

EDJ 1994/10563

Constitutional Court, S 14-7-1994 n° 215/1994 BOE 197/1994 of August 18 1994 rec. 1415/92

Presidents: Mr. García-Mon and Mr. González-Regueral, Fernando

Summary

The Constitutional Court studies the question of unconstitutionality considered in accordance with the LO June 21 1989 in the paragraph where the sterilization of those declared disabled is authorized by their legal representatives. The Constitutional Court considers that such provision does not infringe the right to life and to physical integrity, provided that there is a demand from their legal representatives and, furthermore it is legally agreed. Moreover, "the psychological deficiency of the disabled person whose intended sterilization must be a "serious" deficiency and, as a result, unable to understand the organic aspects of his/her sexuality and of the extent of body intervention whose consent is promoted by his/her legal representative." Three judges disagree with the opinion of the majority, who consider that sterilization of the disabled person should not have been legalized.

REGULATIONS STUDIED

LO 3/1989 from June 21 1989 Criminal code update, art. 6
CE, December 27 2978 Spanish Constitution art. 10.1, art. 15, art. 39.3, art. 43.1, art. 199
D 3096/1973 of September 14 1973 TR Criminal Code, under the L.
44/1971 art. 417, art. 428.2, art. 429.2
RD of July 24 1889 Civil code art. 154

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Bibliography

Discussed in "Bioética y Justicia en el Ámbito Sanitario"

Mentioned in "Actitudes legales ante la situación de embarazo de un incapaz o de un menor de edad y su posible interrupción legal"

FACTUAL BACKGROUND

FIRST. - On June 4 1992 a document written by the senior judge from the Court of First Instance number 5 from Barcelona was admitted to the Record of this Court, together with the testimony of the order from the aforementioned Court from May 30, where it was agreed to propound a question of unconstitutionality in accordance with LO June 21 1989, where it affirms that the sterilization of those declared disabled is approved with the agreement of their legal representatives.

By Order dated the following June 8, the First Division of the Court agreed to certify as received the previous testimony of the order for reference of the question and, before solving its admissibility, require the proponent legal body so as to send, within a period of 10 days and in accordance with art. 36 LOTC, testimony of the main orders and the pleadings from the parties and the Office of Public Prosecutor about the relevance of such reference.

The Division, by order dated June 30 1992, agreed to:

1º) certify as received the relevant procedural steps and give permission to proceed the question propounded;

2º) disclose the procedural steps, in accordance with art. 37.2, LOTC, to the Congress of Deputies and to the Senate, through their Speakers, to the Government, through the Office of Public Prosecutor, and to the Attorney General so they will be able to appear in the process and formulate the advisable pleadings;

3º) reveal the commencement of the question in the Kingdom of Spain Official Gazette "BOE".

SECOND.- The hearing which has led to the question propounded originates as a result of the petition of standard claims procedure formulated by the parents of the disabled Mrs. Mercedes, who suffers from Down's syndrome. They request the sterilization of their daughter through the procedure of "Fallopian tube ligation". Once concluded the orders for the judgment, the Judge, by Order dated March 28 1992, provided the petitioners and the Office of Public Prosecutor with a non-extendible time limit of 10 days so they could plead what they wished related to the relevance of propounding the question of unconstitutionality about this precept introduced in the Criminal Code from the Statute of June 21 1989, which says that the sterilization of a disabled patient who suffers from serious psychological deficiency won't be unlawful when the aforementioned sterilization is approved by the Judge upon the application of the legal representative, heard the report of two specialists, the Office of Public Prosecutor and previous exploration of the disabled person.

All of this, in the case of the legal rule, which bases the request for claimed sterilization, are opposed to art. 15 CE, which admits that everyone has the right to life and to integrity, without, in any case, them being subject to... inhuman or degrading treatment. In the answer to the hearing accorded, both the petitioner and the Prosecutor expressed their opposition to the question.

The legal reasoning of the Order through which the question of unconstitutionality is promoted can be summarized as follows:

A) The reasons that lead a legal body to the question are principally in the contradiction of

the legal rule with the contents of art. 15 CE. There is no doubt that the whole integrity is infringed with sterilization and, if the case is related to adults, the agreement for this invasion of privacy, once the law-maker has legalized the fact, determines the impunity of such conduct, when the case is related to people with physical and psychological disabilities, like the situation of those disabled, who are not able to give any consent, it inspires serious doubts in the Judge the fact that the Government can authorize their parents so as to replace such significant reduction of the integrity of those people subjected to their protection with just one legal consent; a consent that the Judge is forced to give if, after the decision in favour of two professionals, after hearing the submissions of the Office of Public Prosecutor and after examining the disabled, the particular circumstances of the case subjected to its consideration do not advise the opposite.

It is necessary to begin from an unquestionable fact: "the mentally handicapped person has basically the same rights as other citizens who belong to the same country and who are of the same age. This is stipulated in art. 1 of the Declaration on the general and particular rights of mentally retarded persons, adopted by United Nations General Assembly on December 20 1971, which concluded with these words: "the mentally handicapped person has, above all others, the right to be respected". To this, it is important to add what it is established in arts. 10,1 and 15 CE. Thus, every non-voluntary sterilization carried out for eugenic reasons, as punishment or to prevent procreation makes an attempt on somebody's life and integrity; this is also applied to mentally retarded persons.

On the other side, art. 49 CE establishes that "public powers will carry out a policy of prediction, treatment, rehabilitation and integration of those physical, sensorial and psychological disabled, who will have all the specialized attention they will need and will be specially protected so they will enjoy all the rights this Title (the first one, where art. 15 is established) gives all citizens. To develop this provision some legislative measures have been necessary among which it is remarked L 13/83, that defends the "social integration of those handicapped"; the Act of June 24 83, that regulates the disability of the patient or psychological disabled and his/her protection, etc. Thus, the first question we should ask ourselves in relation with sterilization is the following: Does it adapt or not to constitutional protection of health? Does it contribute to the prediction, treatment, rehabilitation and integration of those mentally retarded persons?

B) Some authors are in favour of sterilization, generally, on the ground that this procedure will allow disabled to enjoy one of the rights they have been traditionally denied, the right to sexuality, preventing the normal consequence of this right, which is pregnancy. It is pleaded that this measure is positive for the disabled, as it will allow her to enjoy sex excluding those risks that can follow the action. But the "right to sexuality", invoked by these authors does not exist in a natural sense. It can be described as a pseudo-right not recognized by any universal Declaration.

"On the other hand, it is debatable that the basic physical exercise of sexuality is a positive thing for the person when the action is not accompanied by a complete understanding of the act done and so, for that reason, it is not an expression of affection and of yearning for union. Sexuality is, according to the comprehension of the whole society, demands preparation, not only physical, but also mainly psychological. This is why sexual practice with a minor is

harshly punished. If this practice always resulted in a benefit, it would be illogical to deprive minors of it... but it is a benefit that must be enjoyed only in some determined conditions not just of physical competency, but also of state of mind and intellectual understanding."

C) It is pleaded by other supporters of sterilization that with this measure, the disabled person will be far from any risk of pregnancy that she can never accept. But the simple chance of such an extraordinary event -avoidable in most of the cases if the protectors of the disabled adopt a regular vigilance- does not justify the adoption of a radical method that made an attempt on her integrity, constitutionally defended with a prime range, apart from the fact that in current legislation, the possibility of stopping, in this case, with impunity, the non-desired pregnancy is authorized.

Among the small number of cases where abortion is exculpated in our current legislation, is precisely recognized pregnancy as a result of a rape, and only as a rape, having carnal access to a mentally disabled person. On the other hand, sexuality does not involve pleasure only, but it also means high risks, where pregnancy is just one of them. It is necessary to think also about the different venereal diseases, mostly AIDS and its growing extension. "How could the disabled be protected from this danger? Not thanks to sterilization, but just with some vigilance."

Moreover, there are many other aspects related to this matter. Thus, first of all, the first statute in field of health and medicine published by Hitler was precisely so as to approve the sterilization of those psychological disabled, among other cases. Secondly, we must take into account the medical considerations about mothers who are psychologically disabled which affirm that it is not necessary that their children must be also mentally handicapped. In third place, it is necessary to consider the continuous progress in the field of medicine, which means that they can improve the psychological conditions of those disabled so that they can even have access to a conscious sexuality and a responsible maternity, "which will build for some psychological disabled women an important benefit, of which they will be deprived with sterilization." Last, and mainly, we must think about the decision of TC, upheld when it describes in detail the scope of the constitutional precepts (v.gr., SSTC 53/85 and 120/90).

D) In conclusion, the sterilization of those disabled is, objectively, a humiliating measure and it goes against their physical integrity which is constitutionally protected. There does not exist a right to sexuality, especially if, as it happens with the disabled, they find themselves disabled to practise a truly adult and responsible sexuality. The measure is out of proportion. "There is not any immediate risk that can cause an unwanted pregnancy because of the action of some unscrupulous person and, in that case, it would be considered as violation and there could be found a legal solution in the possibility of an abortion, expressly declared as constitutional the event of violation and, even more if the subject is disabled. "It does not seem either that this measure has been created for an honest purpose, nor so as to benefit the disabled.

"This one, if it's deep —the only case where the law-maker approves it—, he/she will never be able to enjoy the sexual life of an adult, conscious and gratifying. And, repeating the same, if medical progress —a case that cannot be rejected— will achieve in the near future the reinstatement of the minimum conscience and responsibility, we would have deprived, with sterilization, of the right to a future maternity which maybe would have contributed to the

comply self-realization as men or woman (...). Giving this person the theoretical chance to obtain the sterilization of those disabled

—Such an obvious inhuman and humiliating treatment for which the law-maker always demand the conscious consent of the person— replacing this lack through the consent of the protectors is... considerably unconstitutional.

THIRD.- The President of Senate announced, through the document recorded on July 8 92, the Agreement of the Chamber, by which this Chamber approved to be considered as appeared and to have offered its collaboration for the purpose of art. 88,1 LOTC

FOURTH.- The Attorney General prepared the procedure conferred through a registered document from July 16, in which there are registered the pleadings that are now summed up:

A) In the proponent Court's opinion, the exceptionable reflection to art. 428 CP is placed both in the attack that sterilization of those disabled means to their integrity and the degrading or humiliating treatment that it involves. Starting from the latter, we must reject that we are in the presence of a degrading treatment in the proper sense. First of all, it is not possible to consider as degrading for a disabled a treatment that is allowed to conscious people through their consent and to which the order for reference does not seem to find any objection. This means, the fact of causing the agnesia in someone is not a proper degradation nor humiliation, it is not an invasion of dignity of the person who proclaims, as basis of political order and of social peace, art. 10,1 CE and that necessarily is reflected on the contents of art. 15.

On the other hand, "inhuman or degrading treatments are, in a legal sense, adjusted ides of the same scale that, in all its phases, the causation is present, whatever the purposes may be, of physical or psychological sufferings that are unlawful and inflicted in a degrading way for those who suffer them and with that proper intention to humiliate and to humble the will of the patient" (STC 120/90 f.j. 9º.) In the same way, the TEDH has exposed itself in the judicial decisions that this sentence refers to. According to this, it is not possible to see in the practice of a medical intervention that carries out the agnesia of a disabled a treatment that causes physical or psychological sufferings banned by our Constitution and the different international declarations.

B) Thus, it is necessary to examine it this attempts to the integrity of the affected person. Whatever is the concept that it is being dealing with about this integrity, it is presented as an emanation of the life itself. The right to life must be with all the consequences that are inherent to the right, what means, with fullness, in the completely development, with all the derivations of a life, among which we find, clearly, maternity as an indelible attribute of the feminine condition. For that reason, in principle, any action that eliminate or restrict the ability related to generation of the woman must be considered as an attempt to feminine exemption and an infringement in accordance with art. 15 CE.

Thus, the Criminal Code classifies as a serious crime causing the sterilization to a person (art. 419). Nevertheless, although art. 428

CP lays the principle that the agreement of the injured will not cause the impunity of the injuries, it follows an exception for those cases of transplants, sterilization and transsexual surgery, in which the agreement of the injured, free and expressly announced, release from criminal responsibility. So, there are some particular suppositions where, in its legal and

criminal acceptance, they are not a crime. This means, that it is allowed what it can be called self-attempts on physical integrity of a person that are not criminal wrongs.

The law-maker has considered that, in these particular cases, it exists an availability of the person in relation to his/her physical exemption, although to put into effect this provision about the proper person, some guarantees must be adopted: the free and expressed consent from people that enjoy of a complete competency and the intervention of a professional, excluding in any case that no one —his/her legal representatives— can give the consent instead of the minor or disabled.

In relation to sterilization, that is what really matters, and in particular woman sterilization, the justification of this one must be found on freedom, which represents, without any description, one the highest values of the law. Nothing hinders, in this historical moment, that a woman can renounce in a voluntary way to her "generandi" competency. It is obvious that no one has the right to mutilate a woman, neither to impose maternity on her. As a consequence, every woman can renounce to maternity, in a natural way, using from sexual abstention to any of the mechanical means that technique offers, for example, through a surgical intervention that causes her the sterility.

C) From these legal-social categories, the question is if a disabled woman, who cannot give her valid agreement nor to procreation neither to induced agenesia, can be object of medical manipulations that cause her the sterility. The problem, with the necessity of finding the agreement, consist of knowing if it is possible to find different ways in place of this agreement. The question is that if the regulation of art. 428 has a defense, as it goes against the general principle that sterilization must follow the valid consent of the competent patient, and if it is proportional to the aim desired.

It is true that all those mentally retarded people have the same rights that any other person, according to the Declaration signed by United Nations on December 20 1971, where the Spanish legislation is inspired, according to what it is said in art. 2 Act 13/82 of April 7, about social integrations of disabled persons; but it is not less the fact that they are subjected to a number of limitations derived from their own failure, than if it does not affect to their rights and, on the other hand, it does affect to the exercise of these rights. They have legal limitations both to control their person as their properties. Their competency to participate in the world of Right is replaced or complemented by the competency of their legal representative.

According to art. 162 CC, their parents have the representation of the minor, with the exception of the actions in relation with rights of personality that the son/daughter, in accordance with the statutes and their maturity conditions, may do by himself/herself. Even so, the most personal rights or, to be more accurate, their exercise, is subordinated to the "maturity conditions" of the minor or disabled.

In that case: art. 428 CP does not authorize in any case that the consent to apply sterilization —which release from criminal responsibility— is given by the legal representative of the disabled that suffer from a serious deficiency, but the Judge is called, upon the application of the legal representative, to authorize, without any imposition of sterilization in demand. Thus, it is not about that the inexistent consent because of the disability of the mentally retarded person is replaced by the one of his/her representative —against what it seems to be

understood the order questioned, according to what it is said in its procedural part—, but a mechanism that increase the legal guarantees in favour of his/her exemption.

D) What makes the loss of the "generandi" competency of the disabled woman to stop being criminal wrong, or, what it is the same, the attempt to the integrity of the person, in the cause of absence of hi/her conscious consent to such measure is, with no doubt, the obligations that maternity generates. We are before a mixture of right-obligation, right to maternity as natural emanation of the woman and the obligation derived from the condition of mother (see art. 154 CC). A serious disabled woman cannot value the reach of the sexual act or face in a responsible way to maternity. Statutes cannot deprive her from the first thing (although she has the powerful limitation that any action of laying with her mean an offense of violation: art. 429 2° CP), but it is letting that, regarding a number of guarantees, she cannot accede to maternity which she cannot deal as a solvent way. The defense of the sterilization of those serious disabled is found in their impossibility to reply the ethical and legal exigencies derived from the mother's condition.

The proportionality of the measure is found in the proper defense: if she cannot be conscious and a responsible mother, it is necessary to avoid her from getting it, even permitting the practice of surgery that generates her agenesia. The attentive vigilance of the parents that the Judge advocates as an efficiency alternative so as to avoid an unwanted pregnancy is, for the moment, a responsibility that in some moments can be unreasonable, moreover that it cannot assure in an acceptable way that it has the effect desired. Neither, on the other hand, the fact that sterilization gives the peace to parents, or even, if desired, comfort, can described as a noble objective. And certainly it not possible to share the Judge's opinion that the pregnancy of a serious disabled can be solved with a legal abortion (art. 417 2ª CP), as it would be, in any case, a violation. So we get to a contraction that, so as to avoid the least — attempt to integrity— it is permitted the most —elimination of naseiturus.

In summary: The law-maker has let in some punctual cases, among them the method of sterilization, that one person has the availability in one aspect of his physical integrity, in the sense that if maternity cannot be imposed, neither the use of anticonceptive methods can be avoided, in the case that a completely valid consent mediates. In the case of psychological disabled who suffer from serious deficiency, in respect to their disability to value the effect of some actions and, in particular, of the obligations that give raise to maternity, it is permitted, as an exception to the general principle of non validation of the consent from those minors in disabled or from their legal representatives, that medical deprivation of their "generandi" competency may e authorized by the Judge in the process of a procedure in which some requirements must be followed, straightened to the convenience for the least of such measure.

This attempt to their exemption is justified like this because of their disability to face in accordance with the rules of common acceptance the consequences of that natural faculty that this person is deprived of. If voluntary sterilization avoids criminal unlawfulness because it is not allowed to impose an unwanted maternity, the sterilization of a serious disabled woman, which has no discernment, has as defense the impossibility of wanting in a conscious way to be mother and be responsible of the situation originated by this fact.

E) Before concluding, it is convenient escaping from a mechanical interpretation of art. 428 CP which seems to be the admitted by the proponent order. From this article we can find the

idea that the Judge is, in an inexcusable way, conditioned by expert reports. It is not like that. The Judge keeps being a "peritus peritorum" that must comply with the result of the compulsory exploration of the minor. The relation with the evidential result is logic, not irremediable. Nothing prevents him/her to act from restrictive criteria when he has to make his/her decision, taking into account the nature in an exceptional way that the agreed sterilization has (we cannot forget that, as a general rule, the procedure of sterilization is illegal and the proper agreement so as to release from criminal responsibility is stated as an exception to the general principle of its inefficiency, according to art. 428) and the attempt to the human right to enjoyment of faculties derives from the life itself. If the Judge, as here the appellant, "is forced to give" the authorization, he/she should not do it because of the medical reports, but because of the fair evaluation made from them and from other elements of judgment through his/her exam and consideration.

In the view of the above, the Public Prosecutor concludes that art. 428 CP in his document from LO 3/89, in the sense that it allows the sterilization to a disabled who suffers a serious deficiency through the agreement of the Judge, is not against art.

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FIFTH.- Under the document recorded on July 20 1992, the Treasury Counsel, who begged that in the due course a judgment were dictated so as to reject the question exposed. This, in accordance with the following considerations:

A) The precept questioned does not refer to all those disabled, but only those declared like that who suffer any serious psychological deficiency. Thus, it won't be enough that the disabled person who is supposed to be practiced the sterilization is legally disabled. It is necessary that his/her disability entails a serious psychological deficiency. The hearing of the two specialists that the Judge must do, expects to authorize, among others, this extreme. ¿What is the objective that this rule pursues? The objective is just to avoid the procreation of people that have not the possibility to create their will and that are not able to play a role as responsible parents. In the case that has given rise to the posing of the question, it is aimed also, to avoid a non-consented pregnancy and that, moreover, can be not understandable and traumatic for the disabled.

The order for reference shows that the pregnancy is avoidable "in most of the cases if the protectors of the disabled adopt a regular vigilance." Neither the most continue vigilance from those who play the role of parental authority can't prevent the disabled to be sexually abused by any unscrupulous. The solution indicated in this order for the case that the pregnancy occurs is the "practice of the abortion understood as unlawful as it comes from a violation." Not every carnal access with an insane is a violation. The violation is only produced when "someone is abused from his/her insanity", according to art. 429.2 CP. In any case, the practice of the abortion is especially traumatic for a person who does not understand nor knows the meaning of the "remedy" applied to him/her.

B) The problem here is the consideration of the consent of a disabled. In particular, if this suffers from a serious psychological deficiency, he/she has no faculties so as to create a will and give his/her consent. As a benefit for him/her, the law accepts the institution of protection, so as to protect and represent him/her and, in some cases, to extend or rehabilitate the parental authority. The protection of the disabled covers his/her health protection. Through the precept that affects the question, the objective is to safeguard the psychological health the disabled from pregnancies that may result in a traumatic situation. The birth of the children, on the other hand, won't let the disabled may fulfill all the proper functions of the parental authority.

The representation of the children whose degree of disability was high implies the consideration of the consent of them so as to obey them. This consideration won't require in some particular cases, in accordance with the second paragraph of art. 428 CP legal authorization so as to guarantee that the action performed by the parents on behalf of the children is done in their benefit. So, the legal authorization is the necessary accessory that the decision from the representatives of the disabled must have so as to sterilize these lasts. It is accepted in such cases, where the disabled "suffers from a serious psychological deficiency", that the disabled can avoid the fathering of descendants who he/she won't be able to help, and in particular, in the case of the woman, who may suffer the trauma the pregnancy may generate. In order to know the particular psychological circumstances of the disabled to whom it is pretended to sterilize, the questioned rule obeys the Judge to hear "the decision of two specialists."

The Judge is also obeyed, as the decision affects a disabled, to the hearing of the Office of Public Prosecutor. And the Judge is also demanded, so as to be able to have an adequately criteria, the "previous exploration of the disabled." In conclusion, it must be taken into account that there is not any violation of the constitutional right to integrity when the consent for who play the legal role of representation of the disabled with a serious psychological deficiency so as she can be sterilized is given, with the guarantee of the mandatory legal intervention so as to assure that such sterilization is produced because she has not the competency for the right exercise of parental authority and, in her case, because the pregnancy process affects her in a negative way as a consequence of a possible conception. In short, the claim of violation has no reason because of the questioned precept of art. 15 CE.

SIXTH.- The President of the Congress of Deputies, under the document recorded on July 23 1992, informed according to the House that he would not take a position in the procedure, nor formulate pleadings, while giving the Court the actions of the House that it could need, referring to the Directorate of Studies and Documentation form the General Secretariat.

SEVENTH.- By Order dated July 12 1994, it was remarked for the decision and voting of this judgment the 14th of the same month and year.

LEGAL REASONING

FIRST.- The Court of First Instance of Bacerlona number 5 questions the constitutional legitimacy of the second paragraph, last digression, of art. 428 CP, introduced by art. 6 LO 3/89 from June 21, of the update of such code. To focus at the first moment on the truly scope

of the question exposed, it is necessary to reproduce the whole second paragraph of art. 428, as the questioned digression has led to what for competent people is established in the first part of second paragraph.

In this paragraph, after the first paragraph disposed that the sentenced indicated for those offenses by injuries will be imposed "even when the consent of the injured mediates", it is established that "however with accordance with last paragraph, the free and expressly announced consent release from criminal responsibility in cases with relation to organ transplantations done according to law, sterilizations and transsexual surgery practiced by specialists, unless the consents is falsely obtained or, through a price or a reward, or the donor is a minor or a disabled, case in which the consent won't be valid neither from these lasts, nor from their legal representatives. Then, the precept includes the questioned digression that says as following:

"Nevertheless, the sterilization of the disabled person who suffers from a serious psychological deficiency won't be unlawful when this person is authorized by the Judge at the request of the legal representative of the disabled, heard the decision of two specialists, the Office of Public Prosecutor and previous exploration of the disabled.

In the order for reference, detailed in the second fact of this judgment, some considerations or critical comments are done in relation with the questioned digression from the point of view of its poor legislative technique that, according to his mind, does not solve a number of problems like the one related to if the competent Judge must be the one that knew about the judgment of disability or the one that, after a distribution, corresponds to a new procedure; the type and nature of this last, if it comes from a litigious or voluntary jurisdiction; and he also considers that it is unreasonable that from the prohibitive general rule mentioned in the first part of the second paragraph of art. 428 CP—that the donor of the consent were minor or disabled, case in which the consent won't be valid from the lasts or from their legal representatives, —only excepting in the questioned digression the sterilization of those disabled and not of minors, meaning that the problem

keeps being the same and precept does not give any reason for this discrimination.

However, it is necessary to dispense with these deliberations, not only because they are regulated material with general nature in the procedural legislation (competence and procedure) or they are referred to a discrimination, the minors one, highly against what the order pretends, but also and mainly, because in such judicial decision these deliberations are considered as "a simple comment about the poor legislative technique the questioned provision does displays. Thus, this Court must only solve the questioned doubt about unconstitutionality and which is referred to the way that the questioned regulation is against the Human Rights proclaimed in art. 15 CE which "everybody has the right to life and to integrity without, in any case, they may be subjected to... inhuman or degrading treatments.

The order has its origins in a fact that is truly indisputable: psychological disabled have the same rights than the rest of citizens. So as to support this unquestionable statement, it mentions arts. 10 and 49 CE and also refers to the Declaration on the rights of mentally retarded persons, adopted by United Nations General Assembly on December 20 1971, which concluded with these words: "the mentally handicapped person has, above all others, the right

to be respected". For that reason, in the order for reference there a statement that, more than justifying the Judge's doubt, it shows its conviction about the unconstitutionality of the regulation.

After reproducing art. 15 CE in which it affects the question propounded, it states that "for that reasons we must begin from the fundamental fact that every non-volunteered sterilization for eugenic reasons, as a punishment or so as to avoid procreation, makes an attempt on human right to life and to integrity of the person, and also of the mentally retarded person.

Then, the order, after referring so as to fight against doctrinal opinions that are favourable to the measure and the different judgments of this Court related to the rigor and consideration with which Human Rights must be respected when there is a situation of a possible collision between them (SSTC 53/85 53/86 and 120/90), it mentions other measures that maybe could be adopted for the pretended objective by the regulation without getting to the extreme of the sterilization, like the vigilance by the protectors of the disabled or even the interruption of the pregnancy under the second cause of art. 417 bis CP and finished posing the questions in the following terms: sterilization in disabled is a objectively degrading measure and goes against his/her integrity that apparently is constitutionally protected; the measure is out of proportion and seems not inspired by any noble objective, or oriented to the benefit of the disabled; the chance the disabled has of making him better, which is not dismissed because of the improvements in medical science, could deprive him/her of the reproductive faculty as, according to the report, the forensic specialized in gynecology, "nowadays, sterilization practiced with the method supported by the actors, which is the harmless, is irreversible between a 10 an 30% of cases."

The order finishes its argument with the following words: "Giving the theoretical chance to get sterilization in disabled —such an obvious inhuman and humiliating treatment for which the law-maker always demand the conscious consent of the person— replacing this lack through the consent of the protectors is evidently unconstitutional, according to this Judge .

The center of the questions propounded is, this, referring to the possibility or impossibility of arbitrating a formula that, without damaging art. 15 CE, allows the replacement or substitution of the conscious consent of competent people, by a legal authorization that, at the request of the legal representatives and before the impunity of being given by a disabled who suffers a serious psychological deficiency, fulfill the same legalizing objective established in the first part of the second paragraph of art. 428 CP for competent people.

So, the method of authorization anticipated in the questioned precept and which in the order is describes as "considerably unconstitutional", is the one that, mainly, delimits the questioned problem in the order and that we have to solve in this question of unconstitutionality.

SECOND.- It is true that, as it is remembered in the order for reference with quotes from different judgments of this Court, when there is a conflict between Human Rights or some limitations to these ones in the interest of other goods and rights that are constitutionally protected, the role of the constitutional interpreter reaches the maximum importance and this one "is obliged —as STC 53/85 mentions— to consider the rights according to the questioned supposition, trying to

harmonize them is this is possible or, in the opposite case, to describe the conditions and requirements in which it could be possible to prevail one of them."

But in the questioned supposition in the present case, not estimating as unlawful the sterilization of a disabled who suffers from a serious psychological deficiency, does not show a truly conflict between the Human Rights and the person, as the proper precept has its origins in the idea that the free and expressly announced consent of this person, release from criminal responsibility the practice of sterilization. Admitted the self-determination of the person according to his/her integrity in that supposition and the others considered in art. 428 CP — organ transplantation in accordance with the law and transsexual surgery—, according to the amendment of 1983, appears immediately, with regard to sterilization, the advisability that the possibility give to competent people, may be extended, only as a benefit for them, to who, because of a serious psychological disease, are not able to give the free consent demanded by the precept.

At the beginning, if, in relation with those psychological disabled, there is the constitutional duty of protecting in a particular way so they can enjoy the rights that Title I CE gives every citizen (art. 49 CE), a precept that goes in accordance with art. 1 of the Declaration on rights of mentally retarded persons, passed by the United Nations General Assembly on December 20 1971 ("The mentally retarded person must enjoy, until the maximum degree of viability, of the same rights than the rest of human beings"), it will be necessary to conclude that the questioned digression of art. 428 CP does not really expose a problem of a possible infringement of art. 15 CE, as far as this "right integrity" is concerned —although it really affects this right—, but it has a different aspect: specifying if the right to self-determination that this second paragraph of art. 428 CP is recognized to those competent people is subject to being given also to the request of their legal representatives and, with regard to what the question digression is established, to disabled people that, because of a serious psychological deficiency, cannot give a valid consent.

It is followed from this reference, which is the one that appears from relating what it is said in the second paragraph of art. 428 CP in its two kind of people (disabled and competent), that what this Court has to be considered mainly and in the first place, without attending also the argument of the order for reference and the objective of the precept and proportionality of the measure —issues that we will treat in different reasons—, is the one related to the guarantees that the rule established so the legal authorization, called to replace the consent of those competent people, goes before the requirements enough so the same will be justified as a priority interest and the truly one of the proper disabled.

THIRD.- The first thing we must say, according to the guarantees the rule establishes, refuting the remember of the abominable sterilizations the order mentions, is that such provision, referred always to a particular and exceptional supposition, radically excludes any governmental policy about the sterilization of those psychological disabled, as the anticipated in the precept can only been authorized at the request of any legitimate part by the Judge, that means, by the only authority to who the Constitution gives the power to administrate the justice that, provided with independence and impartiality, it satisfies not only the most necessary constitutional guarantees, but they are the only ones to who the law-maker could entrust with both an important and delicate mission. The legal intervention is, therefore,

unavoidable for the authorization to be given, not for the possibility to be given, constituting the main guarantee to which the rest are subordinated.

The request of those who hold the legal representation of the disabled, without which the procedure of legal authorization cannot begin, is the second necessary guarantee or requirement the precept considers: "when it —the authorization— was authorized by the Judge at the request of the legal representative of the disabled." Therefore, whatever the seriousness of the disability is, any sterilization must be legally agreed if there is not the aforementioned request. In addition, the "request of the legal representative" mentioned in art. 428 CP in the questioned digression logically assumes —in relation with psychological disabled over eighteen, who are the only ones whose consent is lawful to replace through such a request— a previous disability of the aforementioned stated jurisdictionally in another process.

This previous legal disability is supposed in the order for reference when there is a doubt when delivering if the consent of the controversial authorization should belong to this Judge. In conclusion, therefore, the necessary initiative of the legal representatives of the disabled assures that the measure will not answer to interests or principles that are exclusive to public authorities; the Judge's authorization guarantees that it won't answer to spurious interests of those aforementioned representatives.

In the third place, the request deduced by the legal representative of the disabled, although it is a unavoidable supposition of the Judge's decision, has not any automatic or decisive effect on the positive nature of the decision. The psychological deficiency of disabled whose intended sterilization must be a "serious" deficiency and, as a result, the responsible for the impossibility to understand the organic aspects of his/her sexuality and of the extent of body intervention whose approval is promoted by his/her legal representative." The serious psychological deficiency must be checked by the Judge not only through the decisions of the specialists that the precept demands, but also by the legal exploration of the disabled.

Finally, the procedure where the consent or denial of the requested authorization has the mandatory intervention of the Office of Public Prosecutor, who, obviously, must take a position about the attendance or not of the official requirements (subject to legal statement of the disability and designation of the legal representative, certify of the request of sterilization formulated by himself/herself, and emission of the decisions from the specialists and exploration of the disabled by the Judge) and the materials aforementioned.

So, foreseen in the precept the unavoidable intervention of the family through the legal representative of the disabled; of the Judge through the authorization he/she can give or not and which is preceded by the exploration of the disabled and of a previous statement of disability also legally agreed; of the specialists that must report about the seriousness of the psychological disability of the disabled and about the consequences to his/her physical and psychological health that could appear from the sterilization and, finally, the intervention of the Office of Public Prosecutor about the performance of all of the guarantees foreseen in the rule, lets state that such guarantees are enough to lead a judicial decision that, for not other objective than the benefit of the disabled, favors his/her living conditions.

It may be understood that to these guarantees others should be annexed that, like the fact that the disease of the psychological disabled is irreversible or that the sterilization will be

done through a irreversible medical procedure or technique, securely guaranteed the serious measure whose authorization is responsibility of the legal authorities, but the truth is that nor the precept avoids that such circumstances or other possibilities may be into account by the Judge as a reason of his decision, either to give it or to refuse it; neither another responsibility corresponds to this Court but the one of deciding is the guarantees foreseen by the law-maker are or not enough from a constitutional point of view so as to authorize the sterilization of the disabled.

If they are enough, as we understand in this questioned precept, we cannot, assuming competencies that belong to other powers of the Government, replace what the law-maker stated, or define how the precept should be legally interpreted. It is not enough with the fact of state, in this last aspect, that the rule, because of the importance of the supposition that it considers, is not susceptible of an extensive interpretation that will allow the conversion in a general openness what it is foreseen for thoroughly exceptional cases.

FOURTH. - There is no doubt that, in cases where no exercise of will is possible, the authorization of sterilization provided in the standard in issue affects the fundamental right to bodily integrity enshrined in the art. 15 CE regarding mentally disabled persons, since it is a physical intervention, settled and practiced without their consent, ablative of the genetic potentiality and therefore prohibitive of the exercise of personal freedom in procreation, which is derived from free development of the personality enshrined in Art. 10.1 EC.

Through the right to physical and moral integrity – as we declare in STC 120/90 -"The inviolability of the person is protected, not only against attacks aiming to harm the body or spirit, but also against any kind of intervention in such goods without the consent of the owner " (f. j. 8°).

This consent, however, is the one that, by definition, cannot be provided by the person suffering serious mental deficiency, and hence the legal prevision of the authorization that, at the request of the legal representatives of the disabled, has to grant or deny the Judge. The proponent body questioned the constitutional legality of replacing the consent of the incapable person by judicial authorization, as sterilization is "diminution of the integrity". This, thus, would never be admissible if there is consent of the affected person.

But this objection, which would exclude disabled people of the possibility given to those that are not disabled, is unacceptable because taken to its ultimate consequences, would lead to refuse any medical treatment, and especially a surgical ablative intervention-essential for life or just beneficial for the health of the serious mentally handicapped. Sterilization itself may be medically indicated for the indicated purposes.

The problem of substitution of consent in cases the disabled provision is not possible given its severe psychic impairment situation, is, therefore, the justification and proportionality of the intervening action on their physical integrity; a justification that only has to lie, always in the interest of the disabled, on the existence of constitutional recognized rights and values whose protection legitimizes the limitation of the fundamental right to bodily integrity that the intervention might involve.

It is clear that those with severe psychic impairment cannot fulfill adequately the obligations imposed to parents by Art. 39.3 CE and expressed in the duties and powers that the CC (Art. 154) points out to those who exercise parental authority. Hence the constitutional duty of parents to provide assistance of every kind to their children (art. 39.3 CE), recognition, among others, of the right of these to the protection of health (art. 43.1 CE) and also their right to enjoy all Constitution states in Title I (Art. 49 CE), although they do not impel the legislature to adopt a rule such as the one we studied, they make it fully legitimate from the teleological aspect, always towards the interest of the disabled and with the aim of improving their living conditions and welfare, equating as much as possible the conditions of capable people and developing their

personality with no other obstacles than the ones resulting from the severe psychic illness. These aims claim for the justification and proportionality of the means provided for the attainment of the purposes of the rule:

a) First –the justification- for the sterilization of the disabled, of course always subject to the requirements and guarantees already discussed that requires judicial authorization for the art. 428 CP, it allows the disabled not to be under constant surveillance that could be contrary to their dignity (art. 10,1 CE) and moral integrity (art. 15,1 CE), enabling the exercise of their sexuality - if it can be supported by their psychic condition- but without the risk of possible consequences of procreation that they can not anticipate neither consciously take into account because of their mental illness and, for the same reason, they would not be able to enjoy the satisfactions and rights of paternity and maternity neither meet the duties (art. 39,3 CE) inherent in such situations.

In addition to the purposes set out to justify the sterilization for both sexes, which in some way can be described as illegitimate or ignoble, in women are enhanced or made more convenient because of the physiological consequences of pregnancy. A severe psychic disabled person would not reach to understand the changes that her body experiences, or the inconvenience and even suffering it entails gestation and, even less, the final traumatic and painful birth. Therefore, if we understand justification for sterilization under subsection questioned in both sexes, the psychic handicapped woman is even more justified to avoid consequences that are incomprehensible to her, can further damage the psychic state because of the physical consequences produced by the pregnancy.

b) A different matter is that the provision in question, authorizing a limitation of the fundamental right to bodily integrity and therefore requiring the justification above mentioned, is also admissible regarding proportionality, that is, that the corporal intervention expected is necessary to achieve the legitimate purpose and does not have other consequences for those affected that the deprivation, to be possible reversible (high percentage in the case of tubal ligation, method referred in the order for reference) of their reproductive capacity.

In the STC 76/90, although referred to art. 14 CE, is not strange the case here presented, we stated that "... the relationship between the measure, the result and the intended purpose by the legislature pass a judgment of proportionality in the constitutional court, avoiding results particularly onerous and unconscionable". Analysis made from this perspective of the rule in question, it is clear that between the aim pursued by the legislator and the means provided for it, it exist a proportionality because the result certainly cumbersome to the disabled, it is not unreasonable to attain safety and certainty the aim pursued.

If the results are legitimate, the measure can not be criticized as a disproportionate, furthermore sterilization is the safest way to achieve the intended result. There are further possible measures referred herein but they will be discussed in the following legal basis. Now we

just point out that, in consequence of the greater security of the outcome, the measure in question is not disproportionate to the purpose intended.

Thus, it is clear that, despite the above, the proportionality would not exist if the legal provision constitutes a violation of the fundamental right to life of the mentally handicapped, but this risk, outside the normal surgical intervention, could only occur if the authorizing resolution was adopted by the court even having the opinion of specialists expressing the serious health risks of sterilization requested by their representatives. Hence the respect for the rights to life and physical and moral integrity of those persons requires the Judge to be interested and rule that the experts decide on the existence of such a risk, because, in such case, none of this legal and constitutional interests which custody might pursue the present precept will justify a judicial decision authorizing the sterilization regarding the disproportion between means and results.

FIFTH. – Once is made the analysis on the above legal foundations in positive direction for the constitutionality of the precept, on the guarantees required for the judge to reach a decision on the authorization, on the legitimate purpose of the precept to cover the limitation of the constitutional right to bodily integrity of the disabled, and on the proportionality between the means authorized and the purposes of the rule, it only remains to analyze the objections and other less drastic possible measures referred in the order of reference:

A) First, it is to be rejected the consideration of inhuman or degrading treatment, which prohibits the art. 15 CE, stated in the order of reference regarding the sterilization of disabled people with serious mental deficiency. All that it is required is to compare the nature of the measure whose practice may authorize the Judge and is conducted by a specialist doctor in conformity to the “lex artis”, to the limits of the constitutionally forbidden action, as it is identified in our case law on the basis of the doctrine of the European Court of Human Rights. Indeed, on the one hand, "torture" and "inhuman or degrading treatment" are, in their legal meaning, (we declared in STC 120/90, f. j. 9º, and we have been reiterating, recently, in STC 57/94, f.j. 4º A) - notions of the same gradual scale, that denote causation, regardless of the purposes, of physical and psychical unlawful ailments and inflicted in a vexatious way to those who suffer and with that intent to vex and blend the will of the patient.

On the other hand, we have also said that although a specific measure can not be regarded as constituting inhuman or degrading treatment concerning the objective pursued, this does not preclude that it can be considered as such regarding the means used. However, none of this happens in the event of sterilization of mentally disabled persons under Art. 428 CP, nor in case of voluntary sterilization of capable adult persons referred to in that article. It is true that what distinguishes both cases is the consent the affected, but the lack of consent in the case of disabled and its replacement by judicial authorization does not involve the breach of the interdiction contained in art.15, since sterilization does not pursue harassing or vilifying neither the medical practice is inhuman or degrading. Of course, if, hypothetically, the sterilization requests a

method that would be irreconcilable with the constitutional prohibition, the judge would have to reject it.

B) The proponent Judge states as an alternative to the precept in question a normal surveillance of the incapacitated by the guardians in order to prevent pregnancy and, ultimately, the recourse to abortion, admitted in our legislation for cases of pregnancy that results from violation. As seen, the judicial body only considers unnecessary the legal precept when affecting disabled women; even so, its argument is not acceptable.

First, concerning the reference to the possibility to interrupt the gestation, which includes the art. 417 bis 1,2 CP and as regarded by the Treasury Counsel, not all sexual intercourse with a serious mentally handicapped constitutes a violation (but only when there is abuse of deficiency: art. 429,2 CP), nor should the practice of abortion be seriously considered as a reasonable alternative to sterilization, which is a more traumatic measure, especially for those who, by reason of his mental condition, can not reach this particular level of understanding.

Moreover, with regard to the "normal" surveillance of the incapacitated, and regardless of its real effectiveness, this is an argument of the Judge "a quo" and, ultimately, and on the premise that sexuality is not part of the contents of any right, leads to justify its absolute repression. Such repression, however, may be against the constitutional principles of dignity and free development of personality (art. 10,1 CE) and, in the event of intimidation, against the fundamental right to moral integrity (article 15). The surveillance could only be legitimate to prevent any form of abuse on the disabled or any damage to their health, but not to prevent the exercise of their sexuality.

C) There are alternative contraceptive measures that, although they are not mentioned in the order of reference, could be implicitly included in this argument, since the ones mentioned are in fact only an indication, nevertheless they would not offer the same security and assurance that we have mentioned with regard to sterilization. Even more, its adoption or application would demand a constant and continuous control by the guardians of the patient, not always possible and therefore random, unless the surveillance of the disable person by the guardians is so intense that it submits to the system of surveillance of the patient of which we have already discussed.

SIXTH. - One last point to consider is the compatibility between the legal provision in question and the provisions of art. 49 CE. Concerning this point, the judicial body enquires, without further considerations, in what does the sterilization allowed in the controversial provision contributes the to the "foresight, treatment, rehabilitation and integration" of the mentally handicapped. In this regard we have to say, reiterating the same argument that we have been arguing, that the legal measure arbitrated by the public authorities, in this case the legislature, does not deviates or contradicts the purpose of art. 49 CE, since it contributes only in the interest of the mentally handicapped, to develop their lives in similar conditions to capable

persons and to avoid the consequences that they are not able to will or to take consciously. In short, the provision of the last paragraph of art. 49 CE, - that the disable persons enjoy the rights that Title I CE grants all citizens- is not only compatible with the standard in question, but, as we have said, helps justify the purpose behind the provision.

WE DECIDE

In attention to the above and by the authority under the Constitution of the Spanish Nation, the TC

Has decided

To declare that the par. 2º, last subsection of Art. 428 CP, made in accordance with art. 6 LO 3/89, is not contrary to the Constitution.

Given at Madrid on July 14, 1994 Miguel Rodríguez-Piñero y Bravo-Ferrer.- Luis López Guerra.- Fernando García-Mon y González- Regueral.- Carlos de la Vega Benayas.- Eugenio Díaz Eimil.- Vicente Gimeno Sendra.- José Gabaldón López.- Rafael de Mendizábal Allende.- Julio Diego González Campos.- Pedro Cruz Villalón.- Carles Viver Pi-Sunyer.

DISSENTING VOTE

Dissenting vote on the judgment in the matter of unconstitutionality no. 1415/92 formulated by Judge Mr. José Gabaldón López.

I disagree with the opinion of most of my colleagues on the legal reasoning and the judgment final decision. With regard to the final decision, because it should have been declared the unconstitutionality of par. 2º, last subsection, Art. 428 CP made in accordance with art. 6 LO 3/89 of 21 June, it is the paragraph which claims: "However, it will be no punishable the sterilization of disabled persons suffering of serious psychic deficiency when it has been authorized by the judge in response of request of the legal representatives of the disabled, after hearing the opinion of specialists, Prosecutor and upon examination of the disabled."

With regard to the legal reasoning, because of the following:

FIRST. - The right to bodily integrity, recognized in the art. 15 CE (as "right to physical and moral integrity") is one of the basic rights, essential, of the personality, also called innate or inalienable rights and are subject to maximum protection in the Criminal Code (CP) by the

definition of the acts that harm the body, physically or morally. It is precisely because of this precept at issue, which has been integrated in the reform of the Criminal Code, that is legalize, and declared not punishable, the sterilization of disabled human beings suffering serious psychic deficiencies.

That is, a physical intervention in the body in order to deprive the reproductive capacity of the person. It is not, therefore, the regulation of the exercise of a fundamental right, but a provision that allows the injury of one of those innate rights, which will lose its strongest legal protection: the criminal. All this, despite the explicit formulation in the constitutional provision of a fundamental right that claims not to be deprived of any vital or part of the body or even of one's personal appearance and of the integrity of the body functions.

SECOND. - The question arises, then, in relation to the conditions of the decriminalization of an action that is criminal in itself as it deprives the person of the capacity of reproduction and is legitimated in two conditions: that the injured party is disabled and also suffers "serious psychic deficiencies" and that the sterilization is requested by the legal representative and is authorized by the Judge on the advice of two doctors and the Prosecutor.

However, on the one hand, all this argumentation shall be based in a key assertion: the disabled person is a human being, as such, has the right to physical integrity. The action that is no longer punishable is therefore legitimated and may not even be granted by the injured party, as disabled. What is legitimate, then, is that physical injury, authorized by a third party: the legal representative that requests the sterilization and the judge who authorizes it, replacing by this way the disability. I perceive, however, that the disability must not be supplied to allow the injury of an essential right of personality, as it is the bodily integrity, considered in nature as inalienable and not subject to disposal.

On the other hand, as the law states, the measures that shall supplied the disability should be always in the benefit of the person and not when the purpose is to allow a clear injury of the bodily integrity.

THIRD. - The replacement of the will of the disabled by the third party is not even proportional. It would be in case the purpose is strictly curative. But the reasons and purposes alleged reveal that disproportion. The notorious insufficiency of each that allows the ablation of a portion of the bodily integrity and its which is supported in other constitutional provisions demonstrates the inadequacy of these purposes. The welfare of the mentally handicapped, besides of the relativity of the concept, is not a fundamental right nor it can collide with the right to physical integrity.

The social-familial purpose, is random and rather theoretical, also lacks of strength to justify the injury. In fact, it is based on a number of hypotheses as the one of preventing the progeny of the disabled alleging the person is not able to assume the responsibilities of

parenthood. Rather, it is a eugenic purpose, where is noted the aim of achieving peace of mind for the keepers, promoters of the authorization.

FOURTH. - Examples on recent history, known and experienced by humanity, highlight the legal disproportion of this kind of measures and the risk of relativize fundamental rights of personality. At the present, a law authorizes, under certain conditions, the injury to the physical integrity of the disabled. So the law is not longer a sufficient guarantee for the defense of fundamental rights and therefore these have been included in the constitutions. The possibility that the laws, with different bases, allows in some cases its affection, places them at risk of being degraded or altered.

But the constitutional guarantee is insufficient if it is not recognized all the inherent strength of rights based directly on the dignity of the human being. Because further laws may, once degraded the constitutional principle, extend the application of the measure by modifying the conditions required: as the purpose, the applicant, and the requirements of judicial intervention... and finally, including in the category "approvable" to other persons considered comparable to those psychic disabled. When there is an alteration of a right of this nature, the unlawful consequences can be immeasurable.

And even historical memory is not necessary. Nowadays, some of these methods are desirable, not only to control population growth, but also to decrease it.

The intervention of the judge has, in fact, with little freedom of decision because it is simply to replace the incapacity with the request of the legal representative and according to the discretion of the experts whose scope and nature the law does not specify, so, it will be limited to grant permission unless there are important informalities. It can be simply a formal guarantee.

The judge may be constrained to allow the mutilation of a human being just because it is asked by attorney and justified by two doctors who allege the existence of a serious mental deficiency, even without determining whether their nature is related to the proposed measure and if it is necessary for the purposes that are adduced in its justification. There is not even a guarantee that the medical execution of the measure would be adjusted to the decision of the judge, neither the judge is allowed to impose any condition.

FIFTH. - The precept is just confined to state sterilization as not punishable. Not even it refers to a possible conditioning to make sterilization less radical, as it can be certain powers attributable to the judge, or conditions of the subject (psychic nature of the deficiency) or of the intervention (reversibility, be a last resort, inability to use other methods ... as requires the European Parliament's report of September 1992 for these practices), of even requirements determined by other laws. Clearly, this precept relativizes the right to physical integrity of the disabled person, in favor of other purposes that are supposed favorable to the person in issue or

its representatives, but purposes, however, that lack of the status and force to limit the fundamental right.

It could be simply invoked an indirect support of other constitutional precepts: duty of care and protection of the children (art. 39,2), shelter and protection of the mentally handicapped (art. 49) ... or any possible right as the herein referred, "right to sexuality...". To prevent an unwanted event for the disabled (maternity or paternity) is not to prevent a real risk, neither, a risk for the disabled itself. The measure that curtails their bodily integrity is clearly disproportionate, in amount but also in quality because the purposes that try to justified the real injury of the bodily integrity are diffuse and of course, they are not orientated to preserve another fundamental right of the same category of personality right. These measures do not protect the dignity of the person.

In short, a third-party intervention is going to hurt the physical integrity, something intrinsic of the dignity of every person, precisely because it cannot be taken in consideration the positive or negative the will of the person concerned. The authorization of intervention in their bodily integrity is a total replacement of their will, which makes them somehow be considered as an object.

Some personal rights cannot be just exercised by third parties, whether they are the legal representatives or the attorney "ad hoc". However, with the legal precept at issue, it may be possible to enter in the physical integrity of the disabled by judicial authorization.

All of the aforementioned, in my opinion, it determines the unconstitutionality of the present precept.

Madrid, July 14, 1994.

Concurring vote formulated by Judge Mr. Vicente Gimeno Sendra to the judgment in CI 1415/92.

I agree with the final decision of the present judgment declaring the constitutionality of Art. 428 CP. I disagree, however, with its legal reasoning in two items: a) references, which are carried out in the f. j. 4º, a), to the greater need for sterilization of mentally handicapped women, even if it is well intentioned, to me it seems discriminatory to women, and b) references to the principle of proportionality contained in f. j. 4º, and 5º, c).

With regard to this just mentioned reference, I think our decision is not very respectful of the doctrine of proportionality, because it makes an abstract analysis of the purposes' goodness sought by the standard and of the mechanical adjustment of sterilization for obtaining such purposes. The decision forgets that proportionality is a method that tells us in which conditions a standard, that impinges on a fundamental right, can be applied in accordance with the

Constitution; it is not a review of the standard allowing in any event, to preach his constitutionality or the constitutional application of it.

In this sense, it is surprising that, in a "physical intervention" such as blood tests for the investigation of paternity (in German doctrine deserve the rating of mild or "trivial"), our STC 7/94 makes a detailed examination of the requirements of proportionality and, in a "serious" body intervention, as is sterilization, which involves a mutilation of sexual organs of human being, this analysis is conspicuous by its absence.

For this reason, I recall here the main lines of the doctrine of proportionality that, even if the present final decision has nothing to say, it must be applied, with greater reason, in the sterilization of mentally handicapped:

a) First, surgical intervention cannot imply any risk on the disabled's life and health, always undertaken by health professionals in hospitals;

b) secondly, it is essential to respect the principle of necessity or, which is the same, the sterilization must be objectively justified for achieving the constitutional purposes that justify it;

c) finally, as a result of the foregoing, the Judge must confirm the existence of a less burdensome measure for the right to physical integrity, because if those purposes could be achieved through measures that do not involve the sacrifice of the fundamental right or its limitation, the sterilization would not be justified or the Judge would have to state with preferred character the reversible surgical interventions versus those that produce the total ablation of the reproductive function.

Unfortunately the final decision of this judgment says little or nothing about the doctrine of proportionality, it is just confined to extol the supposed advantages of sterilization of the mentally handicapped (by the way, even without determining the degree of severity and potential cure of the disease) with considerations, in my opinion, beyond a judgment of constitutionality. Consequently, I'm afraid that we can rethink all these unsolved problems in this judgment through future appeals.

Madrid, July 18, 1994.

Dissenting vote formulated by Judge D. Diego González Campos to the judgment of unconstitutionality in the matter from 1415/92, which adheres Judge D. Pedro Cruz Villalón.

Despite I agree with most of the content of the judgment, I must express my dissent from the discretion of the majority of the Court on the guarantees provided by the legislature for the assumption of the final section of par. 21 of art. 428 CP is inadequate from a constitutional standpoint.

FIRST. - If we compare this case with those listed in the first paragraph of par. 2° of art. 428 CP, in which "the free and freely expressed consent relieves of criminal liability", there, we can see that the legislator has regulated in a very differently manner the needs required to produce this result in relation to the three situations described.

Thus, unlike in a more complex situation such as "organ transplant", in cases of "sterilization and transsexual surgery performed by a physician", legal guarantees for the consent of the injured to be deemed valid are listed in that criminal precept, the criminal legislator forwardback to this situation to govern this case. That is, the LO 3/89 of 21 June, provision that has been subject of several regulatory developments.

Perhaps the special legislative development of the precept in issue can explain that the first of the two ways indicated was used to include in the second paragraph of par. 2° of the mentioned art. 428 CP the case of the "sterilization of disabled person suffering serious psychic deficiencies". But it is enough to mention the situation envisaged by the legislator to understand that it is very different from voluntary sterilization contained in the preceding paragraph, where the legal limiting provisions are to ensure the free expression of consent of the patient. Here, indeed, the situation is different as we are, first, in an extent that affects people enjoying special constitutional protection, because they are mentally disabled (art. 49 CE) and, secondly, a "regime of judicial authorization" must establish to supply their consent.

Thus, it is imperative, in my opinion, that a legal ordination regulating clearly and accurately the material premise of the measure, as well as all the procedural aspects of judicial authorization should have accompanied the exclusion of punishment in the Criminal Code. Therefore, the existing legal regulation of the judicial authorization regime has no correspondence with the constitutional values and goods that may be affected by the measure, nor is it sufficient protection of the fundamental right recognized by the art. 15 CE. This is the conclusion that should have led, in my opinion, to the declaration of unconstitutionality of the precept in issue.

SECOND. - Even if the regulation of the judicial authorization regime is accept to be carried out in the criminal precept, as the judgment did, in my opinion the guarantees provided are insufficient from a constitutional standpoint in attention to the following:

A) First, the provision contemplates the existence of a "serious" psychic deficiency, so it will be necessary not only to determine its existence at the time of application for judicial authorization by the appropriate medical opinions, as indicated in the Judgment, but also that these medical opinions determine whether the psychic disability is permanent or, there may be a positive evolution of the disabled. The first is part, obviously, of the normal judicial function of checking the premises of a conduct that, otherwise, would be lawful. But it is not the same with respect to the second one given the absence of an express legal provision, in my opinion is

violated the fundamental right that art. 15 recognize if, when this warranty is not possible, the court authorize sterilization of those that lately recover his sanity or those with lucid and other serious mental deficiency intervals.

B) Secondly, even for serious psychic handicapped, this does not mean that a person cannot understand the basic aspects of their sexuality and the consequences of a body intervention measure which authorization is sought. This data, like the previous one, in not in the legal provisions and even when it is expressly indicated in the judgment, does not establish the appropriate consequence in terms of guarantees, adding that this should be subject of the medical reports; since, as it has been highlighted by scientific doctrine, such action can only be authorized if there is no understanding by the psychic disabled because, otherwise, the sterilization may require his consent.

C) Finally, to prosecute the proportionality of the measure in relation to its purpose, in my opinion, the judicial body shall accomplish a weighting procedure of other circumstances, linked to the priority interest of the mentally handicapped, for the authorization court to pose the least possible injury to the fundamental right that art. 15 guarantees and the special protection that art. 49 EC states. To this end, the court should proceed to a double appreciation, while seeking the appropriate medical opinions: first, if other measures less burdensome to the physical integrity of the disabled and applied under medical control, can reach the same result for their welfare. Second, if physical intervention is necessary to avoid a serious disturbance of psychic or physical health, in attention to the effects on the psychic disabled of maternity or paternity. The art. 428 CP certainly omits this double weighting and thus, the judicial authorization regime provided is insufficient to adequately protect the fundamental right that art. 15 CE guarantees.

Madrid, July 18, 1994.

Concurring vote formulated by Mr. Rafael Mendizábal Allende, Judge of this Court with respect to the final decision of the judgment of the plenary to answer the question of unconstitutionality no. 1415/92, promoted by the judge of 1st instance no. 5 of Barcelona, on the new wording of art. 428 CP by LO 3/89, of June 21.

I have expressed my opposition in the deliberation of the thesis that finally resulted from majority because of visceral reasons, even if the expression may seem a "contradictio in terminis", it graphically describes the root cause, largely historical and therefore irrational of the deliberation of which I still disagree. I do not hide the appeal of rational solutions whose reasoning is cut and made with an apparent scientism. They are not new. They were born a century ago in the United States by the work of a law that would later flourish in Europe during the decade of the thirties. There was no lack of voices crying out in the desert, but they left there his testimony, like Aldous Huxley's in "Brave New World", futuristic vision of science fiction with a Shakespearean title that used phrase that hit upon, of course, the New World, America.

Even the professor Asua Jiménez, one of the greatest minds of the time, fell into the trap of geometrical biology and, with some inconsistency, defended in those years the castration of "imbeciles, idiots, essential epileptics and all those handicapped patients with no cure and no relief from engender those sad morons offals, nominees for the misfortune and the madhouse ... when their disease is incurable, according to the medical specialists, transmitted to their descendants. We must avoid that cursed legacy. In Instead, criminals, as dangerous and intractable they may seem, the must not be sterilized, because there is no prove of the inheritance of the crime". But it is simply a matter of time before the genetic map of humanity is completed and the one hundred thousand genes that comprise it are identified. What will we do then?

In short, I think the rule of sterilization of disabled people is not only wrong but dangerous, little importance is the good purpose of its framers, that I do not doubt about, though the saying goes "the road to hell is paved with good intentions." Unintentionally, but inevitably, this question make me go back, as an old man, to my historical memory, a fateful day, on September the first, 1939, in which skillful doctors and honest officials ended the life of the terminally ill. Also this measure had a harmless beginning.

The movie "Cabaret", which faithfully reflects that time, contains a scene, a masterpiece within a masterpiece, where an idyllic ballad, sung by an angelic blond teen and a chorus of humble and honest people, turns into an aggressive military march, under the disapproving gaze of an old man, the only one who understands. Without making a drama at all but aware of the risk of these eugenic measures leaved to the State and the family, I raise below my dissent, from a strictly legal perspective, however putting forward the "third premise" referred by the Judge Mr. Frankfurter, the convictions of the author.

FIRST. - Sterilization is an anatomical aggression and by itself would give rise to an offense of injury, qualified by its outcome and therefore punished with particular severity (art. 421 CP). Formal illegality is clear, as it is also the material that serves as a cover. Indeed, the Constitution itself indicates the legal interest being protected, the physical integrity (Article 15 CE) configured as a fundamental right, even more, as a primary right with the instinct of conservation as its biological energy. It does not seems doubtful that the intellectually disabled persons have all the rights of the other citizens said "normal", plus one: to be protected from their own limitations and also, sometimes, from their protectors. Consequently, any interference in the right to physical integrity should be practiced with the utmost delicacy, always in function of its purpose and proportionality of the measure, as well as of the guarantees provided for its adoption.

In this regard, we talk of the disabled's welfare but we forget the convenience for parents, guardians and custodians, his selfishness, which could be decisive in the decision of sterilization. On the other hand, it also hides that the real goal is to prevent hereditary transmission of

disability, explicit purpose in the past, and shameful in the present, of a manifestation of a eugenic policy.

The same rationality could be applied, and the temptation has occurred more than once, to the castration of the psychopathic or psychotic, actually or potentially "serial killers", multiple murderers whose recidivism in liberty can be predicted with total assurance as the experience has shown in our country and others. The end, therefore, does not justify the means, moreover, these are disproportionate due to its irreversibility and could be replaced by a more care or supervision or internment in institutions "ad hoc"; measures, in truth, more uncomfortable or more expensive.

SECOND. - However, if the purpose is insufficient and the disproportion is notorious, the guarantees for the protection of the disabled are nonexistent. First, and from its subjective dimension, the term "disabled person" seems to refer to a situation of fact, without requirement of prior judicial declaration on the subject (Art. 199 CE). Moreover, the trigger or causal element, the "serious psychic deficiency" also lacks the desirable precision and is definitely a concept both, legal and medically, undetermined. It is no required a diagnosis without reasonable margin of error, which is possible today thanks to the spectacular advances of genetics, regardless about the heritability of the condition or impairment of the disabled who is to be castrated, deep ratio but masked in this standard, not even mentioned the method used for castration, which can and should be reversible.

At a single stroke, it is configured a real medical discretion. The opinion of two physicians is decisively considered, the condition of specialists is not required, although the appreciation is in the hands of Judge assisted by the Prosecutor, with guarantee function more formal than substantive because they are laymen. The minimum precautions to ensure the inviolability of the physical integrity are nit taken. And, if it is added that the eugenic reasons are too reminiscent of those that tried and try to justify the death penalty, perhaps this visceral rejection is better understand, and I return to the top, specially in many of those who have lived once in so random and tragic periods. Do not forget, finally, that the respect for human dignity, constitutional requirement, is in the heart of all fundamental rights and is the impassable border for the legislator.

On the basis of the above, said as shortly possible, the final decision should have state that the par. 2º, last subsection, Art. 428 CP, worded according to art. 6 LO 3/89, is contrary to the Constitution.

Madrid, July 18, 1994.