar. Estos cambios van acompañados de un desplazamiento cultural de las actitudes y opiniones del público (J.A. Olmeda, 1997)¹¹.

In the late eighties, the consensus about the compulsory military service was already broken in Spain. Even within the army the positive opinion towards professionalisation was not unusual: in 1989, 53% of the high officers were for a professional army; in 1991, 81% of the high air officers declared the same preference (P. Ibarra, 1992). On the other hand, in 1997 a CIS survey showed a parallel evolution in the public opinion: 74'6% of Spanish citizens were for a professional army.

Meanwhile, the number of conscientious objection in Spain experimented an exponential growth. As a result, Spain leads nowadays the European ratios concerning the social incidence of conscientious objection (V. Sampedro Blanco, 1997): from 1985 to 1991, a number of 92.651 Spanish citizens were legally declared conscientious objectors by the National Council of Conscientious Objection (P. Ibarra, 1992); at the end of 1994, this number rose to 253.924, multiplying 32 times in a decade (V. Sampedro Blanco, 1997). In 1995, the percentage of conscientious objectors over the total of conscriptors was of 40% (V. Sampedro Blanco, 1997)¹². The 30th September of 1997 the requests amounted 551.539. The Chart 1 shows the evolutive trend requests in the last decade.

1984 Acts, born within this ambiance of widespread conscription's rejection (due to both inefficiency reasons and political or ideological attitudes), encountered the frontal opposition of many conscientious objection movements -claiming for law reform or civil disobedience- and the criticisms of several legal professional organisations. Far away from reducing the public debate, the regulation of conscientious objection achieved with 1984 Acts rendered the matter a controversial crux in social, political¹³, legal, and judicial settings¹⁴. We will focus now on the last two aspects in order to frame more accurately our ethnographic data analyzed below.

3. JUGGLERS OF LAW

Lo cierto es que la reforma [CP 1995] no ha podido ser más desafortunada. Es urgente que se proceda a modificar esos artículos en los que las penas a imponer consistan en restricciones parciales de determinados derechos y por períodos de tiempo no superiores a los dos años. Mientras no se modifique el sistema de penas, tendrán que ser Jueces y Fiscales quienes mediante sus resoluciones y calificaciones jurídicas atemperen el excesivo rigor penal de estas conductas, bien aplicando eximentes o atenuantes de la responsabilidad criminal, o solicitando indultos y aplicando los beneficios de la condena condicional. Esta rebaja en las penas facilitaría además que se formase un criterio unificado en los tribunales españoles sobre esta materia, que acabaría con el problema existente hoy en día, de que las penas varíen en más o en menos dependiendo de la Comunidad Autónoma donde acaezcan los hechos, sin necesidad de que los Jueces hayan de acudir a la práctica de “malabarismos jurídicos” (J.A. Sainz Ruiz, 1996)¹⁵.

These words from an Spanish prosecutor express the need for a legal professionals' adaptative behaviour when dealing with a legal frame perceived as too rigid if routinely applied, as it was the case with conscientious objection regulation. What characterizes this creative behavior, to quote P. Casanovas (1997) is that:

[Its] features are not individual properties. Rather, I conceive them as structural and ecological properties of the relationship between social culture, organizational ambiance and legal setting. Each individual activates their learning and professional experience through them. They can be described, then, as tacit knowledge: implicit constraints or guidelines for action and thinking¹⁶.

From its very beginning, laws of 1984 had to face many legal objections. Political institutions such as the Spanish Ombudsman or judicial courts such the *Audiencia Nacional* presented the Constitutional Court their doubts about the constitutional adjustment of the legal regulation of the conscientious objection¹⁷. Constitutional Court Sentence of 27th October 1987, showing the opposite views of the Magistrates, denied all their legal claims and maintained the current regulation. Since then, many judicial organs have requested the High Court for legal pronouncements about specific aspects of these laws, with identical results¹⁸.

Since the Spanish Supreme Court [*Tribunal Supremo*] has not the competence to unify the legal criteria applying to conscientious objection judicial processes, there is a vast and contradictory minor jurisprudence regarding this matter. Many of these Judges and Tribunals' sentences reflect the multiple legal ways to achieve solutions that diminish the punitive consequences of Law 8/84 or lead to the defendants' absolution. With this aim, constitutional principles such as the preeminence of "individual's dignity" (art. 10.1 EC) or fundamentals rights such as the "freedom of consciousness" (art. 16 EC) are directly invoked to justify the absolution. Other sentences, while declaring defendant's guilty, call for diminishing circumstances lowering the penalty (such as the "state of necessity"), legal principles such as the "error in believing to act rightfully" or the final proposal of an indult. It is important to notice that these argumentative legal devices are constructed by judges as a flexible tool allowing not only to give new "legal light" to the objector's punishable behavior, but also to take into consideration the individual and the social interests at stake.

However, these sentences are only the final product of a previous process of collective reasoning involving both prosecutors and lawyers. We do not know much about how this process actually works in judicial courts. The aim of the second part of this paper is to give some light on this interactive decision-making process, stemming from our own ethnographic data. The social, political, and legal context already outlined frames the decision-making process in which our particular down-to-earth "legal jugglers" are involved.

4. SPACE AND SETTING

The case recorded was heard before the Low Criminal Court of Sabadell (Barcelona) in May 1995¹⁹. It could be said that, during the professionals' interaction before the oral hearing, the courtroom ritual space lacks the symbolic character that it still has in the oral hearing: legal professionals create a dynamic space overcoming the physical elements that, later on, will constitute the visible landmarks of the institutional distance that legal professionals maintain towards the defendant.

Much has been discussed about the aesthetics of courts and the need to suppress the use of gowns, wigs, mallets and other ritual elements still used in many European countries (J.L. Aulet, 1998)²⁰. In Spanish low criminal courts gowns are the single ritual garment, furnitures are not especially rich in symbols (there are only the Spanish and the Autonomous Community flags, the King's picture and the constitutional emblem), and the wooden low dais is not very high. Like in Sabadell low criminal courts, the courtroom setting is much more shaped by bureaucratic severity than by judicial sumptuousness.

5. SYNOPSIS

The case involves one single fact: the defendant was a young man who had been legally declared "conscientious objector" five years earlier and, when formally contacted, he refused to do the compulsory "social service". The public prosecutor's writ of indictment which opens the case was about the defendant's rejection to serve the alternative social service. In principle, the prosecutor pleaded for him two years, four months and one day of prison, whereas the lawyer pleaded his absolution. Nevertheless, both prosecutor and lawyer had reached a previous arrangement to dismiss the punishment and they communicate it to the judge. The latter, who used to absolve defendants in those cases, considers the possibility to ignore the agreement in order to absolve the defendant. But being aware of the risks of such a decision (the ordinary refusal of absolutory sentences by the superior criminal court) submits to the defendant the maintenance of the agreement, who eventually accepts it.

It is important to outline here that the magistrate involved in this case was an active and well-known member of a Spanish judges' association ("*Jueces para la Democracia*"²¹) that had already claimed the law reform in different professional fora. In 1996 -one year later the case considered took place- the same magistrate requested the High Court [*Tribunal Constitucional*] for the constitutional adjustment of the art. 2.3 of Law 8/84, calling for the principle of "interdiction of the arbitrariness of all the public powers" (art. 9.3 EC). To put in his own words:

*Tal arbitrariedad se produce cuando se otorga distinta sanción penal, sin razonar motivadamente las causas de dicha regulación discriminatoria, a conductas que merecen igual reproche jurídico-social y, con mayor razón aún, cuando se sanciona con pena más grave un comportamiento aceptado por amplias capas de la sociedad, cuya antijuricidad es altamente cuestionable y cuestionada por obedecer a lógicas e inherentes consecuencias del ejercicio de los derechos a la libertad ideológica y de expresión*²².

6. SEQUENCES

6.1. "Gown-less" decision-making: what is "legally obvious"

When making decisions in court, differences between "formal" and "informal" situations tend to blur: any context of communication is set-up on the basis of interaction patterns retrieved from similar previous situations. If we bear in mind that in Spanish criminal courts roughly 30% of sentences are obtained as a result of pre-court settlements²³, we may hypothesize that legal professionals have interiorised -at least in some degree- the most suitable interaction patterns to reach satisfactory agreements in court. If this is true, it would be better to speak of "ritualised" versus "non-ritualised" or subliminal interaction patterns, rather than of "formal" versus "informal" situations.

It has to be precised that, in some way, the term of "interaction pattern" is a borrowing from the Watzlawick *et alia* (1967) studies on the pragmatics on human communication. From their perspective, pragmatics is conceived not only as the study of the communication effects over the hearer, but approached as the analysis of the relation which is set up by means of the communication process itself (ibid., p. 24). Under this view, any participant has not the full control of the communication flow. Instead, we may preliminarily assume that contexts are created and modified throughout interaction²⁴.

In order to analyse the data, the recorded event can be analitically divided in two basic sequences: first of all, a sequence containing an initial discussion between the legal professionals involved in the case; secondly, the act of oral hearing with the final decision of the case. Although it is easy to find sharp differences featuring both sequences (verbal interaction, gestures, movements, etc.), to consider the first one as "informal" and the second one as "formal", for the reasons already exposed, would be rather confusing: despite gowns patient waiting on the chairs and respective owners' free movements, a high degree of "formalism" can be signaled with respect to: (i) participants' turn-taking; (ii) participants' information requests (iii) type of information to be provided; (iv) level of detail of the information provided; (v) reactions to the expected participants.

Thus, there is a first non ritualised exchange between the magistrate, the prosecutor and the counsel of the defense which takes place before the scheduled oral session. It lasts 2 minutes and 20 seconds. This previous exchange, as usually happens in these over-loaded and time-constrained criminal court agendas, allows the magistrate to get the main pieces of information concerning the case: (i) what the case is about; (ii) what the prosecutor's and counsel's initial proposals are; (iii) the existence of a previous arrangement achieved between the prosecutor and the defendant's counsel, as a result of which the former grants a dismissal of the punishment for the defendant²⁵. The interaction between the three participants, relying in a great measure on professionals' previous cases experiences, goes as the following transcription partially reconstructs:

P1: a lo millor la primera és una conformitat, eh?

M1: el primer del dilluns és una conformitat. val. = molt bé

P2: que que..

L1: soy yo

M2: molt bé senyor abogat

L2: Es que: ..

M3: dígame.

L3: es una prestación, no? de un un incumplimiento.. y: bueno (...) hay conformidad con el ministerio fiscal.

M4: su cliente la va a aceptar?

L4: (...) es que han habido antecedentes de un caso parecido.. del dos cuatro uno y .. esto me ha supuesto .. para un testigo de jehová ..

M5: _porque él la causa de: no realizar e:l, la prestación social sustitutoria es por razón ideológica?

L5: =sí es que hay una sentencia.. y
P3: _hem hem se conforma?
M6: esto me pone en un problema a mí, eh? me pone en un problema moral a mí de hacer uso.. de las facultades del setecientos noventa y tre:s .. tres .. es decir .. de no aceptar la conformidad y ustedes ya saben que yo absuelvo en estos casos .. por estimar que concurre una exigente completa.
P4: en ese caso en ese caso apelaría.
L6: claro, claro.
M7: vamos a ver.
P5: mira a éste se le pide el **dos cuatro uno** .
M8: se le pide de entrada el **dos cuatro uno** .
P6: el **dos cuatro uno** . yo lo he consultado y: .. bueno a parte de determinar (...) cosas un poco (...) más yo lo dejaría: en cuatro meses y un día, la mínima, también cambiaría el tipo .. y aplicaría en vez de: rehusar a prestar la prestación social el que no se hubiera presenta=do.
M9: =no presentarse.
P7: no presentarse. entonces la pena en grado máximo, la mínima cuatro meses y un día .. vamos yo creo yo creo que le sale a cuenta.
M10: sí:. sí:. hombre le sale más a cuenta eso que el dos cuatro uno. hombre eso está clarísimo, pero no le sale tan a cuenta como una absolutoria, que son los precedentes que hay en este juzgado . lo que pasa es que yo soy consciente del riesgo- a ver a ver como lo haremos soy consciente del riesgo de luego una apelación, una apelación es más grave a ver . me lo voy a mirar con calma:. a ver siéntense un momento:

[P1: the first one may be a conformity, eh?
M1: the first one on monday's a conformity. OK. = very good.
P2: what what..
L1: that's me.
M2: very good lawyer
L2: the thing is: ..
M3: I'm listening.
L3: it's a performance, isn't it? a a non-fulfilment.. and: well (...) the thing is that we are in conformity with the department of public prosecution.
M4: is your client going to accept it?
L4: (...) the thing is there have been antecedents a similar case.. a number two.four-one you see, so.. and this has meant to me .. for a jehova's witness
M5: _because the cause for: not fulfilling th:e, compulsory social service is for an ideological reason, isn't it?
L5: =yes the thig is there is a sentence.. and
P3: _hem hem does he comply?

- M6: this gets me into a problem, eh? it gets me into a moral problem of making use .. of the borrowing power in number seven hundred ninety three:e .. three .. I mean .. of not accepting the conformity and you know I usually absolve in these cases .. estimating that there concurs a reason for being exempt.
- P4: in that case in that case I'd appeal.
- L6: of course, of course.
- M7: let's se..
- P5: Look, that one got number two-four-one.
- M8: He got in principle number two-four-one.
- P6: Number two-four-one . I have consulted it myself, and...well, apart from (...) things (...) I'd leave it in four months and one day, the minor one. I'd also change the type and apply instead of his denial to serve the social service, the fact that he didn't present himself.
- M9: Not presenting himself.
- P7: Not presenting himself. Then the punishment in the maximum degree, the minor one, four months and one day. Well, I think, I think that's worth his while.
- M10: Oh yes, yes that's worth his while better than number two-four-one, you bet, that's as plain as pikestaff, but it's not as advantageous as one of not guilty, which are the precedents in this court. But the thing is that I am aware of the risk, let's see, we'll talk to him...I'm aware of the risk of later an appeal, a more serious appeal...let's see, I'm going to take a long walk at it...OK? Sit down, will you].

In the first section of the sequence (P1-C6) participants let each other know their positions concerning the case. The case presented to the magistrate by the prosecutor and the counsel is already coded in abstract legal categories. On the one hand, the prosecutor speaks of the case as a "conformity", which is received as good news but giving no specific information about its particulars. On the other hand, the counsel explains that it is a "performance" and a "non-fulfillment", which directly situates the case on the grounds of 8/84 Act.

Nevertheless, the information received is still too abstract for the magistrate to confirm his acceptance of the settlement. To do this, he needs some specific knowledge about the case. Only when he learns by the counsel that the defendant is a Jehovah's Witness, emphasizing the existence of legal precedings, he may clearly make his view explicit. Quite differently, abstract legal categories are used here to code a concrete issue which is directly related to a more general and controversial matter: the Jehovah's Witnesses rejection to both military and social services²⁶.

Perhaps one of the new salient patterns to outline here is that the magistrate anticipates a decision that the counsel has presented not only as analogical to a similar previous case -this would be a fairly usual way to proceed- but framed within the context of a broader social and political issue. And this issue is retrieved not in political terms, but in legal abstract categories. Similarly, being sensitive to defendant's moral position in court and, at the same time, having to apply the current legal norms requires far more legal imagination than strict technical argumentation (which, in any case, is needed only at the end of the process). This effective legal problem that professionals have to face is suggested by the down-to-earth prosecutor's

utterance: "In that case I'd appeal"²⁷. The great uncertainty of a second instance ruling makes the pre-court settlement a reasonable way to solve the problem, so that the second section of the sequence (M-7 to M-10) consists on the prosecutor's and magistrate's legal articulation of the agreement achieved.

The last part of the sequence (from M7 to M10) allows both judge and prosecutor to determine the situation. The explicit prosecutor's categorisation of the case as a "two-four-one" functions here as a sort of "tracking shot" which puts simultaneously on the foreground four legal categories that remain implicitly assumed: (i) the fact: the defendant did not present himself to do the social service when formally asked; (ii) the crime's category: a refusal to do the social service when being legally declared "conscientious objector"; (iii) the subsequent punishment: two years, four months and one day of prison ("two-four-one"); (iv) the applicable norm: the article 2.2 of the 8/1984 Act.

In M8 the magistrate rectifies the assertion specifying that "two-four-one" is just the original prosecutor's criminal charge. In P6 he obtains a confirmation and then the prosecutor introduces an additional specification of the shifting from article 2.2 to article 2.1: "I'd also change the type and apply instead of his denial to serve the social service, the fact that he didn't present himself" [*también cambiaría el tipo y aplicaría en vez de rehusar a prestar la prestación social el que no se hubiera presentado*]. The last clause overlaps with magistrate's acceptance of the alternative suggested by the prosecutor (M9), who confirms again the proposal in P7 and then introduces an explicit causal link between the shifting of the criminal charge and the punishment dismissal ("Then the punishment in the maximum degree, the minor one, four months and one day"). [*Entonces la pena en grado máximo la mínima cuatro meses y un día*].

In the legal jargon of law criminal courts, the utterance of expressions like "two-four-one" (it may also apply to other criminal categories as well) is the fastest way to deal with everyday cases. Those shared legal categories or "technical prototypes" are communicative devices, explicit contextual landmarks which probably help to develop the collective legal reasoning that remains implicit in the verbal interaction²⁸. This is what S. Philips (1984) calls "the labeling decision", which she situates in the context of the criminal trial:

Interestingly enough, criminal litigation is the process through which the ultimate labeling decision is made. In other words, whereas we readily decide that a plant is a bush or a tree, or that a food is meat or vegetable, the decision to label an activity as a crime belongs to the jury or the judge of a criminal trial, and the presentation of evidence of whether activities which occurred do or do not fulfill the elements of the crime is highly regulated by procedural law. Through trial practice, lawyers learn what sorts of evidence are routinely presented in order to meet or satisfy the statutory definitions of crimes.

In our case, however, what seems readily agreed by legal professionals is the criminal label itself: according to rules of 8/84 Act, they see defendant's behavior as number "two-four-one" as easily as they would see a plant as a bush (in that sense, there is not a legal but a "moral dilemma": does that behavior deserve such a prison punishment?). Thus, what is really at stake is not the criminal label, but the possibility of tempering its consequences in a legally satisfactory manner. And this is done within the frame of a "gown-

less" negotiation whose successful outcome requires the learning of professional practices and skills barely regulated by procedural laws²⁹.

6.2. Judge's reconstruction of legal pre-court settlement: some paradoxes

Magistrate: This judge considers that the principle of "effective judicial tutelage" in article 117.3 from the LECr obliges me to leave to your own discretion, to your own discretion, the decision of whether you want to run this risk of, on the one hand, be absolved in first instance and condemned in second, that is just a hypothesis, but it is possible, or, making use of the facultatives of liberty of acceptance of the agreement which the prosecutor and the defense have reached, resign yourself to the sentence request which they have suggested. In this second hypothesis, if you accepted for that security, this court, even keeping legal reserves on the contents of that outline agreement, would accept it in order not to violate to your detriment the possibility of a sentence falling in second instance which were detrimental to your interests. Have you perfectly understood the explanation I have just given you?

Defendant: Yes

Magistrate: Do you wish to consult the decision you have to take with your lawyer, before deciding?

*Defendant: Yes*³⁰

The second sequence of the case consists on the scheduled oral hearing, the so-called "abbreviate procedure". Once the reading of prosecutor's indictment is finished, the magistrate reconstructs the decision-making process performed before the oral hearing session. He lets the defendant know that law allows the judge to rule out the pre-court settlement if certain legal conditions are fulfilled and, having acquitted defendants in similar cases, leaves the last decision to him.

Oral hearing usually starts with the judicial secretary's reading of the prosecutor's writ of indictment. According to the Spanish procedural statute (*Ley de Enjuiciamiento Criminal*) its purpose is to inform the defendant of the charge against him. In practice, this reading constitutes the ritual fulfilment of a procedural act, so that it is usually read by the judicial secretary in a monotonous pitch, a high elocution speed and a low gestuality. In the case reported the magistrate anticipates to the defendant the fulfilment of this act, from which the latter is supposed to learn the new content of the criminal charge. This anticipation, which may be interpreted as a judge's leading transition from plea bargaining to the ritual, aims at the defendant's understanding of both the reason for the formal reading act and the criminal charge he is going to face:

M: Muy bien señor x la señora secretaria judicial le va a leer el escrito de acusación que en su día formuló el Ministerio Fiscal por un presunto delito de negativa a realizar la prestación social substitutoria al servicio militar en el cual verá usted que inicialmente se le pedía una condena de dos años cuatro meses y un día de prisión menor. A continuación le informará del contenido del preacuerdo al que han llegado en la fase previa a este juicio la fiscalía y su abogado defensor con lo cual se le reduce a usted la condena en los términos la petición de condena en los términos que se le dirán. Una vez haya escuchado usted los cargos me manifiesta por favor en primer lugar si se reconoce culpable de ese delito de haber cometido ese delito o por el contrario se considera usted inocente, y considera que no ha infringido ninguna norma legal y en la primera hipótesis, solamente

en la primera hipótesis, me dice usted si está de acuerdo con la pena que han consensuado antes de este acto el fiscal y la defensa.

[Very good mister R., the chief clerck is going to read you the writ of indictment which the Ministry of the Public prosecution made for an alleged denial to fulfill the compulsory social service for those who refuse to do the military service in which you will see that one requested a medium-term prison sentence of two years, four months and one day. Next, she will inform you of the contents of the outline agreement which the Ministry of the Public prosecution and your defending lawyer have reached in the phase preceding this law suit, in which your sentence is reduced according to the terms, the sentence request, according to the terms which will be specified. Once the charges have been you listened, you declare, please, in the first place, wheter you admit your guilt to that offence, to having committed that offence, or on the contrary, you consider yourself innocent, and consider that you have infringed no legal norm. And, in the first hypothesis, only in the first hypothesis, you tell me whether you agree with the outline agreement which the prosecutor and the defense have reached before this action].

However, this judge's explicit effort of familiarising the defendant with the oral hearing ritual development clashes with the way he expresses his attempt -highly ritualised itself- and the criptic content of the subsequent secretary's reading. On the one hand, the magistrate behaves maintaining a distant attitude of institutional authority. On the other, focusing on what is verbally communicated, the pragmatic descriptors' analysis (M. Poblet, E. Pascual, A. Roig, J. Comín, P. Casanovas, 1998) has shown the high number of cognitive metaoperations that the hearer must perform in order to understand the magistrate's instructions. In other words, the defendant must decodify not only the unfamiliar technical expressions of magistrate's language -the expressions' meaning level- but also the way he qualifies or refers to them (his using of legal language to speak of legal language). This is fairly clear in the ongoing magistrate's identity self-references throughout the ritual session (the use of abstract expressions such as "this tribunal", "the court which judges you" or "this judge" instead of personal pronouns), in the identity's prosecutor references ("the Public Prosecution Office") or in legal considerations such as the following one:

*(...) este tribunal, en precedentes anteriores en casos similares al que hoy se juzga, y lo pone en conocimiento de usted, sin perjuicio de lo que resulte de la práctica de la prueba que se desarrollará en este juicio oral, ha dictado: sentencias *absolutorias contra: acusa:do:s que están imputa:do:s por hechos *similares a los que usted, hoy, tiene en su contra. sin embargo, este tribunal tampoco quiere que usted desconozca la siguiente circunstancia. en primer lugar, que el criterio de dictar sentencias absolutorias en este tipo de delito:... es minoritaria en los tribunales del estado español. y por lo tanto no existe una jurisprudencia: *unitaria y consensuada sobre esta materia.*

[this court, in previous precedents in cases similar to the one being judged today, and it makes this known to you without prejudgement of what may result of the presentation of the proofs which will be developed in this oral trial, has pronounced sentences *of not guilty against defendants who are imputed for *similar facts to the ones which you have against you. nevertheless, this court does not

want you to be ignorant of the following circumstance. in the first place, that in this type of offence the criterion of pronouncing sentences of not guilty in this kind of crime:.. is minority in the court of the spanish state. and thus there exists no *unitary and consensual jurisprudence on that matter].

As a result, communication becomes paradoxical (P. Watzlawick, J. Beavin Bavelas, D.D. Jackson, 1967)³¹. The paradoxical nature of this sequence is due to the dissociation between judge's will to leave the defendant the last decision about the case and the way this will is expressed. First of all, he tries to reconstruct the decision-making process that took place before the oral session and then leaves the final decision to the defendant. However, the attempt to explain in plain words what legal professionals considers as "legally obvious" is performed stemming from the same legal language structures.

Perhaps the most striking linguistic feature of magistrate's monologues is that, being oral speeches, they rather seem a well-written legal text. However, this "written-flavour" causes small wonder considering that not only the main pieces of criminal suits are written text³² (i.e. the vast bulk of documents and reports in which the files consist, a great number of technical evidences, sentences, etc.) but also that law itself can be considered as a written realm. In Spanish law faculties, to learn law means to learn, and sometimes to memorise as well, "written law". This memorising effort is further reinforced by the studies programme that both judges and prosecutors candidates have to follow. Legal concepts are therefore acquired not only by means of a specific and technical vocabulary, but also by a complex set of linguistic chunks. Try to by-pass "legalese" when making understandable what is "legally obvious" may certainly be a hard task. A further consideration may help to explain one of the reasons why communication collapses between magistrate and defendant at the verbal dimension: even if text cohesion is fully achieved by understandable grammatical structures³³, there is a complete lack of familiar conceptual content organized in "culturally meaningful ways" (E. Hutchins, 1980).

In addition, there are inconsistencies at the metacommunicative dimension that frame the linguistic construction of the speech. The magistrate's attempt to break the ritualised interaction patterns in court, favorising the defendant's participation in the decision-making process, contrast with the distant authority from which he performs his institutional identity. Furthermore, neither the ritual space nor the verbal language used enhance his participation. As a result, the communication flow that the magistrate meant to be fluent is blocked by the effective manner in which instructions are performed. Defendant's eventual acceptance of the agreement puts him in a K.'s perplexity situation: he pleads guilty, agreeing to a legal settlement which remains strange and obscure to him.

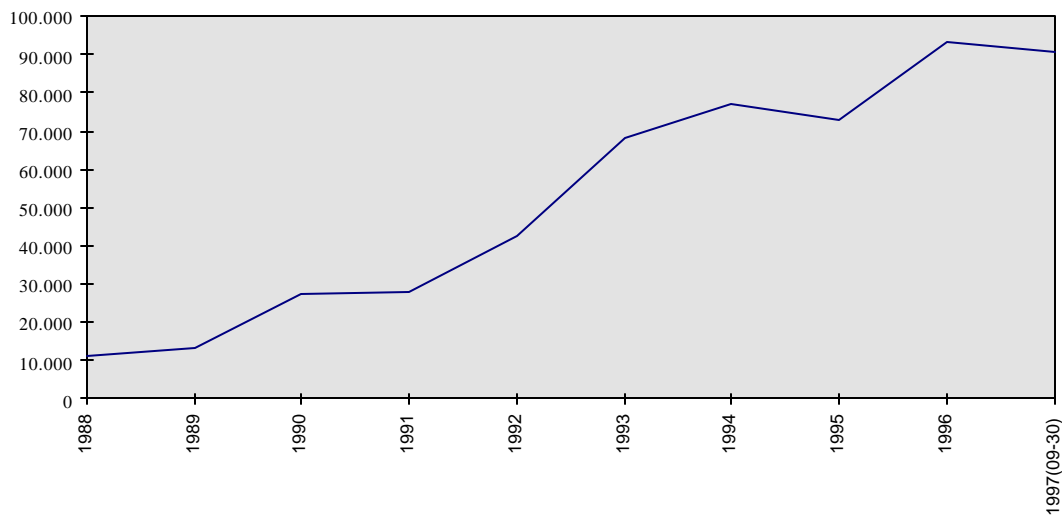
7. CONCLUSION

The great significance of these type of decision-making processes in the Spanish judicial system contrasts with the rigidity of judicial ritual elements. Albeit the legal reform in 1988 (7/88 Act of 26th December) acknowledges the full effects of pre-court settlements, norms does not provide further facilities for

them to be achieved. The lack of an specific workplace of negotiation, for instance, leads in some cases to the judges' offering their chambers or, in some others, to the familiar scenes of corridors' negotiation.

This court case may help us to see what it could be preliminary termed as a "transitional" model of law towards a fully "participative" one. Its particular "transitivity" would be reflected by the legal professionals introduction of new patterns of interaction, breaking into a space which still preserves its physical and communicative barriers. Thus, judges and magistrates, prosecutors and lawyers tend to perform their activities throughout a broader openness towards non-institutionalised values, serching for decisions much closer to the scheme "problem-available solutions" of particular cases than to that of "norm-interpretation-application" (P. Casanovas, M. Poblet, forthcoming). Orality gains terrain slowly and new professional skills are required (flexible negotiation routines, consideration of legal alternatives, risks evaluations, creative technical argumentation, etc.). Individuals' general attitudes are similarly "transitives": although general goals such as "citizens' participation" or rather concrete practices such as "negotiation" already pertain to some extent to their professional background, much of the particular devices required to develop and improve those practices are still to be found. Similarly, the study of these new interaction patterns in court cannot be fully constructed on the basis of an ethnography of verbal communication. Similarly, the representation of the pragmatic pluridimensionality of contexts set up by legal professionals in court requires to develop a methodology able to articulate, on the basis of a broad ethnographic research, the complex structure of the interaction patterns in legal courts.

Chart 1



Source: *Consejo Nacional de Objeción de Conciencia*

NOTES

1. This paper is the result of a collective ethnographic research carried out in Barcelona and Sabadell criminal courts since 1995, which includes the audiovisual recording of some trials. The case studied is one of them. Ethnography, video edition, transcriptions and English translation have been done by the Sociolegal Studies Group (GRES) members. In addition, audiovisual data have been analysed in team sessions where most ideas presented here had already been discussed.
2. According to A.E. Pérez-Luño (1997) "Los principios generales del derecho son un mito jurídico, pero un mito que responde a una necesidad propia de los ordenamientos jurídicos de los Estados de Derecho: reconocer el valor de la seguridad jurídica" (p. 22). [*General legal principles are a legal myth, but one that fulfils a legal systems' need: to recognise the value of legal security*].
3. The empirical basis of this study will be audiovisual data from a trial at the Sabadell Criminal Court. The recording, lasting 20 minutes and 21 seconds, was carried out in the frame of research activities of the Sociolegal Studies Group (GRES) in 1995. A written transcription of the interaction is also done by the analysts in order to facilitate the tasks of codification.
4. On this view, the GRES ethnographic fieldwork also implies the elaboration of data concerning the tasks of both prosecutors and lawyers organizations in situated contexts.
5. ["Article 6 of the Civil code establishes that ignorance of law does not exempt from its fulfilment, which significantly shows that the need to make law required behaviour understandable has been undermined. Hence, law, aiming at the regulation of human beings social behaviour, turns its back to those behaviours. It is not surprising, therefore, that efforts to overcome the long-lasting justice crisis in our modern society are vain"].
6. ["Conscientious objection started to be in this country a mostly urban phenomenon which gathered either Marxist, libertarian or Christian ideas, and joined both partisans of liberation wars and rural communes. Having the fight for conscientious objection in France and the examples of another big civil disobedience campaigns as main references, those first conscientious objectors organised themselves in the early 70's to ask for the conscientious objection right acknowledgment and the alternative of a social service"].
7. As G. Landrove (1990) reports, the sounding international impact of the "Contijoch's Case" was on the immediate political background: A. Contijoch was a Jehovah Witness carpenter imprisoned several times for his conscientious objection. When he eventually received pardon in 1970, he had already spent eleven years in prison.
8. See P. Ibarra (1992) for the origins of the Conscientious Objectors Movement and other Spanish collectives.
9. The countries within the European Union that acknowledge the conscientious objection right in its Constitutions are Germany, Netherlands, Portugal, and Spain (J.A. Sainz Ruiz, 1996). The rest of them (with the exception of Greece, that does not explicitly recognise this right) have developed legal regulations.
10. 48/1984 and 8/84 Acts of 26 December 1984.
11. ["In order to understand the changing trends of the military organisation we need to take into account the current transformations stemming from the new frame of international relations and the national society. The relative weakening of the most characteristic forms of social organization is especially outstanding: the national-State, the national markets, the democratic citizenship, and the mass army forces. In other words, a substantial global social organisations growing is been taking place, changing the conditions under which national-States used to exercise their power, maintained citizens' loyalty and displayed their military force. These changes occur hand in hand with a citizenship opinions and attitudes cultural shifting"].
12. As this author shows, conscientious objectors movements are largely responsible for this continuous increase: "By directly opposing the political measures adopted by successive governments, objectors have weakened and greatly subverted the legal consequences of their refractory conduct" (*idem*, p. 172).
13. V. Sampedro Blanco (1996).
14. Act 8/84, today derogated by the Criminal Code of 1995, established for legally declared objectors non fulfilling the substitutory social service a set of penalties ranging from four months of major arrest to two years, four months of

minor prison. On the other hand, since 1992, citizens refusing both the conscription and the legal status of 'conscientious objector' had to face judicial processes according to parallel rules in the the Criminal Code (till that year, this kind of insubmission mattered to military courts and penalties were higher). Since 1995, all kinds of objection and insubmission are regulated by the Criminal Code, and a 8-12 years inhabilitation for public jobs has substituted the prison penalties.

15. ["Criminal code reform could not be more unfortunate. It is urgent to modify those articles partially limiting some rights. Meanwhile, judges and prosecutors will have to temper the excessive severity of punishments by means of estimating reasons for exemption, asking for government pardon or applying for conditional sentence benefits. This would facilitate the adoption of a unified criterion in Spanish courts that would eliminate the problem of having different degrees of punishment according to each Autonomous Community, and thus the need to 'legal juggling' judges' practices"].
16. These features are: (1) cooperative behavior; (2) collective reasoning; (3) formal decisions through informal situations; (4) individual evaluation of criminal alternative possibilities; (5) implementation of learning ability; (6) different inter-institutional and extra-institutional relationships; (7) different "elite consciousness" (P. Casanovas, 1997).
17. More specifically, the Ombudsman (echoing a wide set of contests from MOC, Basquian Parliament, Christians for the Peace, etc.) claimed the fundamental right rank of conscientious objection in the Spanish Constitution and the unequal treatment of conscientious objectors in serving a social service much longer than the military one. The *Audiencia Nacional*, on the other hand, considered unconstitutional the deny to exercise conscientious objection when serving the military service.
18. See the widespread Constitutional Court Jurisprudence about conscientious objection in J.A. Sainz Ruiz (1996).
19. GRES (1995).
20. According to J.L. Aulet (1998), the use of these aesthetic elements depends on the State model. Thus, non-authoritarian States which allow legal professionals self-government tend to have more sumptuous judicial rituals and professionals exhibit a strong aesthetic-elitist component, whereas traditionally authoritarian States tend to devalue the ritual role of the trial and to consider magistrates as civil servants.
21. 23% of the Spanish Judges and Magistrates belong to the professional association *Jueces por la Democracia*, whereas 57'2% of them are engaged in the largest and conservative-oriented *Asociación Profesional de la Magistratura* (Annual Report of the General Council of Judicial Power, 1997).
22. ["This arbitrariness occurs when a diferent punishment is given to the same behaviors deserving identical reproof and, furthermore, when a behavior which is broadly accepted by the society is penalized with a more severe punishment, bearing in mind that its current legal status is both questionnable and questioned, because these behaviors are simply the logical and inner consequences of ideological and expression freedom rights"]. *Cuestión de inconstitucionalidad nº 3653/1996* and *RTC 380/1996* (Aranzadi Jurisprudence Database).
23. In 1996, Spanish criminal courts dictated an amount of 102.501 sentences, 30.692 of them on the basis of a pre-court settlement (Annual Report of the Public Prosecution Office, 1997).
24. As P. Casanovas (1999) recently wrote: "we may describe interaction as the continuous context modification among participants on communicative events. Let me add that interaction itself may be patterned in the participants' mind, especially if they belong to an organization, they have been trained within the organizational mood and they share some kind of previous learned collective, cooperative or coordinated experiences".
25. This is what is legally termed a "pre-court settlement", usually consisting in an agreement made between the public prosecutor and the defendant's counsel which stipulates that the defendant will plead guilty in exchange for some sort of reduction of the original criminal charge.
26. The sentence invoked by the counsel was dictated by another criminal court in 1992 (Madrid, Criminal Court number 4, Sentence 75 of 6th March 1992). It opened a great public debate (in the media as well as in the academia) about conscientious objection and civil disobedience. The controversy, well-known by legal professionals, is reported in the M. Atienza's book *Tras la Justicia* (1993) under the title of "*Un dilema moral*". The counsel had brought the book to the court to prepare his argumentation and the magistrate reflects on the case as putting him "in a moral problem".

27. Spanish Public Prosecution Office [*Fiscalia General del Estado*] gives in its Instructions the criminal policies that each Autonomous Community Prosecution Office has to follow (e.g Instructions 1/91 and 4/92). As the given orientation is to appeal absolutory sentences, the internal organizations allowing adaptative decisions -such as the Catalan one- must search for settlements that does not blatantly contradict the general instruction.
28. However, as far as the relationship between language as an expression of thought and thought itself remains an open question for cognitive scientists (R. Jackendoff, 1996), we cannot set up a model of this collective reasoning entirely based on the participants' linguistic expressions. If there is no reasoning in language itself we should assume that there is no logic to model conversation. All we have in the linguistic expression dimension are some clues of the cognitive processes underlying conversation, but the relationship between the use of communicative devices such as "technical prototypes" and those cognitive mechanisms has to be investigated.
29. At this stage, and trying to go beyond an ethnography of verbal interaction, the methodology developed by GRES (P. Casanovas, 1994; P. Casanovas, M. Reinert and GRES, 1995; P. Casanovas, J. Mach, E. Ardèvol, 1998; M. Poblet, E. Pascual, A. Roig, J. Comin, P. Casanovas, 1998) consists on the reconstruction of the pluridimensionality of communicative contexts set up by the participants by means of the so-called pragmatic descriptors, to avoid confusion with the applied linguistics use of "pragmatic markers" (D. Schiffrin, 1987; G. Redecker, 1990; B. Fraser, 1990, 1996; A. Knott & T. Sanders, 1998; C. Kroon, 1998; U. Lenk, 1998; R. Risselada, 1998). Pragmatic descriptors consists on a dynamic set of conventionally defined indicators pointing out those metacommunicative elements, encoded or not in language, which cognitively frame the linguistic construction of speech (M. Poblet, E. Pascual, A. Roig, J. Comín, P. Casanovas, 1998).
30. GRES (1997).
31. We have used the term of "paradox" (E. Pascual; M. Poblet, forthcoming) when describing the communicative difficulties and inconsistencies arised in court interaction that, in some way, affect all the participants. In their classical study, P. Watzlawick, J. Beavin Bavelas y D. Jackson (1967) identified as "pragmatic paradoxes" those instructions which, in the frame of interpersonal communication, request an specific behavior that, by its own nature, it can only be spontaneous. As an exemple, those order or indications such as "Be spontaneous" or "Don't be so obedient". In the legal field, they quote the article 27 of the Swiss civil code: "No one is allowed to renonce to his freedom or to limit it as to violate law or moral".
32. It may be interesting to notice that, although Spanish Criminal Procedure Law (*Ley de Enjuiciamiento Criminal*) establishes an "orality principle" which has to preside the criminal procedure, this is usually conceived (with the exception of cross-examination acts) as a "reading principle".
33. Text cohesion, as T. Givón (1993) outlines, does not necessarily mean "text comprehension", as a cognitive operation in which both "working-memory buffer" and "episodic memory" are involved: "*It is fairly well established that the working memory buffer for text is severely limited, perhaps retaining no more than 2-5 clauses at a time, or roughly 8-20 seconds of verbatim text. (...). During the short-time span of the buffer, whatever portion of the 'external' speech signal that is at all to survive in longer-term memory must be translated rapidly into some other form of episodic mental representation.*"

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